Date and Time: Tuesday, September 26, 2023 1:01:00 PM CST

Job Number: 206613606

Documents (100)

1. Shell Oil Co. v. FTC, 360 F.2d 470

   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: Jan 01, 1891 to Dec 31, 2022

2. United States v. General Motors Corp., 384 U.S. 127

   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: Jan 01, 1891 to Dec 31, 2022

3. American Infra-Red Radiant Co. v. Lambert Indus., 360 F.2d 977

   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: Jan 01, 1891 to Dec 31, 2022

4. United States v. Von's Grocery Co., 384 U.S. 270

   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: Jan 01, 1891 to Dec 31, 2022

5. FTC v. Brown Shoe Co., 384 U.S. 316

   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: Jan 01, 1891 to Dec 31, 2022

6. *Florida E. C. R. Co. v. United States, 259 F. Supp. 993*

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: Jan 01, 1891 to Dec 31, 2022

7. *FTC v. Dean Foods Co., 384 U.S. 597*

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: Jan 01, 1891 to Dec 31, 2022

8. *United States v. Marshall & Ilsley Bank Stock Corp., 255 F. Supp. 273*

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: Jan 01, 1891 to Dec 31, 2022

9. *Cedar Crest Hats, Inc. v. United Hatters, etc., 362 F.2d 322*

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: Jan 01, 1891 to Dec 31, 2022

10. *Schulman v. Burlington Industries, Inc., 255 F. Supp. 847*

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: Jan 01, 1891 to Dec 31, 2022

11. Automated Bldg. Components v. Hydro-Air Eng'g, 362 F.2d 989

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: Jan 01, 1891 to Dec 31, 2022

12. Lewis v. Pennington, 257 F. Supp. 815

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: Jan 01, 1891 to Dec 31, 2022

13. State v. Milwaukee Braves, Inc., 31 Wis. 2d 699

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: Jan 01, 1891 to Dec 31, 2022

14. Rutherford v. United States, 365 F.2d 353

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

15. Wash. v. Am. Pipe & Constr. Co., 41 F.R.D. 59

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

16. [Malco Mfg. Co. v. Nat'l Connector Corp., 1966 U.S. Dist. LEXIS 7220]

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: Jan 01, 1891 to Dec 31, 2022

17. [United States v. Johns-Manville Corp., 259 F. Supp. 440]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

18. [Ayers v. Pastime Amusement Co., 259 F. Supp. 358]

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: Jan 01, 1891 to Dec 31, 2022

19. [United States v. Crocker-Anglo Nat'l Bank, 263 F. Supp. 125]

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

20. [United States v. Provident Nat'l Bank, 259 F. Supp. 373]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

21. [Peelers Co. v. Wendt, 260 F. Supp. 193]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

22. *Otto Milk Co. v. United Dairy Farmers Cooperative Asso., 261 F. Supp. 381*

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: Jan 01, 1891 to Dec 31, 2022

23. *Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449*

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: Jan 01, 1891 to Dec 31, 2022

24. *United States v. Third Nat'l Bank, 260 F. Supp. 869*

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: Jan 01, 1891 to Dec 31, 2022

25. *Lloyd A. Fry Roofing Co. v. Federal Trade Com., 371 F.2d 277*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

26. *Nichols v. Spencer International Press, Inc., 371 F.2d 332*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

27. *K-91, Inc. v. Gershwin Publ'g. Corp., 372 F.2d 1*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

28. *Y & Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

29. *L. S. Good & Co. v. H. Daroff & Sons, Inc., 263 F. Supp. 635*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

30. *Quinn v. Mobil Oil Co., 375 F.2d 273*

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: Jan 01, 1891 to Dec 31, 2022

31. *Nelson v. Berry Petroleum Co., 242 Ark. 273*

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: Jan 01, 1891 to Dec 31, 2022

32. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F.2d 776

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

33. Royal Crown Cola Co. v. Coca-Cola Co., 1967 U.S. Dist. LEXIS 11191

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

34. Holmes v. Struthers Scientific & International Corp., 268 F. Supp. 122

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

35. Denver & R. G. W. R. Co. v. United States, 387 U.S. 485

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

36. United States v. Reed Roller Bit Co., 274 F. Supp. 573

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

37. [Old Dominion Box Co. v. Cont'l Can Co., 273 F. Supp. 550]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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38. [Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

39. [Lewis v. Seanor Coal Co., 382 F.2d 437]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

40. [Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

41. [United States v. Concentrated Phosphate Export Asso., 273 F. Supp. 263]

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: Jan 01, 1891 to Dec 31, 2022

42. [Wash. v. Am. Pipe & Constr. Co., 274 F. Supp. 961]

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: Jan 01, 1891 to Dec 31, 2022

43. *Hensley Equip. Co. v. Esco Corp., 383 F.2d 252*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

44. *Trucking Unlimited v. California Motor Transport Co., 1967 U.S. Dist. LEXIS 11536*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

45. *Bracken's Shipping Center, Inc. v. Ruwe, 273 F. Supp. 606*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

46. *Shoaf v. Triangle Publications, Inc., 43 F.R.D. 10*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

47. *Barr Rubber Prods. Co. v. Sun Rubber Co., 277 F. Supp. 484*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

48. United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

49. Austin v. House of Vision, Inc., 385 F.2d 171

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

50. Kaplan v. Lehman Bros., 389 U.S. 954

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

51. Wurzberg Bros., Inc. v. Head Ski Co., 276 F. Supp. 142

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

52. Reimel v. Alcoholic Beverage Control Appeals Board, 256 Cal. App. 2d 158

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

53. Southern Pacific Co. v. United States, 277 F. Supp. 671

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

54. American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

55. Otto Milk Co. v. United Dairy Farmers Cooperative Asso., 388 F.2d 789

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

56. Vornado, Inc. v. Corning Glass Works, 388 F.2d 117

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

57. United States v. Provident Nat'l Bank, 280 F. Supp. 1

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

58. [United States v. Third Nat'l Bank, 390 U.S. 171]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

59. [State v. McBride Transp., Inc., 56 Misc. 2d 90]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

60. [Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391]

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: Jan 01, 1891 to Dec 31, 2022

61. [American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821]

Client/Matter: -None-

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Search Type: Natural Language

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62. [Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876]

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: Jan 01, 1891 to Dec 31, 2022

63. [Woods Exploration & Producing Co. v. Aluminum Co. of America, 284 F. Supp. 582]

Client/Matter: -None-

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Search Type: Natural Language

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64. Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672

Client/Matter: -None-

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65. United States v. Olympia Provision & Baking Co., 282 F. Supp. 819

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

66. United States v. Tidewater Marine Service, Inc., 284 F. Supp. 324

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

67. Aimcee Wholesale Corp. v. Tomar Products, Inc., 21 N.Y.2d 621

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

68. Original Tractor Cab Co. v. United States, 286 F. Supp. 281

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

69. *National Dairy Products Corp. v. Federal Trade Com., 395 F.2d 517*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

70. *Minnesota v. United States Steel Corp., 44 F.R.D. 559*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

71. *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

72. *Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481*

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

73. *Northern Natural Gas Co. v. Federal Power Com., 399 F.2d 953*

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

74. *Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305*

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

75. *Premier Electrical Constr. Co. v. Miller-Davis Co., 292 F. Supp. 213*

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

76. *Rader v. Balfour, 1968 U.S. Dist. LEXIS 12145*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

77. *Stanton v. Texaco, Inc., 289 F. Supp. 884*

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78. *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804*

Client/Matter: -None-

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79. [Research Frontiers, Inc. v. Marks Polarized Corp., 290 F. Supp. 725]

Client/Matter: -None-

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80. [Klinger v. Rose, 291 F. Supp. 456]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

81. [Sahm v. V-1 Oil Co., 402 F.2d 69]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

82. [Bela Seating Co. v. Poloron Prods., 297 F. Supp. 489]

Client/Matter: -None-

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83. [Boise Cascade International, Inc. v. Northern Minnesota Pulpwood Producers Asso., 294 F. Supp. 1015]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

84. [International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 296 F. Supp. 920]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

85. Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

86. Alberto-Culver Co. v. Andrea Dumon, 295 F. Supp. 1155

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

87. Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

88. Arthur Murray, Inc. v. Reserve Plan, Inc., 406 F.2d 1138

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

89. Stiftung v. Zeiss, 298 F. Supp. 1309

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

90. *Attorney-General of New York v. Lundy, 59 Misc. 2d 436*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

91. *Water Servs. v. Tesco Chems. Co., 410 F.2d 163*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

92. *Carl N. Swenson Co. v. E. C. Braun Co., 272 Cal. App. 2d 366*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

93. *Simpson v. Union Oil Co., 411 F.2d 897*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

94. *TNT Communications, Inc. v. Management Television Systems, Inc., 32 A.D.2d 55*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

95. [United States v. Uniroyal, Inc., 300 F. Supp. 84]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

96. [Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

97. [Std. Pressed Steel Co. v. Astoria Plating Corp., 1969 U.S. Dist. LEXIS 10541]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

98. [Kolene Corp. v. Motor City Metal Treating, Inc., 307 F. Supp. 1251]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

99. [Cosentino v. Carver-Greenfield Corp., 1969 U.S. Dist. LEXIS 13134]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

100. *Gottesman v. General Motors Corp., 414 F.2d 956*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022

Shell Oil Co. v. FTC

United States Court of Appeals for the Fifth Circuit

April 18, 1966

Nos. 18967 and 18969

Reporter

360 F.2d 470 *; 1966 U.S. App. LEXIS 6460 **; 1966 Trade Cas. (CCH) P71,744

Shell Oil Company, Petitioner v. Federal Trade Commission, Respondent, The Firestone Tire & Rubber Company, Petitioner v. Federal Trade Commission, Respondent

Core Terms

dealers, sales commission, sponsored, oil company, overt, economic power, coercion, tires, suppliers, effects, percent, service station, anti-competitive, cases, wholesale, oil, outlets, sales, rubber company, distributors, batteries, contracts, petroleum, coercive, products, station, buy, tying arrangement, manufacturers, orders

LexisNexis® Headnotes

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 > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN1[] **Tying Arrangements, Clayton Act**

Tying arrangements are per se violative of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1 et seq.* whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product and a not insubstantial amount of interstate commerce is affected.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

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

HN2[] **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. The lack of an express tie is unimportant; a tying arrangement may be found in a course of dealing between the parties.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] **Antitrust & Trade Law, Federal Trade Commission Act**

The words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.

Judges: [1]** Brown and Wisdom, Circuit Judges, and Johnson, District Judge.

Opinion by: WISDOM

Opinion

[*471] WISDOM, Circuit Judge:

This case is one of a trilogy of cases the Federal Trade Commission brought in January 1956 against (1) Atlantic Refining Company and Goodyear Tire and Rubber Company (*Atlantic-Goodyear*), (2) Texaco (Texas) Company and Goodrich Tire and Rubber Company (*Texaco-Goodrich*) and (3) Shell Oil Company and Firestone Tire and Rubber Company **[*472]** (*Shell-Firestone*). In each complaint the FTC challenged the validity of a sales commission contract between the oil company and the rubber company, alleging that the contract was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. [1]

As everyone who drives a car knows, **[**2]** service stations usually carry tires, batteries, and automobile accessories (TBA). [2] **[**3]** The most widely used plans for marketing TBA are the (1) purchase-resale and (2) sales commission systems. Under the purchase-resale plan, the oil company purchases TBA from the manufacturers and resells the TBA to its service station dealers and wholesale distributors. Under the sales commission plan, the manufacturers sell TBA directly to the oil company's dealers and wholesalers. This system is based on a contract: In return for promoting sales of the rubber company's TBA the oil company receives an overall commission (override) [3] **[**4]** on all the supplier's TBA sold at the oil company's wholesale and retail outlets. Shell, Texas

[1] "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful." Federal Trade Commission Act, § 5(a)(1), 66 Stat. 632; *15 USC § 45(a)(1)*.

[2] Since World War II, service stations have become increasingly important as TBA outlets. Their large number, the convenient location of the usual station, the availability of TBA for immediate installation at a station, and the possibility of the "single stop" at one station for all automotive needs contribute to the still rising importance of gasoline service stations as market outlets for TBA. Shell's evidence indicates that in 1958 about 45 per cent of all TBA was sold through service stations, a figure representing an estimated increase of 14 per cent in ten years. Shell estimates that in 1955 about 50 per cent of the sales of replacement tires was made through service stations.

Company, and Atlantic use the sales commission system. [4] They contract **[*473]** with Firestone, Goodrich, and Goodyear, the three largest TBA suppliers, and with other tire and rubber companies; Shell, for example, has a sales commission contract with Goodyear as well as with Firestone.

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[3] Shell receives 10 per cent of the gross sales made by Firestone to Shell dealers and 7 1/2 per cent of the gross sales to Shell jobbers. To simplify bookkeeping, each Shell dealer is assigned to a specific Firestone wholesale "supply point ". Since Shell sells no TBA itself, the Commission accurately, if pejoratively, terms these payments an "override ".

There is a spirited difference between the parties as to whether the commission represents compensatory payments or a windfall. One ancient intra-company letter dating from 1947 suggests that the payments were "almost all net profit ". In 1956 Shell received about $3.6 million in commissions from Firestone and Goodyear. If indeed this sum represented "almost all net profit" it was a healthy profit for a company that allegedly entered the TBA jungle only to insure its market position in the sale of gasoline and other petroleum products. However, uncontradicted evidence of Shell's promotional costs in 1956 demonstrates that the commission payments were no windfall. Shell's promotional activities in 1956 cost $3.2 million, leaving it with a mere $400,000 profit from TBA, a negligible sum considering the magnitude of its petroleum enterprises. Shell estimated the costs as follows:

Credit costs from the use of

credit cards and deferred

payment plan

$ 500,000

Maintenance, repairs, and

depreciation on displays

and promotional equipment

600,000

Promotion and advertising

2,225,000

Total

$ 3,325,000

Strangely, this accounting does not even include the cost of personnel involved in TBA promotion. This cost was estimated at $1,875,000 for 1956 and would have raised Shell's TBA costs to $5,260,000, or $1,600,000 in excess of its commission revenue. There is of course no way of knowing in dollar and cents the extent to which Shell's TBA program promoted its sales of gasoline. Shell was satisfied with its program; at any rate, it preferred that program to any other.

[4] In order to offer a sales commission plan, a tire manufacturer must be able to offer a complete line of TBA to its service station customers; those items which it does not manufacture must be purchased and stocked (usually under its own private brand name). Furthermore, the company must have distributive facilities at least as widespread as are the dealers of its customers.

[5]** The same examiner heard all three cases. In each case he found that the sales commission plan was lawful [5] **[**6]** but that in certain instances the oil companies had used overt coercive tactics. [6] The Commission adopted the findings of overt coercion. More importantly, in *Atlantic-Goodyear* and *Shell-Firestone* the Commission ruled that, considering the "competitive effects resulting from respondent's use" of the sales commission system, the system itself was an "unfair method of competition". The novelty in these rulings was the Commission's rationale: [7]

> "Shell has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA *even without the use of overt coercive tactics*. For reasons set forth hereinafter, we conclude that the exercise of this power by Shell through the use of the sales commission plan in favor **[*474]** of Firestone (Goodyear) constitutes an unfair method of competition and an unfair act or practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act."

[7]** March 9, 1961, in *Shell-Firestone*, the Commission issued broad orders prohibiting Shell's using coercion in marketing TBA; outlawing the oil company's use of the sales commission plan with Firestone or "any other rubber company or tire manufacturer, or any other [TBA] supplier"; and outlawing the rubber company's use of the plan with Shell or any other oil company. Similar orders were issued in *Atlantic-Goodyear*. *Goodyear Tire and Rubber Company, 58 F.T.C. 309*; *Firestone Tire and Rubber Company, 58 F.T.C. 309*.

This means a national distribution system. Only four, possibly three, tire manufacturers (Goodyear, Firestone, Goodrich, and, possibly, U.S. Rubber) satisfy these requisites. They are dominant in the area of sales commission plans. But the smaller companies, as well as the giants, may participate in purchase-resale plans whereby the oil companies assemble their own TBA package. Most of the tire manufacturers, and here Firestone is a notable exception, do in fact participate to some extent in purchase-resale programs.

The gasoline market is a rough-tough competitive struggle pitting a few giants struggling against each other and against a large number of pigmy producers. In this context the purchase-resale and the sales commission programs work in opposite directions. To enter into a purchase-resale program, an oil company must have resources large enough to finance an extensive TBA inventory. It must also have sales and distributive facilities for marketing these products. And, of course, the oil company must have an established reputation for quality, if it seeks to market TBA under a private label. As a result, the small companies prefer the less burdensome sales commission plans; the giants, notably Standard Oil, are capable of purchasing and reselling a complete line of TBA under their own brand names. In *Atlantic* the Supreme Court expressly refrained from passing on the merits of the purchase-resale plan.

The amicus curiae brief of Champlin Oil & Refining Co. (concurred in by Ashland Oil & Refining Company, Continental Oil Company, Jenney Manufacturing Company, Inc., Leonard Refineries, Inc., Shell Oil Company, South Penn Oil Company, and Sunray D-X Oil Company) makes the point that "virtually every marketing oil company in the United States provides a TBA program for the benefit of its marketing outlets ". Champlin and other small or relatively small companies use the sales commission plan because it enables them to provide the necessary TBA program without having to invest in a large TBA inventory. Champlin avows that a *per se* approach to the problem will force it to use the purchase-resale system, make unnecessary demands on its capital, and place it at a disadvantage in competing with large oil companies having a nationwide system of distribution.

[5] The examiner found as to Shell: "No inference or implication can be drawn simply from the contractual relationship between Shell and its dealers that the degree of control by Shell over its dealers is sufficient to force dealers to purchase only sponsored TBA."

[6] The examiner found that there was "no evidence" that Firestone "participated" in any coercive practices. But as to Shell: "Shell representatives . . . did . . . force Shell dealers to purchase substantial quantities of Goodyear and Firestone TBA . . . [by] demands that dealers discontinue the purchase or display of non-sponsored TBA under threat of lease cancellation or other corrective action."

[7] Courts have looked with disfavor on arrangements by oil companies to sponsor TBA, but until *Atlantic-Goodyear* no court had gone further than to enjoin overt coercive acts. *Osborn v. Sinclair Refining Co., 4 Cir. 1960, 286 F.2d 832*, cert. denied, 1961, ***366 U.S. 963, 81 S. Ct. 1924, 6 L. Ed. 2d 1255***; *United States v. Sun Oil Co., E.D. Pa. 1959, 176 F. Supp. 715*. But see *Simpson v. Union Oil Co., 1964, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051* and *Broussard v. Socony Mobil Oil Company, 5 Cir. 1965, 350 F.2d 346* viewing the dealer-oil company relationship as inherently coercive. See also Note, 63 Mich. L. Rev. 713 (1965).

In *Texaco-Goodrich*, unlike the companion cases, the 1961 Commission reached a result the 1966 Commission described as "enigmatic": [8] "[Although] 'Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics', *the record did not contain 'sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA*'." The Commission therefore remanded the case to the hearing examiner for the taking of additional evidence on that issue. **[**8]** [9] B.F. Goodrich, 58 F.T.C. 1176. On remand, the examiner found that the Texaco-Goodrich plan was unlawful; the Commission entered orders identical with those entered in the two companion cases. (*B.F. Goodrich*, Docket 6485, April 15, 1963).

[9]** When these cases reached the courts, the Seventh Circuit affirmed the Commission in Goodyear Tire & Rubber Co. v. Federal Trade Commission, (Atlantic-Goodyear), 1964, 331 F.2d 394; the District of Columbia Circuit reversed the Commission in *Texaco-Goodrich* [10] **[**10]** and ordered the complaint dismissed, 1964, 118 U.S. App. D.C. 366, 336 F.2d 754. The Supreme Court granted certiorari in both cases. This Court withheld its decision pending final action by the Supreme Court in the companion cases. In *Atlantic-Goodyear* the Court affirmed the judgment. Atlantic Refining Company v. Federal Trade Commission, 1965, 381 U.S. 357, 85 S. Ct. 1498, 14 L. Ed. 2d 443; reh. denied 382 U.S. 873, 86 S. Ct. 18, 15 L. Ed. 2d 114. In *Texaco-Goodrich* the Court vacated the judgment with instructions that the case be remanded to the Commission for further proceedings, "in light" of Atlantic. [11] **[*475]** Federal Trade Commission v. Texaco, Inc., 1965, 381 U.S. 739, 85 S. Ct. 1798, 14 L. Ed. 2d 714.

The parties differ widely in their understanding of *Atlantic*. The respondent asserts that under *Atlantic*, a TBA sales commission contract is unlawful *per se*; the petitioners assert that the Supreme Court decided *Atlantic* not on any generalized theory of *per se* illegality but on specific findings of fact supported in that case by substantial evidence. The petitioners' contention serves as the predicate for their argument that the facts here are unlike the controlling facts in *Atlantic-Goodyear*; the orders against Shell and Firestone should be set aside for lack of substantial evidence; in the alternative, this Court should remand the proceeding to the Commission for further consideration.

On the record before us, the difference between the two interpretations of *Atlantic* may be more verbalistic than real. Even assuming the correctness of the petitioners' interpretation and even admitting that there are some differences between the Atlantic-Goodyear system and the Shell-Firestone system, the **[**11]** controlling facts in this case are so similar to those in *Atlantic* that the same result should be reached in both cases. The importance, however, of judicially declaring *or not* declaring a new category of *per se* violations affecting every oil company,

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[8] Opinion on remand in Texaco-Goodrich, FTC Docket 6485, Jan. 14, 1966.

[9] In remanding the case to the examiner, the Commission said:

> "The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the competitive effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means. . . . Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels." 58 F.T.C. 1176.

[10] *Texaco-Goodrich* also involved the question whether the Chairman of the Commission was disqualified from participating in the decision because he had indicated in a speech made while the case was pending that he had prejudged it. The Court dismissed the case because the Commission's orders were not supported by the record and because of the undue protraction of the administrative process.

[11] And without the participation of the Chairman of the Commission.

every TBA supplier, and every car-owner requires the Court to give careful consideration to the factual background and to the conflicting contentions. [12]

I.

A. In *Atlantic-Goodyear* and *Shell-Firestone* the Commission, using virtually identical language in the two opinions, found that the oil companies had exercised their economic power "to cause [their] dealers to purchase substantial amounts of a different class of products, TBA, as a condition to their continuance as . . . **[**12]** lessees and dealers". This finding, "in conjunction with their 'market position and the volume of TBA affected, would bring them within the Supreme Court's ruling in *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)* and the more recent decision in *Osborn v. Sinclair Refining Co., 4 Cir. 1960, 286 F.2d 832*'". And, as the Commission noted, "The Court held in the *Northern Pacific* case that ***HN1***[] tying arrangements are *per se* violative of *Section 1* of the Sherman Act 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product' and a 'not insubstantial' amount of interstate commerce is affected". The Commission looked to *Osborn*, a case involving an implied tie-in, for the content of the phrase "sufficient economic power". Comparing Sinclair Refining Company, the oil company in *Osborn*, with Shell and Atlantic, the Commission found that these two companies had "sufficient economic power" in the tying commodity -- petroleum products -- **[**13]** to bring the case within the doctrine of tying arrangements. At that point in the opinion one would have to conclude that the Commission regarded the sales commission system as a tying arrangement *per se* illegal [13] on a showing of the oil company's requisite economic power in the tying product.

Precisely at this point in both opinions, however, the Commission broke new ground with the statement: "But we do **[*476]** not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases". **[**14]** Abandoning the tie-in and overt coercion contentions, the Commission stated the issue as "the legality of a particular method of distributing TBA products used by the respondents". This issue, the Commission said, requires an examination and assessment of the anti-competitive effects of the oil company's use of its economic power by means of the sale commission method. In *Atlantic-Goodyear* therefore the Commission said:

> Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents.

In view of this reasoning, the Commission's action in *Texaco-Goodrich* is not "enigmatic". Texas Company uses a TBA plan with Goodrich that is substantially the same as the Shell-Firestone **[**15]** and Atlantic-Goodyear plans. The Commission's remand of *Texaco-Goodrich* carries the necessary implication that the Commission did not treat the sales commission arrangement as a tying scheme and did not condemn the system as *per se* illegal. [14] If it had, the remand would have been pointless. An "inquiry into effect upon competition . . . [would have been] irrelevant". *White Motor Company v. United States, 1963, 372 U.S. 253, 265, 9 L. Ed. 2d 738, 83 S. Ct. 696*. (Concurring opinion.)

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[12] The Supreme Court excepts from its ruling oil companies able to show that they are "not possessed of economic power over their dealers". *381 U.S. at 377-78*. The nature and extent of this exception is of course beyond the scope of this opinion.

[13] "It is generally agreed that tying arrangements are illegal *per se*. While examination of a particular tying arrangement is not limited to the characterization of the practice, as has traditionally been the case with price fixing and group boycotts, judicial inquiry is nevertheless confined to the determination of a single fact: the amount of commerce affected in the tied product." Pearson, Tying Arrangements and Antitrust Policy, 60 N.W.L. Rev. 626 (1965).

[14] See footnote 9.

B. When the TBA cases reached the circuit courts, General Counsel for the FTC took the flat position that the sales commission contract was illegal *per se* -- as a tying arrangement and in itself. [15] **[**17]** In *Atlantic-Goodyear* the Seventh Circuit recognized that "Goodyear's contract with Atlantic in itself has no tying features", but "considered contextually with the oil company-dealer relationship and the economic power that Atlantic has over its dealers does its tying features **[**16]** emerge". *331 F.2d at 402*. The "tying arrangement *is* the sales commission system operated by Goodyear and Atlantic". Ibid. "The heart of this case is the economic power Atlantic possesses over its service station dealers. Ostensibly, they are independent businessmen; but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers." *331 F.2d at 400*. In accepting more or **[*477]** less completely the tying and *per se* arguments, the court seems to have shifted the emphasis from avoiding anti-competitive effects to protecting the dealers against exploitation by the oil company. [16]

The District of Columbia Circuit, on the other hand, held for Texaco and Goodrich. According to that court, the "keystone of the Commission's ultimate decision" was the "unwarranted assumption", for which there was "no basis in the record", that Texaco **[**18]** has "sufficient economic power over its dealers to compel them to handle Goodrich tires exclusively." *336 F.2d at 766*.

C. As we read *Atlantic*, the Supreme Court approached only to the brink of holding TBA sales commission contracts *per se* unlawful. True enough, on the record before it, the Court might have held that the Atlantic-Goodyear distribution system, as distinguished from the bare contract, was a tacit but true tying arrangement. [17] But the Court, like the Commission in its 1961 decision, declined to classify the sales commission "arrangement" as

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[15] The complaint did not allege, in terms, a tying arrangement or a *per se* violation. Counsel for Shell asserts in his brief in this Court that during the trial neither theory was mentioned. The briefs filed with the examiner and, on appeal, with the Commission, do not discuss tying or *per se* arguments.

Mr. Justice Goldberg, in his dissent in Atlantic, said: "In short, the Commission opinions in this and the related cases are bathed in confusion and leave unanswered a number of questions necessarily involved in the decision of these cases. Are TBA sales-commission plans only unfair methods of competition if the oil company has used coercive tactics on its dealers? If they are illegal without past or present evidence of coercion, are they illegal for oil companies which do not have the same relation with their dealers as Atlantic has with its dealers? Are they illegal for oil companies which do not have the same market position as Atlantic? Has the Commission drawn a distinction between sales commission and purchase-resale TBA promotion plans, condemning the former but approving the latter? If it has, is there a rational basis, consistent with the policies of § 5, for such a distinction? All of these questions appear to me to be inadequately answered by the Commission's opinion. . . . Moreover, if in these and the related cases the Commission is laying down the broad rule that all sales-commission TBA promotion arrangements in the oil industry are *per se* unfair methods of competition, such a rule has neither been clearly articulated nor supported with adequate economic analysis."

[16] One commentator has observed: "[A distinction should be drawn between] restraints of trade, which constitute clear public injury, with mere restrictions on the freedom of the dealer to act as an independent businessman. This is where the approach of the Seventh Circuit would seem to differ significantly from the approach of the Commission. The Commission accepted the fact that the oil companies enjoyed controlling economic power over their dealers but did not condemn its use as such; it condemned only the abuse of this power. Only when it resulted in anti-competitive effects did the Commission step in. By applying the tying arrangement analogy, the Seventh Circuit effectuated an important shift in emphasis from preventing anti-competitive effects toward protecting the dealers." Note, 63 Mich. L. Rev. 713, 719 (1965).

[17] ***HN2***[] 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." *Northern Pac. Ry. v. United States, 1958, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545*. TBA sold to dealers is tied to gasoline and oil or to the leasing of service stations, or to both. Goodyear's TBA sales, therefore, do not result from competition in the open market, but from Goodyear's purchasing a captive market. The lack of an express tie is unimportant; a tying arrangement may be found in a course of dealing between the parties. *McElhenney Co. v. Western Auto Supply Co., 4 Cir. 1959, 269 F.2d 332*. The Court has treated tying arrangements generally as *per se* violations of ***antitrust law*** because they necessarily restrict a buyer's freedom of choice between competing products in the market for tied products. See *United States v. Loew's Inc., 1962, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*; *International Salt Co. v. United States, 1947, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20*.

a "tying scheme". And nowhere in the opinion can be found the words "per se". This could hardly have been an accident. The Court specifically said:

> "At the outset we must stress what we do not find present here. We recognize that the Goodyear-Atlantic *contract is not a tying arrangement.* Atlantic is not required to tie its sale of gasoline and other petroleum products to purchases of Goodyear tires, batteries, and accessories. Nor does it *expressly* require such purchases of its dealers. But neither do we understand that either the Commission or the Court of Appeals held that the salescommission **[**19]** arrangement was a tying scheme." *381 U.S. at 369*.

"What the Commission and the Seventh Circuit did find", the Supreme Court said, "was that the central competitive characteristic was the same in both cases -- the utilization of economic power in one market to curtail competition in another". (*381 U.S. at 369*)

[20]** The rationale for the Atlantic decision may be broken down into three essential components, [18] each of which depends on the facts of the case before the court:

(1) the oil company's dominant economic power over its dealers;
(2) the exercise of that power over its dealers;
(3) the anti-competitive effects of using that power.

The first need not detain us. The Court determined that "there is 'warrant **[*478]** in the record' for the findings of the Commission" as to Atlantic's economic powers. (*381 U.S. at 368*) Atlantic, as "a major producer, refiner and distributor of oil and its by-products" (*381 U.S. at 363*) and its dealers "simply do not bargain as equals ". (*381 U.S. at 368*) This power exists independently of any particular plan for distributing TBA.

Second, as is demonstrated by the success of the sales commission system, Atlantic **[**21]** exercised its economic power over its dealers by forcing them to sell sponsored TBA. The very purpose of the system was to exploit that power. As the Court observed: "The Commission was well justified in concluding that Goodyear had in effect purchased a captive market." (*381 U.S. at 375*) "It is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers . . ." (*381 U.S. at 376*) Since "persuading" its dealers to buy Goodyear TBA was "a natural incident of [Atlantic's] power" (*381 U.S. at 368*) proof of specific acts of overt coercion was not essential to the holding.

Atlantic did not seek review of that part of the Commission's order relating to overt acts of coercion. The Supreme Court however did not ignore the evidence of overt coercive acts. The Court noted that "utilization of economic power in one market to curtail competition in another" exists *here as in tie-ins, but here "that lever was bolstered by actual threats and coercive practices*." (*381 U.S. at 369*) "The long **[**22]** existence of the plan itself, coupled with the coercive acts practiced by Atlantic pursuant to it, warranted a decision to require more" than enjoining the use of overt coercive tactics. Atlantic's overt coercion however was simply "symptomatic of a more fundamental restraint of trade." (*381 U.S. at 361*) Successful operation of the TBA commission plan did not depend on overt coercion. It did not depend on any express provision in the sales commission contract compelling Atlantic to require its dealers to purchase Goodyear's TBA. To its dealers, Atlantic's wish was Atlantic's command.

The Supreme Court's action in *Texaco-Goodrich* clarifies the rationale in *Atlantic-Goodyear*. There the Court summarily vacated the judgment upon a petition for writ of certiorari raising the question of the legality of the sales commission system in the absence of any acts of overt coercion. The petition alleged: "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of TBA *even without the use of overt coercive tactics* ".

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[18] In its brief the Commission uses this breakdown to show that the Court applied tying principles.

Third, in determining the anti-competitive effects, the Court noted that **[**23]** the Commission "looked to the entire record" and concluded that "the activity of Goodyear and Atlantic impaired competition at three levels of the tires, batteries and accessories industry." The Court went into considerable detail in showing Goodyear's close cooperation with Atlantic. It was "of little consequence that Atlantic actually applied the pressure ". There "was ample evidence establishing on Goodyear's part a course of conduct lasting over 14 years aimed at utilizing oil company structures to curtail competition in tires, batteries and accessories ". In affirming the Commission's order against Goodyear, the Court noted that the sales commission plan "enabled Goodyear to integrate its own nationwide distribution system with the economic power possessed by Atlantic over its wholesale and retail petroleum outlets." (*381 U.S. at 373*).

In approving the breadth of the order the Court relied on the fact that Goodyear had contracts with 20 oil companies in addition to Atlantic. Nine of the contracts were before the Commission; all were similar to the Atlantic-Goodyear contract. "Upon considering the destructive effect on commerce that would result from the widespread **[**24]** use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset **[*479]** these evils by a showing of economic benefit to themselves." (*381 U.S. at 371*) Goodyear complained that "there is no evidence of the economic power of many of the companies with which it has sales-commission plans ". The Court did not discount this argument; it looked to the record:

> This order does not necessarily prohibit Goodyear from making contracts with *companies not possessed of economic power over their dealers*. The evidence in this particular record, however, does involve relationships such as it has enjoyed with Atlantic and *its propensity to use those relationships for an unfair competitive advantage*. Goodyear offered no evidence that it has arrangements differing from those mentioned in the instant case. . . . *On this record we cannot say that the Commission's remedy is unreasonable* . . ." (*381 U.S. at 377*)

The Court's approach in *Atlantic* is consistent with the broad scope of a Section 5 proceeding. Section 5 is intended to **[**25]** halt practices in their incipiency that may show promise of developing into violations of the Sherman and Clayton Acts and to defeat practices not specifically proscribed by those laws but contrary to the principles animating the Sherman and Clayton Acts. [19] **[**26]** The approach is also consistent with the Court's usual reluctance to adopt a *per se* rule until it can be supported by a series of decisions. [20]

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[19] " . . . ***HN3***[] The words 'unfair practices' and 'unfair methods of competition' are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly." *Pan American World Airways v. United States, 1963, 371 U.S. 296, 307, 83 S. Ct. 476 9 L. Ed. 2d 325*. See also *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc., 1953, 344 U.S. 392, 73 S. Ct. 361, 97 L. Ed. 426*; *Federal Trade Commission v. Cement Institute, 1948, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010*; *Fashion Originators' Guild of America v. Federal Trade Commission, 1941, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949*; *Federal Trade Commission v. Beech-Nut Packing Co., 1922, 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307*. See also Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts, 59 Mich. L. Rev. 821 (1961).

[20] "The cases also show that generally a restraint of trade in the past has been declared to be per se unlawful only after a cumulative series of rulings -- adverse to the practice -- had given the courts a solid basis for arriving at *per se* condemnation. For example, tying arrangements had so frequently been found unreasonably to restrain trade that the courts finally declared that they hardly serve any purpose beyond the suppression of competition." Van Cise, The Future of Per Se in ***Antitrust Law***, 50 Va. L. Rev. 1165, 1172 (1964). In *White Motor Co. v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 9 L. Ed. 2d 738*, the Supreme Court reversed a district court which had developed a per se rule of antitrust liability without regard to the economics of the situation: "This is the first case involving a territorial restriction in a vertical arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us."

The door allowing escape to **[**27]** the rule of reason is ajar. At this stage in the development of anti-trust law applicable to TBA distribution plans of oil companies, courts may not adopt a doctrinaire approach. Courts must look to the record, at least to the extent the Supreme Court relied on the record in *Atlantic*.

II.

The three essential elements on which the Supreme Court based its decision in *Atlantic-Goodyear* are present in *Shell-Firestone*.

A. First, Shell has dominant economic power over its dealers similar to Atlantic's power over its dealers. Shell too is a major integrated producer, refiner, and distributor of petroleum products. In 1955, when the record closed, Shell sold about 5 per cent of the total gasoline sold in the United States, [21] and had annual **[*480]** operating revenues exceeding $1,700,000,000.

[28]** In 1957 Firestone, the second largest tire manufacturer in the United States, sold 17 per cent of all replacement tires sold; Goodyear, the largest manufacturer, sold 24 per cent. Shell has had sales commission arrangements with Firestone and Goodyear since 1940; written contracts since 1951.

At the time the FTC hearings were held, Shell marketed its products in 41 states and the District of Columbia through a network of 23,000 service stations. [22] Shell had more than 10,000 direct **[*481]** dealers; Atlantic had about 5,500 direct dealers.

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[21] The statistical picture is muddy. The Commission estimates that in 1955 about 34,795,000,000 gallons of gasoline were sold at retail in the United States. This figure is based on the total sales of gasoline (46,394,000,000 gallons) published by the Ethyl Corporation and the assumption that 75 per cent of the gasoline sold in the United States is sold at retail. In 1954 Shell sold 1,890,491,000 gallons of gasoline to service stations (about 5 per cent of the 1955 total) and it sold an additional 1,039,344,000 gallons to jobbers. There is no indication of how much of the gasoline sold to jobbers ultimately is sold at retail. (The Commission, in its opinion, seemed to indicate that all of this gasoline would be sold at retail. It also picked up the figure as 1.4 billion gallons instead of the proper 1.04 billion gallons. Nevertheless, the Commission finally found that Shell sold about 5 per cent of the national market, a figure that indicates the Commission's view that only the gasoline sold directly to retailers was considered relevant.) In addition to the gasoline sold to retailers and to jobbers, Shell sold 5,486,000 gallons of gasoline at stations Shell owned and operated. In light of the lack of certainty behind the statistical analysis, it is improper to be more specific than to say that in the years of 1954 and 1955 Shell supplied in excess of 5 per cent of the gasoline sold at retail in the United States.

[22] Four different types of service station operators acquire their gasoline directly from Shell. (1) At one extreme are the *commission stations, designated as "C" stations*. These stations are owned by Shell and operated by managers who sell gasoline and petroleum products as commission agents. They are independent businessmen as to TBA and other products, except that they are restricted to selling "such merchandise as Shell may approve". (2) Next, there are *lessees, "L" dealers*, who rent their stations, including the pumps and tanks, from Shell. Ostensibly, "L" dealers are independent of their supplier-landlord. The leases are usually for one year and are automatically renewed; no cause is necessary for refusal to renew a lease at the end of its term. (3) "DL" stations are similar to the "L" stations. *DL operators own their own stations*, but lease them to Shell. Shell, in turn, leases these stations back to their owners for the same period of time and at the same rental. This procedure is used for the purpose of providing collateral -- the Shell lease -- upon which the operator can borrow money to finance the construction or improvement of his station. In some cases Shell does this financing itself. The leases are for varying lengths of time and are automatically renewed from year to year after the initial period. (4) Finally, there are the other dealers, *"OD" dealers, who either own their own stations outright or lease them from some third party*. OD dealers purchase gasoline from Shell through yearly contracts (dealer sales agreements) terminable by Shell. Many OD stations are not gasoline stations as such, but are restaurants, garages, parking lots, or other businesses that incidentally have gasoline pumps. The TBA sales potential from an "OD" station is usually smaller than it is from other Shell outlets. In addition to selling through service stations, Shell sells through jobbers.

In 1955 Shell's direct outlets and their relative importance as purchasers of gasoline were as follows:

"C"

"L"

[29]** The Supreme Court referred to three sources of an oil company's power over dealers: (1) control of the dealers' oil and gasoline supply; (2) control over dealers through short-term leases and equipment loan contracts renewable year-to-year and terminable at year's end upon ten days notice; (3) control over advertising on the premises of service stations. The first provides inherent leverage; the two others are "control devices" available to the oil company. The first two sources of power are unquestionably present in *Shell-Firestone*. The record is unclear as to the extent of Shell's control of advertising on the premises of its service stations although there is no

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"DL"

"OD"

Total

Number of stations

999

3910

1922

3231

10,062

Percentage of the total for

direct dealers

9.9

38.8

19.1

32.2

100.0

Percentage of gasoline sold

to direct dealers (1.9 bil-

lion gallons)

14.7

46.7

20.2

18.4

100.00

The picture of Shell's distributive system is completed by adding sales to 847 jobbers who supply, among others, about 13,000 retail gasoline stations, and the sales made by Shell in its few wholly owned and operated retail outlets. In 1955 Shell's sales to jobbers amounted to around 1.04 billion gallons; direct retail sales amounted to around 5 million gallons.

doubt as to the close cooperation between Shell and Firestone in arranging the displays at Shell stations. Other sources of power are (4) the leverage when Shell finances a station or owns the site, [23] and (5) the control device of house-keeping requirements concerning the station's use, maintenance, and appearance which, if breached, could result in immediate cancellation of a lease without notice. Cf. Broussard v. Socony Mobil Oil Co., 5 Cir. 1965, 350 F.2d 346. In final analysis, the dominance **[**30]** of a major oil company over its dealers comes from the leverage inherent in the structure and economics of the petroleum distribution system and from the company's firm velvet-gloved grip on control devices.

[31]** B. Second, the record shows that in performing its obligations to the rubber company under the sales commission agreement, Shell, like Atlantic, did indeed use its economic power over its dealers to cause them to buy sponsored TBA.

The following acts of persuasion or promotion which the Supreme Court noted in its Atlantic opinion are matched by corresponding acts of Shell in the instant case:

> Announcement to dealers of sponsorship of Goodyear TBA; suggestion to dealers that they maintain adequate stocks of sponsored TBA; maintenance of service station identification and advertising relating to Goodyear TBA; oil company salesman representation of, and assistance to, Goodyear in sponsored TBA promotions; maintenance by oil company of dealer training programs in sale of sponsored TBA; "double-teaming" solicitation of dealers; projection of dealer sponsored TBA quotas; assignment of each dealer to specified sponsored TBA supplier; reporting technique whereby oil company may determine exact amount of sponsored TBA purchased by each dealer; rubber company reporting to oil company of names of noncooperative dealers for appropriate action by oil company; advance notice to Goodyear **[**32]** supply points of identity of new selected Atlantic dealers.

Firestone makes the point that what the Supreme Court said in condemnation of Goodyear cannot be said of Firestone. Here the examiner found that there was "no evidence" that Firestone "engaged in, or participated in, any acts of or practices designed to force dealers and distributors **[*482]** of Shell Oil Company to purchase Firestone TBA products ". Nevertheless, Firestone took advantage of Shell's acts of persuasion and integrated its promotion plans with Shell's system. [24] As the Supreme Court commented in the parallel situation in the companion case, "It was for this bundle of persuasion that Goodyear paid Atlantic its commission ". (381 U.S. at 368)

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[23] The relatively heavy cost of constructing a modern service station accounts in part for the dealers' (retailers) high degree of financial dependence on major oil companies. In 1957 the average total cost of construction of a Shell station, including land costs, was $92,000. When an untrained man is accepted by Shell as a dealer, the usual procedure is to start him off as a commission agent. The C operators usually have no investment in the service station itself; they are responsible for furnishing any inventory of TBA. This, together with tools and equipment, means an investment of about from $3,000 to $7,000. C operators are completely dependent upon remaining in the good graces of their Shell employers; for any reason at all, Shell may change or remove a C dealer upon only twelve hours notice. After a C dealer is initiated into his operation, Shell often converts the station into an L station, thereby giving its operator a good deal more freedom and security along with considerably more financial responsibility. Personal investments in L and DL stations (exclusive of land) are usually between $5,000 and $15,000 on which $2,000 and $4,000 represents TBA inventory.

[24] Shell promotes Firestone and Goodyear TBA in a number of ways. (1) Shell informs these companies when new service stations will be opened and new dealers initiated, enabling the nominee rubber company to start soliciting the new business far in advance of its other competitors. (2) Shell operates dealer training schools and dealer clinics and holds sales meetings where Firestone and Goodyear TBA products are strongly recommended and are invariably used in demonstrations. (3) Because of the tremendous variety of automotive replacement parts, service station dealers, particularly newcomers, need expert advice on inventory. Firestone and Goodyear prepare elaborate inventory guides geared to their TBA. Shell distributes these guides to its dealers carrying Firestone or Goodyear TBA. (4) Shell dealers are authorized to sell TBA to motorists on Shell credit cards on ordinary credit terms or on a six month deferred payment credit plan; however, the dealers may sell *all* TBA, whether sponsored or not, on such credit. (5) Shell representatives and the rubber company representatives participate in advertising and other promotional activities for the sale of TBA. Some promotions are sponsored jointly; some are paid for by Shell alone. The promotion may take the form of an advertising campaign or the distribution of Goodyear or Firestone signs, racks, or window decals to the Shell service stations. (6) The activity considered most valuable and relied upon to bring fast results is " double-

[33]** Shell contends that the Supreme Court would not have decided *Atlantic* as it did but for the findings showing widespread overt coercion sufficient to convince the Court that Atlantic had indeed abused its power by forcing its dealers to buy sponsored TBA. Making bad matters worse, Atlantic did not contest these findings and Goodyear called no witnesses in defense of the Atlantic-Goodyear plan. On the other hand, Shell denies the use of coercion and insists that there is no substantial evidence to support a finding of coercion; that the evidence, taken in a light most favorable to the Commission, established only isolated complaints by eleven dealers among 30,000 dealers during the relevant period of time. Shell and Firestone produced an array of witnesses, including 127 dealers, who testified in defense of their TBA plan.

It is certainly true that the Supreme Court larded and interlarded its opinion with references to Atlantic's "admitted overt coercive practices ". (*381 U.S. at 374*) It is also true, as we see it, that here, although the evidence seems to support the findings as to certain isolated acts of overt coercion, taking the record as a whole the evidence **[**34]** discloses no pattern of overt coercion. These arguments, however, bear on the issue of overt coercion; they do not bear directly on the principal issue, the Company's use of its economic power through the sales commission plan to cause its dealers to buy **[*483]** sponsored TBA even in the absence of overt coercion.

Shell and Firestone contend that in structure and operation their plan is basically different from Atlantic's and Goodyear's plan. Shell, for example, emphasizes that it does not attempt to allocate TBA by geographical areas. Atlantic sponsored one TBA supplier in half of its marketing area and another TBA supplier in the other half of the area, foreclosing each from the other's territory; Shell sponsors two TBA suppliers throughout its entire marketing area. The evidence, however, shows that each Shell dealer was expected to choose between the two sponsored suppliers to the exclusion of all others. Once the dealer chose one company, the other company did not compete for any part of the dealer's business.

Shell points to certain facts peculiar to *Atlantic-Goodyear* showing beyond a doubt that Atlantic forced Goodyear TBA on unwilling dealers. In late 1950 Atlantic **[**35]** switched from a purchaser-resale plan of selling Lee tires and Exide batteries to a sales commission plan of sponsoring Goodyear and Firestone TBA. Before making this switch, Atlantic conducted a survey of its dealers: 67 per cent preferred Lee tires, 76 per cent preferred Exide batteries over competing brands; only 11 per cent preferred Goodyear tires and 4 per cent Firestone tires. Within nine months after the switch, Lee and Exide lost 75 per cent of their Atlantic business. Shell, on the other hand, adopted its sales commission plan in 1940, has not changed its system, has not shifted TBA suppliers, and contends that there is no evidence that the wishes of Shell dealers were ignored. Undoubtedly, Atlantic's switch of suppliers shows that company's economic dominance over its dealers and the use of that power to promote sponsored TBA -- to say nothing of anti-competitive effects. No such striking example of abuse of power by an oil company can be found in the *Shell-Firestone* record. But that does not detract from the less spectacular but solid evidence supporting the Commission's finding that Shell used its economic dominance to cause a substantial number of its dealers **[**36]** to purchase sponsored TBA.

C. Third, the anti-competitive effects of the Shell-Firestone system are comparable with those the Commission found in evaluating the Atlantic-Goodyear system. (There is necessarily an overlap between this subsection and the preceding subsection of this opinion.)

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teaming" by salesmen from Shell and Firestone or Goodyear. A Shell salesman supervises 15 or 20 stations. He is Shell's link with its dealers, handling negotiations for lease renewal, rental changes, or other adjustments. The salesmen assist in adjusting complaints of Shell dealers against Firestone and Goodyear and gives merchandising advice to dealers. The Commission's brief characterizes the Shell salesman as the "big brother" of the dealer, although this characterization was used by only one witness and then, perhaps, not with an Orwellian connotation. In any event, when a TBA representative finds difficulty in moving his line to a nominated dealer, he calls upon the Shell salesman to accompany him on his sales rounds. Their joint solicitation makes clear to a dealer Shell's interest in TBA and, to no one's surprise, the team produces excellent results. The Commission contends that the salesmen go beyond the proper limits of salesmanship and promotion by threatening that Shell will not renew leases or will increase the rents or turn down equipment loans or in other ways injure a balky dealer, if dealers do not carry and sell a sufficient quantity of Firestone (and Goodyear) TBA. Shell and Firestone vigorously deny any coercion through threats or otherwise.

In *Atlantic*, by recognizing the effect of the sales commission plan as "similar to that of a tie-in," the Supreme Court simplified the problem of proving market foreclosure. "*Extensive* ["full-scale"] economic analysis of the competitive effect" based on "examining the entire market in tires, batteries and accessories" was unnecessary. Evidence of "economic justification" or "economic benefit" to the parties was immaterial. It was "enough that the Commission found that a not insubstantial portion of commerce" was affected. Nevertheless, in summarizing its position the Court looked to the record. "The short of it" was that Atlantic, with Goodyear's aid, had "marshaled its full economic power in a continuing campaign to force its dealers" to buy Goodyear TBA. " The anti-competitive effects" were "clear on the record."

In *Atlantic* the Court found that the effect on commerce **[**37]** was not insubstantial where Firestone and Goodyear sales with Atlantic outlets exceeded $11,000,000 in 1955 and $50,000,000 in six years. The comparable figures here are much greater. In 1957 Firestone and Goodyear sales with Shell outlets amounted to $47,000,000; in eight years the sales reached $290,000,000. In 1957 Firestone sales were $6,190,000 to Atlantic's dealers; $21,000,000 to Shell's dealers; $91,300,000 to dealers of all 16 contracting oil companies.

Before this Court the Commission lists certain "highlights of anti-competitive effects ". [25] These "highlights" show the **[*484]** "dramatic and immediate" anti-competitive pressures *on dealers*. "Yet ", as the Commission pointed out in its original opinion, "from the point of view of the anti-trust laws, it is the devastating competitive effects of the sales commission system *on competitors* of Firestone and Goodyear which raise the most grave questions in this proceeding." It is these destructive effects on TBA competition that submerged the tie-in issue and that most concerned the Commission and the Supreme Court.

[38]** As in *Atlantic*, competition was impaired at three levels. (a) Wholesalers and manufacturers of competing brands were foreclosed from Shell's market. Even Firestone dealers who were not authorized supply points were cut off from Shell's outlets. (b) Firestone and Goodyear were excluded from competing with each other after a dealer had selected his supplier. [26] (c) Shell's dealers, who were limited to sponsored TBA were placed at a competitive disadvantage in having to compete with dealers free to stock several brands of TBA.

[39]** Neither party has convincing figures on the relative success of the sales commission plan in terms of the amount of Shell business Firestone captured. Shell contends that its direct dealers bought no more than one-third of their TBA from sponsored outlets in 1954 and that this fact alone shows that Shell did not coerce its dealers or cause them to buy sponsored TBA. Shell's statistical method has deep holes in it. [27] **[**40]** And the Commission's

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[25] Shell dealers understand they are required to purchase sponsored TBA; they believe failure to cooperate may result in franchise termination; Shell dealers generally purchase substantial quantities of sponsored TBA and correspondingly refuse to purchase TBA from nonsupported sources; the purchase of nonsponsored TBA is something "tolerated" by Shell in emergencies; Shell stations generally are identified "Firestone" or "Goodyear"; Shell, Firestone and Goodyear understand that, under the system, Shell is the "customer" or "account" and that its stations will automatically follow; Firestone understands that its only competitor with Shell is Goodyear; Firestone and Goodyear do not compete for the TBA business of a Shell station once it is assigned to the other; Firestone signs contracts with virtually all of the Shell stations assigned to it which have TBA potential; and Goodyear has sold more TBA to Shell stations than has Firestone; intrabrand competitive injury results from the system's requirement that each Shell station may purchase only from its designated supply point.

[26] Shell maintains that many stations are "nominated" to serve as supply points of both Goodyear and Firestone. The Commission, however, found that less than ten per cent of the Shell stations with any TBA potential were nominated by both manufacturers. The Commission found also that usually stations are nominated before they are opened, and once one manufacturer secures the nomination the other company will not solicit the dealer's business. Although Goodyear and Firestone are far and away the largest competitors in the replacement tire market, a market known for its keen competition, the record shows that any competitive activity between them is aimed only at influencing Shell to change a nomination.

[27] In 1954 Shell sold 2,824,407,000 gallons of gasoline to its service stations and jobbers. During that same year, these outlets purchased $33,798,000 in sponsored TBA from Firestone and Goodyear. By dividing the latter figure into the former, Shell derives $11.97 as a dollars per 1,000 gallons of gasoline figure for sponsored TBA in 1954.

[*485] statistics are not free from holes. [28] The Commission could not make up its mind between asserting that there was two-thirds coverage and one hundred per cent coverage. It decided, somewhat uncertainly, that 68 per cent was the share of Shell TBA sales Firestone and Goodyear gained from their arrangements with Shell.

[41]** Goodyear and Firestone are chiefly manufacturers and sellers of tires and tubes. Almost 80 per cent of the sponsored TBA sales by both companies constituted sales of tires and tubes. These companies purchased batteries and many other accessories from other companies and sell them under their own brand name in order to have a complete line of TBA to offer to any service station. In 1957 Firestone and Goodyear were responsible for selling 41 per cent of the replacement tires in the country. This market share is particularly impressive when we recognize that Sears, Roebuck & Co. (All State) and Montgomery Ward & Co. (Riverside) together sold another 11

Total sales of tires and tubes from service stations in 1954 were $290,620,000. This volume was sold by 124,548 service stations. In that the Census Bureau listed some 182,000 service stations in 1954, it is indicated that about 57,500 service stations sold no tires and tubes in 1954. Of those that did sell them, the average sales per station was $2,333 in 1954.

In this same year service stations sold $355,202,000 in batteries and accessories. In this case 135,791 stations handled these items indicating that more than 46,000 did not. For the stations which handled batteries and accessories, the average sales per station was $2,616.

Shell adds the figure of $2,333 to $2,616, the sum of which is $4,949. This is purported to be total TBA sales per station. That is, of course, a bastard figure in that its components come from arithmetic divisions which were made with different divisors. Even if it were possible to assume that all stations handling tires and tubes also handled batteries and accessories, this figure would still be a false one. Nevertheless, Shell braves along and divides this figure into the figure representing the average gasoline gallonage per service station in 1954 (137,972 gallons). This division brings it a purported national TBA sales per 1,000 gallons of gasoline of $35.87. By comparing $35.87 with $11.97, Shell is happily able to assert that Firestone and Goodyear supplied 1/3 of the Shell service station market.

Two errors cast doubt on the Shell statistical analysis. Even if we were to close our eyes to the manner in which the average total TBA sales were compiled, the fact remains that the national figures involved only service stations which carried TBA. There is no telling from the statistics offered how many of the stations carried tires alone, how many carried only batteries and accessories, and how many carried a full line of TBA. The figure of $35.87 serves no useful purpose.

If total sales of tires and tubes were added to total sales of batteries and accessories, the total for 1954 would be $645,822,000. Using Shell's figures for the total amount of gasoline sold by service stations in 1954 (25,176,029,000 gallons), we could divide the gallonage total into the TBA volume amount in order to get a nationwide dollar per 1,000 gallon figure, not taking into account the fact that some stations sold no TBA (irrelevant for this analysis unless it can be shown that Shell stations are more likely to handle TBA than non-Shell stations -- a fact which is certainly likely but never shown). The resulting figure is $25.65.

The figure would possibly be comparable to the $11.97 figure for sponsored TBA were it not for Shell's second basic error. In establishing the sponsored figure, Shell used its total sales to service stations and jobbers. There is no question that much of the gasoline sold to jobbers is not ultimately sold at service stations but is sold to motor fleet owners, airlines, and other direct purchasers. The $11.97 figure is therefore, too low for service stations, but there is no evidence in the massive record to indicate just how low it is.

In summary, we can gain very little positive knowledge from Shell's laborious statistical analyses.

[28] The Commission's method of computation involves the comparison of Shell's percentage share in the national gasoline market (sold through service stations) with the share of its sponsored TBA in the national TBA market (sold through service stations). The underlying assumption is that a service station will have TBA potential in relation to its gasoline sales and this assumption is accepted by all parties. The Commission offers 5 per cent as Shell's share in the national service station gasoline market. See Footnote 12. The major error is that it takes into account only the sales to direct dealers and ignores sales through jobbers. This glaring omission indicates that Shell's share in the market is in excess of 5 per cent although it is impossible to estimate to what extent.

At the same time, the Commission offers 3.4 per cent as Shell's sponsored TBA share in the national service station TBA market. Although there is some indication that some sponsored TBA is sold to non-service station outlets, the division of Shell's sponsored sales volume into the national service station TBA volume would appear to be a warranted statistical method were it not for the fact that the Commission chose to use figures from the year 1947. It thus attempts to compare a percentage from 1947 with one from 1954; the TBA market saw such revolutionary changes during this period that it is impossible to determine the distortion which results from this comparison.

per cent of the national market. Against these figures, Shell's contention that Firestone and Goodyear supplied **[*486]** only one-third of the TBA at Shell's stations loses most of its relevancy. Firestone and Goodyear could sell considerably less than 100 per cent of service station TBA to their Shell outlets and still maintain complete dominance in the tire field, the market area in which they are primarily interested. A device which enhances the position of two or three leading TBA suppliers vis-a-vis smaller competitors cannot **[**42]** be defended on the ground that the device was not completely effective. The Commission's and the Court's ultimate concern was with the cumulative danger presented by the "widespread use" of the plans, rather than the relative effectiveness of particular plans.

Indeed, it is not even necessary to show open or veiled threats of cancellation to mark the sales commission plan as anti-competitive. While Shell may not punish dealers for failure to purchase sponsored TBA, there are many ways in which Shell may help its dealers over the course of a long term relationship. It may extend payment periods, extend credit, renew leases without rental increases. All of these are reasons for a dealer to curry favor with Shell. At the very least, Shell's economic position inclines a dealer to purchase sponsored TBA when it costs him no more to do so. But even this intervention into the process of competitive choice has been prohibited. *Northern Pac. R. Co. v. United States, supra.* As long as Shell's goodwill is worth having, its dealers will purchase sponsored TBA, at least when it costs them no more to do so. Competition in TBA is thus displaced; sales are, in some part, determined **[**43]** not by the market but by oil company favor purchased by Firestone.

III.

Taking the record as a whole, we reach the following conclusions.

A. Nothing in the record or in *Atlantic* suggests that the case should be remanded to the Commission.

B. We are not impressed by the evidence showing overt coercion. The Commission introduced testimony of eleven ex-Shell dealers purportedly coerced by Shell. All of these dealers mentioned threats of some type but in no instance was a dealer's lease cancelled or was renewal refused; in no instance was a lease rental increased because of recalcitrance in buying sponsored TBA. None of these eleven dealers bought his entire TBA requirements from a sponsored source. The testimony of these eleven witnesses, supplemented by such documentary evidence as was adduced, was not enough to show a pattern or practice of overt coercion throughout Shell's nationwide network of dealers. When we reflect that the Commission had over 10,000 active dealers and over 20,000 former dealers to draw from in producing evidence, we conclude that the record evidence of overt coercion slims to invisibility -- even after making allowances for the difficulties in **[**44]** finding dealers, past or present, willing to testify against Shell.

Shell produced thirty-two former Shell dealers and ninety-five present dealers to testify that their purchase of TBA was wholly free and uncoerced. Shell bolstered this evidence with testimony of seventeen competing suppliers who said that they had no problem selling to Shell dealers; testimony showing a Shell policy to encourage initiative and independence of the part of its dealers; documents indicating that Shell's official TBA policy, known to dealers, was based on the dealers' freedom to purchase any TBA. It is true that the examiner discredited Shell's witnesses or minimized the effect of their testimony. It is not our province to substitute our judgment for his in this matter. Nevertheless, his failure to mention the mass of countervailing evidence, when taken with the slimness of the evidence upon which he did rely, leaves us with the definite conviction that the record, when taken as a whole, does not support the finding of fact that overt coercion of dealers to buy from sponsored TBA outlets was a prevailing Shell business practice.

C. The lack of testimony showing overt coercion and the affirmative **[**45]** testimony **[*487]** showing that Shell encouraged initiative and independence in its dealers make even more impressive the evidence establishing that the sales commission system is inherently coercive and results in foreclosure of competition in the TBA market. We find it unnecessary to require the Commission to present a precise measure of the system's effectiveness.

The relationship of a major oil company to its service station dealer goes beyond the bigness-littleness antithesis that exists in innumerable contract negotiations and in the operations of a modern, large business. [29] The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer (who is usually also a lessee). The classic market factors of price, quality, attractiveness, and whatever enables a retailer to resell goods at a profit are pre-empted by the TBA distribution system superimposed from on high by *deus ex machina*. A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit **[**46]** from his patronage of sponsored TBA outlets, the velvet glove of request has within it the mailed fist of command. His interest in catering to Shell's sponsorship of certain TBA will be especially strong when the time for lease renewal approaches (once a year) or when a change in rental or commission appears in sight. The run of the mill service station dealer is a man of limited means who has, for him, a sizeable investment in his station. Much of the value of that investment is in goodwill attached to the gasoline he sells, the TBA he stocks, and the location of the station where he sells these products. While it is true that it is expensive for Shell to switch dealers, it is far more expensive, in relative terms, for a dealer to lose his station.

[47]** The *per se* doctrine has a charm all its own in antitrust litigation. When a *per se* rule is applicable in a given situation, businessmen know where they stand. Lawyers, for the government or for private clients, are saved the necessity of building a record bulging with complicated facts, statistical analyses, market data and other formidable economics material. Here, with the proper authorization, the incantation of two words would enable the Court to sweep most of nine volumes of record under the rug. We hold, however, that in the circumstances this case presents the Supreme Court has not yet authorized that incantation.

In the light of *Atlantic* but based on the record as a whole, we conclude that substantial evidence supports the Commission's basic findings. *Within the factual context of this case*, Shell (a) had dominant power over its dealers and (b) exerted that power through natural leverage and through control devices in carrying out its TBA sales commission plan, (c) causing adverse competitive effects on a not insubstantial portion of the TBA market. The Shell-Firestone sales commission system is inherently coercive upon its dealers and innately anticompetitive **[**48]** in its effect. Its precise harm is hard to measure. But here the Commission has shown enough harm, existent and potential, to require the Court to condemn the Shell-Firestone TBA sales commission plan as an unfair method of competition under Section 5 of the Federal Trade Commission Act.

The first four numbered paragraphs of the Commission's orders against Shell and Firestone deal with the sales commission contract and the sales commission system. Those portions of the Commission's orders are affirmed and will be enforced. Since we have found that the record fails to support the Commission's finding that Shell overtly coerced any substantial number of dealers or that there was any pattern of overt coercion **[*488]** by Shell, we do not approve or affirm paragraphs five and six of the orders, except to the extent that all coercion intended to promote sponsored TBA in accordance with a sales commission plan is prohibited.

End of Document

[29] Congress dealt with a somewhat similar situation in enacting a statute to protect automobile dealers from coercive practices of manufacturers. *15 U.S.C. §§ 1221- 1225*. See The Automobile Dealer Franchise Act: A "New Departure" in Federal Legislation, 52 Nw. U.L. Rev. 253 (1957).

United States v. General Motors Corp.

Supreme Court of the United States

December 9, 1965, Argued ; April 28, 1966, Decided

No. 46

Reporter

384 U.S. 127 *; 86 S. Ct. 1321 **; 16 L. Ed. 2d 415 ***; 1966 U.S. LEXIS 2960 ****; 1966 Trade Cas. (CCH) P71,750; 10 Fed. R. Serv. 2d (Callaghan) 1245

UNITED STATES v. GENERAL MOTORS CORP. ET AL.

Prior History: [**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Disposition: *234 F.Supp. 85*, reversed and remanded.

Core Terms

dealers, discounters, associations, conspiracy, sales, franchised, Sherman Act, customer, collaborative, unilateral, promise, prices, manufacturer, price competition, establishments, repurchase, antitrust, retailing, referral, concert, outlets

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **Antitrust & Trade Law, Sherman Act**

Explicit agreement is not a necessary part of a Sherman Act conspiracy, and certainly not where joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

There are statutory inhibitions on the right of an automobile manufacturer to terminate dealer franchises. *15 U.S.C.S. § 1222*.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Per Se Rule & Rule of Reason, Per Se Violations**

Elimination, by joint collaborative action, of a group of automobile discounters from access to the market is a per se violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, the court need not inquire into the economic motivation underlying their conduct to find a violation of the Sherman Act.

Lawyers' Edition Display

Summary

Upon complaint by its dealers in the Los Angeles area about sales by some of the dealers through discount houses, the defendant automobile manufacturer elicited from each dealer a promise not to do business with the discounters; three dealer associations, which were also defendants, undertook jointly to police the agreements so obtained; the associations, as requested by the manufacturer, supplied information to the manufacturer for use by it in bringing wayward dealers into line; and as a result of this collaborative effort, a number of dealers were induced to repurchase cars they had sold through discounters and to promise to abjure such sales in the future.

In the present civil action brought by the United States in the United States District Court for the Southern District of California to enjoin the defendants from participating in an alleged conspiracy to restrain trade in violation of 1 of the Sherman Act, the court concluded that the proof failed to establish the alleged violation, and entered judgment for the defendants. (*234 F Supp 85*.)

Upon direct appeal, the Supreme Court of the United States reversed. In an opinion by Fortas, J., expressing the view of eight members of the Court, it was held that the joint activities of the defendants constituted "a classic conspiracy in restraint of trade," and that the evidence was sufficient to prove such a conspiracy.

Harlan, J., concurred in the result, feeling bound by a precedent even though he had dissented from its holding.

Headnotes

MONOPOLIES §30 > collaboration between manufacturer and dealers -- elimination of discounters -- > Headnote:
LEdHN[1][] [1]

Joint collaborative action by an automobile manufacturer, its franchise dealers, and associations of these dealers to eliminate discount houses as competitors by terminating business dealings between them and a minority of the dealers and to deprive the dealers of their freedom to deal through discounters if they so choose, is a conspiracy in restraint of trade in violation of 1 of the Sherman Anti-Trust Act (*15 USC 1*), it being immaterial whether the clause in the franchise agreement which prohibits a dealer from moving to or establishing a new or different location without the manufacturer's prior written approval may be construed to prohibit the dealers from selling through discounters.

EVIDENCE §991.5 > sufficiency -- violation of antitrust laws -- > Headnote:
LEdHN[2][] [2]

A conspiracy to restrain trade by eliminating discount houses is proved where the evidence shows that an automobile manufacturer to which its dealers had complained about sales through discounters elicited from every dealer in the area a promise not to do business with the discounters; that three associations of the dealers undertook jointly to police these agreements obtained and, as requested, supplied information to the manufacturer for use by it in bringing wayward dealers into line; and that as a result of this collaborative effort, a number of dealers were induced to re-purchase cars they had sold through discounters and to promise to abjure such sales in the future.

ERROR §1477 > review of findings -- antitrust action -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Federal Civil Procedure *Rule 52 (a)*, under which findings of fact shall not be set aside unless clearly erroneous, has no application to a finding by the District Court that defendants' conduct did not constitute a combination in violation of the Sherman Act, where the District Court premised its finding on an erroneous interpretation of the standard to be applied.

MONOPOLIES §14 > test of combination -- > Headnote:
LEdHN[4][] [4]

For purposes of determining whether there has been a combination or conspiracy in violation of 1 of the Sherman Anti-Trust Act (15 USC 1) it is of no consequence that each party acted in its own lawful interest; nor is it of consequence, where an automobile manufacturer and its dealers are charged with collaborative action to eliminate discounters from access to the market, whether their franchise system and a clause contained in the franchise agreement prohibiting a dealer from moving to or establishing a new or different location without the manufacturer's prior consent are lawful or economically desirable.

MONOPOLIES §10 > conspiracy -- explicit agreement -- > Headnote:
LEdHN[5][] [5]

An explicit agreement is not a necessary part of a conspiracy in violation of 1 of the Sherman Anti-Trust Act (15 USC 1), and certainly not where joint and collaborative action was pervasive in the initiation, execution, and fulfilment of the plan.

MONOPOLIES §29 > elimination of competition -- > Headnote:
LEdHN[6][] [6]

Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Sherman Anti-Trust Act.

EVIDENCE §343.5 > MONOPOLIES §30 > group boycotts -- > Headnote:
LEdHN[7][] [7]

Group boycotts are a class of restraint of trade which, from their nature or character, are unduly restrictive and, 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.

MONOPOLIES §14 > economic motivation -- > Headnote:
LEdHN[8][] [8]

Where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, the courts need not inquire into the economic motivation underlying the conduct.

MONOPOLIES §29 > exclusion of traders from market -- > Headnote:
LEdHN[9][] [9]

Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Anti-Trust Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing goods, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.

MONOPOLIES §36 > price control -- > Headnote:
LEdHN[10][] [10]

A substantial restraint upon price competition is a goal unlawful per se under the antitrust laws when sought to be effected by combination or conspiracy; the per se rule applies even when the effect upon prices is indirect.

MONOPOLIES §6 > purpose of antitrust laws -- > Headnote:
LEdHN[11][] [11]

The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws.

MONOPOLIES §29 > elimination of competitors -- > Headnote:
LEdHN[12][] [12]

The Sherman Anti-Trust Act prohibits conspiracies or combinations to put competitors out of business entirely, as well as conspiracies to fix prices at which competitors may sell.

Syllabus

This is a civil action to enjoin General Motors Corporation (GM) and three associations of Chevrolet dealers in the Los Angeles area from participating in an alleged conspiracy to restrain trade in violation of *§ 1* of the Sherman Act by eliminating sales of new Chevrolets through "discount houses" and "referral services." The District Court found, among other things, that the Losor Chevrolet Dealers Association in the summer of 1960 complained to GM personnel about sales to discounters; that at a Losor meeting in November 1960 member dealers agreed to embark on a letter-writing campaign to enlist GM's aid; that in December and January GM personnel talked to every dealer in the area and obtained promises not to deal with discounters; that representatives of the three dealer associations met on December 15, 1960, and created a joint investigating committee; that the associations then undertook to police the agreements so obtained **[****2]** by GM; that the associations supplied information to GM for use in bringing wayward dealers into line, and that the Chevrolet zone manager asked them to do so; that as a result a number of dealers were induced to repurchase cars they had sold to discounters and agreed to refrain from making such sales in the future; and that by spring 1961 sales through discounters seem to have ended. However, the District Court found no conspiracy in violation of the Sherman Act, holding that each alleged conspirator acted to promote its own self-interest and that in seeking to vindicate these interests the alleged conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action." *Held*: This is a classic conspiracy in restraint of trade: joint, collaborative action by dealers, associations, and GM to eliminate a class of competitors by terminating dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Pp. 138-148.

(a) The District Court's conclusion that appellees' conduct did not amount to a conspiracy within the meaning of the Act was not the kind **[****3]** of fact-finding shielded from review by the "clearly erroneous" test embodied in *Rule 52 (a) of the Federal Rules of Civil Procedure*, since the question involved the application of a legal standard to undisputed facts and since the bulk of the case was presented to the trial judge in the form of documents, depositions, and written statements. P. 141, n. 16.

(b) In determining whether there has been a conspiracy or combination under *§ 1* of the Sherman Act it is of no consequence that each party acted in its own lawful interest or whether the franchise system is lawful or economically desirable. P. 142.

(c) Even if it were assumed that there had been no explicit agreement among the appellees and their alleged co-conspirators, such an agreement is not a necessary part of a Sherman Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan. *United States v. Parke, Davis & Co., 362 U.S. 29, 43*. Pp. 142-143.

(d) The joint and interrelated activities of GM and the co-conspirators in obtaining the agreements not to deal with discounters and in policing such agreements cannot **[****4]** be described as "unilateral" or merely "parallel." Pp. 144-145.

(e) The elimination, by joint collaborative action, of businessmen from access to the market is a *per se* violation of the Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207*. Pp. 145-146.

(f) The economic motivation of those who by concerted action seek to keep others from trading in the market is irrelevant. Pp. 146-147.

(g) Inherent in the success of the combination in this case was a substantial restraint upon price competition, a goal unlawful *per se* when sought to be effected by combination or conspiracy. *United States v. Parke, Davis & Co., supra.* P. 147.

Counsel: Daniel M. Friedman argued the cause for the United States. On the brief were Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Richard A. Posner and Robert C. Weinbaum.

Homer I. Mitchell argued the cause for appellee General Motors Corp. With him on the brief were Warren M. Christopher, Marcus Mattson, Aloysius F. Power, Robert A. Nitschke, Nicholas J. Rosiello, Henry C. Thumann, Donald M. Wessling and Robert W. Culver. Victor R. Hansen argued the cause **[****5]** for appellees Losor Chevrolet Dealers Association et al. With him on the brief were Glenn S. Roberts and Henry F. Walker.

Thomas A. Rothwell and William C. Hillman filed a brief for O. M. Scott & Sons Co. et al., as amici curiae.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

Opinion by: FORTAS

Opinion

[*129] **[***417]** **[**1322]** MR. JUSTICE FORTAS delivered the opinion of the Court.

This is a civil action brought by the United States to enjoin the appellees from participating in an alleged conspiracy to restrain trade in violation of *§ 1* of the Sherman Act. [1] The United States District Court for the Southern District of California concluded that the proof failed to establish the alleged violation, and entered judgment for the defendants. The case is here on direct appeal under *§ 2* of the Expediting Act, 32 Stat. 823, *15 U. S. C. § 29 (1964 ed.)*. We reverse.

[**6]** I.

The appellees are the General Motors Corporation, which manufactures, among other things, the Chevrolet line of cars and trucks, and three associations of Chevrolet dealers in and around Los Angeles, California. [2] All of the Chevrolet dealers in the area belong to one or more of the appellee associations.

[*130] Chevrolets are ordinarily distributed by dealers operating under a franchise from General Motors. The dealers purchase the cars from the manufacturer, and then retail them **[***418]** to the public. The relationship between manufacturer and dealer is incorporated in a comprehensive uniform Dealer Selling Agreement. This agreement does not restrict or define those to whom **[****7]** the dealer may sell. Nor are there limitations as to the territory within which the dealer may sell. Compare *White Motor Co*. v. *United States, 372 U.S. 253*. The franchise agreement does, however, contain a clause (hereinafter referred to as the "location clause") which prohibits a dealer from moving to or establishing "a new or different location, branch sales office, branch service station, or place **[**1323]** of business including any used car lot or location without the prior written approval of Chevrolet."

Beginning in the late 1950's, "discount houses" engaged in retailing consumer goods in the Los Angeles area and "referral services" [3] began offering to sell new cars to the public at allegedly bargain prices. Their sources of supply were the franchised dealers. By 1960 a number of individual Chevrolet dealers, without authorization from General Motors, had developed working relationships with these establishments. A customer would enter one of these establishments and examine the literature and price lists for automobiles produced by several manufacturers. In some instances, floor models were available for inspection. Some of the establishments negotiated **[****8]** **[*131]** with the customer for a trade-in of his old car, and provided financing for his new-car purchase.

The relationship with the franchised dealer took various forms. One arrangement was for the discounter to refer the customer to the dealer. The car would then be offered to him by the dealer at a price previously agreed upon between the dealer and the discounter. In 1960, a typical referral agreement concerning Chevrolets provided that the price to the customer was not to exceed $ 250 over the dealer's invoiced cost. For its part in supplying the customer, the discounter received $ 50 per sale.

Another common arrangement was for the discounter **[****9]** itself to negotiate the sale, the dealer's role being to furnish the car and to transfer title to the customer at the direction of the discounter. One dealer furnished Chevrolets under such an arrangement, charging the discounter $ 85 over its invoiced cost, with the discounter getting the best price it could from its customer.

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[1] The statute reads in relevant part: ***HN1***[] "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. . . ." 26 Stat. 209, *15 U. S. C. § 1 (1964 ed.)*.

[2] Named as co-conspirators but not as defendants are "the officers, directors, and members of [the three associations], certain officers and employees of such members, certain officers and employees of General Motors, other Chevrolet dealers in the Southern California area, and others to the plaintiff unknown . . . ."

[3] Since the evidence does not consistently distinguish between "discount houses" and "referral services," based either on the variety of goods offered to the public or on the nature of the arrangement between the establishment and the franchised dealer which supplied it with cars, we shall hereinafter use the term "discounter" to embrace all such establishments.

These were the principal forms of trading involved in this case, although within each there were variations, [4] **[****10]** and there were schemes which fit neither pattern. [5] **[*132]** By 1960 these methods for retailing new cars **[***419]** had reached considerable dimensions. Of the 100,000 new Chevrolets sold in the Los Angeles area in that year, some 2,000 represented discount house or referral sales. One Chevrolet dealer attributed as much as 25% of its annual sales to participation in these arrangements, while another accounted for between 400 and 525 referral sales in a single year.

Approximately a dozen of the 85 Chevrolet dealers in the Los Angeles area were furnishing cars to discounters in **[**1324]** 1960. As the volume of these **[****11]** sales grew, the nonparticipating Chevrolet dealers located near one or more of the discount outlets [6] **[****12]** began to feel the pinch. Dealers lost sales because potential customers received, or thought they would receive, [7] a more attractive deal from a discounter **[*133]** who obtained its Chevrolets from a distant dealer. The discounters vigorously advertised Chevrolets for sale, with alluring statements as to price savings. The discounters also advertised that all Chevrolet dealers were obligated to honor the new-car warranty and to provide the free services contemplated therein; and General Motors does indeed require Chevrolet dealers to service Chevrolet cars, wherever purchased, pursuant to the new-car warranty and service agreement. Accordingly, nonparticipating dealers were increasingly called upon to service, without compensation, Chevrolets purchased through discounters. Perhaps what grated most was the demand that they "precondition" cars so purchased -- make the hopefully minor adjustments and do the body and paint work necessary to render a factory-fresh car both customer- and road-worthy.

[**13]** On June 28, 1960, at a regular meeting of the appellee Losor Chevrolet Dealers Association, member dealers discussed the problem and resolved to bring it to the attention of the Chevrolet Division's Los Angeles zone manager, Robert O'Connor. Shortly thereafter, a delegation from the association called **[***420]** upon O'Connor, presented evidence that some dealers were doing business with the discounters, and asked for his assistance. O'Connor promised he would speak to the offending dealers. When no help was forthcoming, Owen Keown, a director of Losor, took matters into his own hands. First, he spoke to Warren Biggs and Wilbur Newman, Chevrolet dealers who were then doing a substantial business with discounters. According to Keown's testimony, Newman

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[4] One dealer, for example, paid its referral service one-third of the gross profit on each sale, up to $ 75, there being no fixed price at which the sale was to take place. The same dealer earlier had paid a flat fee of $ 17.50 for every referral, whether or not the sale was consummated.

[5] At least one discount house actually purchased its cars from cooperative dealers, then resold them to its customers. In this situation, which in the trade is referred to as "bootlegging," the customer does not receive a new-car warranty. General Motors, while disapproving of the practice, does not assert that it violates the "location clause." In those arrangements against which General Motors and the associations did direct their efforts, title to the new car passed directly from dealer to retail customer, who thus obtained a new-car warranty and service agreement.

There must also be distinguished the ubiquitous practice of using "bird dogs" -- informal sources who steer occasional customers toward a particular dealer, in return for relatively small fees -- often a bottle of liquor. This practice is not only deemed by General Motors not to violate the "location clause," but has the corporation's endorsement as a desirable sales device.

[6] As the District Court found, 70% of the local Chevrolet dealers were located within five miles of one or more of the 23 discount house or referral outlets.

[7] There is evidence in the record that discount sales undercut the prices at which franchised dealers were able to, or chose to, compete. Two purchasers of Chevrolets, one on referral and the other in a discount house "sale," testified that they had "shopped" other dealers but found the discount and referral prices lower. Dealers and their salesmen complained to General Motors about sales lost through inability to meet the discounters' price. Moreover, the discounters advertised and actually provided auto loans at interest rates substantially lower than those offered by G. M. A. C., General Motors' financing subsidiary.

There is also evidence that it was not just price itself which induced customers to purchase Chevrolets through the discounters. One customer testified that he preferred the discount house because he thereby avoided the haggling over price which seems an inevitable facet of purchasing a car in the orthodox way. Others apparently assumed, without bothering to confirm by comparison shopping, that "discount" stores would offer lower prices. This assumption was fed by discount house advertising which promised "the lowest price anywhere" and "savings of hundreds of dollars."

told him that he would continue the practice "until . . . told not to by" Chevrolet, and that "when the Chevrolet Motor Division told him not to do it, he **[*134]** knew that they wouldn't let some other dealer carry on with it." [8]

[**14]** Keown then reported the foregoing events at the association's annual meeting in Honolulu on November 10, 1960. The member dealers present agreed immediately **[**1325]** to flood General Motors and the Chevrolet Division with letters and telegrams asking for help. Salesmen, too, were to write. [9]

Hundreds of letters and wires descended upon Detroit -- with telling effect. Within a week Chevrolet's O'Connor was directed to furnish his superiors in Detroit with "a detailed report of the discount house operations . . . as well as what action we in the Zone are taking to curb such sales." [10]

[**15]** By mid-December General Motors had formulated its response. On December 15, James M. Roche, then an executive vice president of General Motors, wrote to some of the complaining dealers. He noted that the **[*135]** practices to which they were objecting "*in some instances* represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the General Motors Dealers Selling Agreements." (Emphasis supplied.) Recipients of the letter were advised that General Motors personnel proposed to discuss that matter with each of the dealers. [11] O'Connor in Los Angeles was apprised of the letter's content and instructed to carry on the personal discussions referred to therein. With respect to the offending dealers, he was to work with Roy Cash, regional manager for the Chevrolet Division. Cash had been briefed on the subject in Detroit on December 14.

[**16]** General **[***421]** Motors personnel proceeded to telephone all area dealers, both to identify those associated with the discounters and to advise nonparticipants that General Motors had entered the lists. The principal offenders were treated to unprecedented individual confrontations with Cash, the regional manager. These brief meetings were wholly successful in obtaining from each dealer his agreement to abandon the practices in question. Some capitulated during the course of the four- or five-minute meeting, or immediately thereafter. [12] **[****17]** One dealer, who met not with Cash but with the city sales manager for **[*136]** Chevrolet, put off

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[8] Dealer Biggs put the same sentiments into a letter to both Keown and Chevrolet's zone manager O'Connor, written on November 5, 1960. The day before, in O'Connor's presence, Keown had challenged Biggs to justify his dealings with the discounters. Biggs wrote: "We would be most reluctant to discard an account as good as this one without rather concrete assurance that it would not immediately be picked up by another Chevrolet dealer." Two weeks later, O'Connor forwarded Biggs' letter to General Motors officials in Detroit.

[9] In Keown's words, "We were seeking the assistance of the higher echelon officials of Chevrolet and General Motors in bringing about an end to the discount house sale of Chevrolets."

[10] O'Connor's report, dated November 22, recounted that "zone management" had talked with the offending dealers "in an attempt to have them desist," and that "our Dealer Associations have formed a committee to call on the supplying dealers and have asked them and have attempted to persuade them to discontinue this practice." Supported by a copy of dealer Biggs' letter, see n. 8, *supra*, O'Connor predicted that "many dealers will cease this type of business if they had any assurance that the account would not be picked up by some other dealer, immediately upon relinquishment."

[11] Roche wrote to those dealers who had complained directly to John Gordon, then president of General Motors. On December 29, 1960, a virtually identical letter went out to all General Motors dealers throughout the Nation, under the signature of the general sales managers for the respective divisions.

[12] One dealer testified that he abruptly terminated arrangements long maintained with two discount houses, despite the fact that one of these connections owed him $ 20,000 and the other $ 28,000. In the preceding four weeks the latter had reduced its indebtedness by $ 52,000 and could reasonably have been expected to erase it completely within a few weeks. The dealer anticipated that upon cancellation of the accounts these debts would become uncollectible. His fears were justified. The accounts were terminated. The debts remained unpaid.

decision for a week "to make sure that the other dealers, or most of them, had stopped their business dealings with discount houses." [13]

There **[**1326]** is evidence that unanimity was not obtained without reference to the ultimate power of General Motors. The testimony of dealer Wilbur Newman was **[****18]** that regional manager Cash related a story, the relevance of which was not lost upon him, that in handling children, "I can tell them to stop something. If they don't do it . . . I can knock their teeth down their throats."

By mid-January General Motors had elicited from each dealer a promise not to do business with the discounters. But such agreements would require policing -- a fact which had been anticipated. General Motors earlier had initiated contacts with firms capable of performing such a function. This plan, unilaterally to police the agreements, was displaced, however, in favor of a joint effort between General Motors, the three appellee associations, and a number of individual dealers.

On December 15, 1960, representatives of the three appellee associations had met and appointed a joint committee to study the situation and to keep in touch with **[*137]** Chevrolet's O'Connor. [14] Early in 1961, the three associations agreed **[***422]** jointly to finance the "shopping" of the discounters to assure that no Chevrolet dealer continued to supply them with cars. Each of the associations contributed $ 5,000, and a professional investigator was hired. He was instructed **[****19]** to try to purchase new Chevrolets from the proscribed outlets, to tape-record the transactions, if any, and to gather all the necessary documentary evidence -- which the associations would then lay "at the doorstep of Chevrolet." These joint associational activities were both preceded and supplemented by similar "shopping" activities by individual dealers and by appellee Losor Chevrolet Dealers Association.

[**20]** General Motors collaborated with these policing activities. There is evidence that zone manager O'Connor and a subordinate, Jere Faust, actively solicited the help of individual dealers in uncovering violations. Armed with information of such violations obtained from the dealers or their associations, O'Connor or members of his staff would ask the offending dealer to come in and talk. The dealer then was confronted with the car purchased by the "shopper," the documents of sale, and in most cases a tape recording of the transaction. In every instance, the embarrassed dealer repurchased the car, sometimes at a substantial loss, and promised to stop such sales. At the direction of O'Connor or a subordinate, the checks with which the cars were repurchased were **[*138]** made payable to an attorney acting jointly for the three defendant associations.

O'Connor testified that on no occasion did he "force" a dealer to repurchase; he merely made the opportunity available. But one dealer testified that when an assistant zone manager for the Chevrolet **[**1327]** Division asked him to come in and talk about discount sales, "he specified a sum of money which I was to bring with me **[****21]** when I came down and saw him. . . . I kept the appointment and brought a cashier's check. I knew when I came down to Los Angeles that I was going to repurchase an automobile . . . ." Another dealer testified that upon being confronted with evidence that one of his cars had been purchased through a referral service, he not only bought it

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[13] According to Francis Bruder, a dealer who had been doing business with the discounters since 1957, "Cash told me that he felt certain that the other dealers would discontinue dealing with discount houses and referral services as well. I left this meeting with the impression that every dealer who had been doing business with a discount house or referral service would soon quit."

This was precisely the impression General Motors had intended to implant. As was explained in an inter-office memorandum to the general sales manager of General Motors' Chevrolet Division, "[All dealers were talked to] in order that every dealer with whom the subject was discussed would know that a similar discussion was being held with all other dealers so that, if certain dealers should elect to discontinue their cooperation with a discount house, we might be able to discourage some other dealer who might be solicited from starting the practice."

[14] The District Court characterized this December 15 meeting as the first between representatives of the three associations, pertaining to the problem of discount house and referral sales. However, as we have previously noted, n. 10, *supra*, O'Connor reported to General Motors three weeks earlier, on November 22, that the three associations had formed a committee which already had called upon nonconforming dealers. The record does not enable us to resolve this factual conflict, nor is its resolution important. On either version, the appellee associations entered into an explicit agreement to act together to eliminate the new mode of intrabrand competition.

back (without questioning the correctness of the price exacted) but also fired the employee responsible for the transaction -- although the employee had been commended by the Chevrolet Division a few weeks earlier as the "number one fleet salesman" in the 11-state Pacific region.

By the spring of 1961, the campaign to eliminate the discounters from commerce in new Chevrolet cars was a success. Sales through the discount outlets seem to have come to a halt. Not until a federal grand jury commenced an inquiry into the matters which we have sketched does it appear that any Chevrolet dealer resumed its business association with the discounters.

II.

On these basic facts, the Government first proceeded criminally. A federal grand jury in the Southern District of California returned an indictment. After trial, the defendants were found not guilty. **[****22]** The present civil action, filed shortly after return of the indictment, was then brought to trial.

[*139] Both the Government and the appellees urge the importance, for purposes of decision, of the "location clause" in the Dealer Selling Agreement which prohibits a franchised dealer from moving to or establishing **[***423]** "a new or different location, branch sales office, branch service station, or place of business . . . without the prior written approval of Chevrolet." The appellees contend that this contractual provision is lawful, and that it justifies their actions. They argue that General Motors acted lawfully to prevent its dealers from violating the "location clause," that the described arrangements with discounters constitute the establishment of additional sales outlets in violation of the clause, and that the individual dealers -- and their associations -- have an interest in uniform compliance with the franchise agreement, which interest they lawfully sought to vindicate.

The Government invites us to join in the assumption, only for purposes of this case, that the "location clause" encompasses sales by dealers through the medium of discounters. But it urges **[****23]** us to hold that, so construed, the provision is unlawful as an unreasonable restraint of trade in violation of the Sherman Act. [15]

LEdHN[1][] [1]We need not reach these questions concerning the meaning, effect, or validity of the "location clause" or of any other provision in the Dealer Selling Agreement, and we do not. We do **[****24]** not decide whether the "location **[*140]** clause" may be construed to prohibit a dealer, party to it, from selling through discounters, or whether General Motors could by unilateral action enforce the clause, so construed. We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating **[**1328]** business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination, the "location clause" is of no avail. Whatever General Motors might or might not lawfully have done to enforce individual Dealer Selling Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point. And, because the action taken constitutes a combination or conspiracy, it is not necessary to consider what might be the legitimate interest of a dealer in securing compliance by others with the "location clause," or the lawfulness of action a dealer might individually take to vindicate this interest.

[**25]** The District Court decided otherwise. It concluded that the described events did not add up to a combination or conspiracy violative of the antitrust laws. But its conclusion cannot be squared with its own specific findings of fact. These findings include the essentials of a conspiracy within *§ 1* of the Sherman Act: That in the summer of 1960 the Losor Chevrolet Dealers Association, "through some of its dealer-members," complained to General Motors personnel about sales through discounters (Finding 34); that at a Losor meeting in November 1960 the dealers there present agreed to embark on a letter-writing campaign directed at enlisting **[***424]** the aid of

[15] The Government's complaint contains no reference to the "location clause," and the Government concedes that its case was tried on a conspiracy theory, the defendants injecting the contractual issue by way of defense. Trial counsel for the Government did advert to the clause in the District Court, but it does not appear that he challenged its validity, as construed, in the same sense that the Government does here. See Trial Transcript, pp. 9, 17-18. In light of our disposition of the case, we have no occasion to consider whether the Government's argument directed to the clause, as construed, is properly before us.

General Motors (Finding 35); that in December and January General Motors personnel discussed the matter with every Chevrolet dealer in the Los Angeles area and elicited from **[*141]** each a promise not to do business with the discounters (Finding 39); that representatives of the three associations of Chevrolet dealers met on December 15, 1960, and created a joint investigating committee (Finding 40); that the three associations then undertook jointly to police the agreements obtained from each of the dealers by General **[****26]** Motors; that the associations supplied information to General Motors for use by it in bringing wayward dealers into line, and that Chevrolet's O'Connor asked the associations to do so (Findings 41 and 42); that as a result of this collaborative effort, a number of Chevrolet dealers were induced to repurchase cars they had sold through discounters and to promise to abjure such sales in future (Finding 42).

LEdHN[2][] [2]LEdHN[3A][] [3A]These findings by the trial judge compel the conclusion that a conspiracy to restrain trade was proved. [16] **[**1329]** The **[*142]** error of the trial court lies in its failure to apply the correct and established standard for ascertaining the existence of a combination or conspiracy under § 1 of the Sherman Act. See United States v. Parke, Davis & Co., 362 U.S. 29, 44-45.The trial court attempted to justify its conclusion on the following reasoning: That each defendant and alleged co-conspirator acted to promote its own self-interest; that General Motors, as well as the defendant associations and **[****27]** their members, has a lawful interest in securing compliance with the "location clause" and in thus protecting the franchise system of distributing automobiles -- business arrangements which the court deemed lawful and proper; and that in seeking to vindicate these interests the defendants and their alleged co-conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action."

LEdHN[3B][] [3B]

[**28]** LEdHN[4][] [4] LEdHN[5][] [5]These factors do not justify **[***425]** the result reached. It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the "location clause" and franchise system are lawful or economically desirable. And although we regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory "finding" that there had been no "agreement" among the defendants and their alleged co-conspirators, it has long been settled that HN2[] explicit agreement is not a necessary part of a Sherman **[*143]** Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan. United States v. Parke, Davis & Co., supra, at 43; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-723; **[****29]** Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 455.

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[16] We note that, as in United States v. Parke, Davis & Co., 362 U.S. 29, 44-45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the "clearly erroneous" test embodied in Rule 52 (a) of the Federal Rules of Civil Procedure. That Rule in part provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." As in Parke Davis, supra, the question here is not one of "fact," but consists rather of the legal standard required to be applied to the undisputed facts of the case. See United States v. Singer Mfg. Co., 374 U.S. 174, 194, n. 9; United States v. Mississippi Valley Co., 364 U.S. 520, 526, and cases there cited.

Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52 (a) (see United States v. Oregon State Med. Soc., 343 U.S. 326, 331-332), plays only a restricted role here. This was essentially a "paper case." It did not unfold by the testimony of "live" witnesses. Of the 38 witnesses who gave testimony, only three appeared in person. The testimony of the other 35 witnesses was submitted either by affidavit, by deposition, or in the form of an agreed-upon narrative of testimony given in the earlier criminal proceeding before another judge. A vast number of documents were also introduced, and bear on the question for decision.

In any event, we resort to the record not to contradict the trial court's findings of *fact*, as distinguished from its conclusory "findings," but to supplement the court's factual findings and to assist us in determining whether they support the court's ultimate legal conclusion that there was no conspiracy.

Neither individual dealers nor the associations acted independently or separately. The dealers collaborated, through the associations and otherwise, among themselves and with General Motors, both to enlist the aid of General Motors and to enforce dealers' promises to forsake the discounters. The associations explicitly entered into a joint venture to assist General Motors in policing the dealers' promises, and their joint proffer of aid was accepted and utilized by General Motors.

Nor did General Motors confine its activities to the contractual boundaries of its relationships with individual dealers. As the trial court found (Finding 39), General Motors at no time announced that it would terminate the franchise of any dealer which furnished cars to the discounters. [17] The evidence indicates that it had no intention of acting in this unilateral fashion. [18] On the contrary, overriding **[**1330]** corporate policy with respect to **[*144]** proper dealer relations [19] dissuaded General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust **[****30]** laws was **[***426]** assumed, without being decided, in *Parke Davis, supra.*

[**31]** As Parke Davis had done, General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings between nonconforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. And once the agreements were secured, General Motors both solicited and employed the assistance of its alleged co-conspirators in helping to police them. What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired objective **[*145]** can by no stretch of the imagination be described as "unilateral" or merely "parallel." See *Parke Davis, supra, at 46*; *Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 453*; **[****32]** *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-723*; *Interstate Circuit, Inc*. v. *United States, 306 U.S. 208, 226*; *United States v. Masonite Corp., 316 U.S. 265, 275*; Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962). [20]

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[17] The December letters to all dealers said only that "in effect, in some instances" the arrangements in question might violate the unauthorized location clause of the Dealer Selling Agreement. No dealer was told, either by letter or in person, that *its* conduct violated the franchise agreement, and no dealer was warned that continuance of discount house or referral sales would result in termination of its franchise. Zone manager O'Connor did not regard his instructions from Detroit as authorizing him to go that far, and he was of the view that "the general letter [to all dealers] didn't suggest any such thing."

[18] We refer to this without considering whether General Motors could lawfully have taken such action.

[19] James Roche testified, "It is not [General Motors'] practice to threaten dealers with termination of their franchise." Good dealers and dealer locations, he said, are hard to come by. In many dealerships, General Motors itself has invested substantial funds. Therefore, said Roche, "we would not want our people to go in and wave the franchise agreement, selling agreement, and threaten the dealer with termination in the event he didn't agree, after following -- after reading a letter he was violating our agreement and should change his practice. Instead we expected that this would be handled on a sound, calm, sensible business-like approach."

HN3[] There are also statutory inhibitions on the right of an automobile manufacturer to terminate dealer franchises. See Act of Aug. 8, 1956, c. 1038, *§ 2*, 70 Stat. 1125, *15 U. S. C. § 1222 (1964 ed.)*; Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 103-114 (1959).

[20] Compare *Klein v. American Luggage Works, Inc., 323 F.2d 787 (C. A. 3d Cir. 1963)*, and *Graham v. Triangle Publications, Inc., 233 F.Supp. 825 (D. C. E. D. Pa. 1964)*, aff'd *per curiam*, *344 F.2d 775 (C. A. 3d Cir. 1965)*, discussed in Fulda, Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint? 30 Law & Contemp. Prob. 590, 592-597 (1965).

LEdHN[6][] [6]***HN4***[] There **[****33]** can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.

LEdHN[7][] [7]In *Klor's, Inc*. v. *Broadway-Hale Stores, Inc., 359 U.S. 207*, the Court was confronted with the question whether "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." *359 U.S., at 210*.The allegation was that manufacturers and distributors of electrical appliances had conspired among themselves and with a major retailer, Broadway-Hale, "either not to sell to Klor's [Broadway-Hale's next-door neighbor and competitor] or to sell to it only at discriminatory prices **[**1331]** and highly unfavorable terms." *359 U.S., at 209*. The Court concluded that the alleged group boycott of even a single trader violated the statute [21] without regard to the **[*146]** reasonableness **[***427]** of the conduct in the circumstances. **[****34]** Group boycotts of a trader, said the Court, are among those "classes of restraints which from their 'nature or character' were unduly restrictive . . . ." *359 U.S., at 211*. This was not new doctrine, for it had long been recognized that "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 and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. *Northern Pac. R. Co*. v. *United States, 356 U.S. 1, 5*. See also *Fashion Originators' Guild of America, Inc*. v. *Federal Trade Comm'n, 312 U.S. 457*, and *Eastern States Retail Lumber Dealers' Assn*. v. *United States, 234 U.S. 600, 613-614*, neither of which involved price-fixing.

[**35]** ***LEdHN[8]***[] [8]***LEdHN[9]***[] [9]The principle of these cases is that ***HN5***[] where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals To Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed -- as **[*147]** in *Fashion Originators' Guild of America, Inc*. v. *Federal Trade Comm'n, supra, at 468*.

LEdHN[10][] [10] **[****36]** We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition -- a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E. g., United States v. Parke, Davis & Co., 362 U.S. 29, 47*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223*. And the *per se* rule applies even when the effect upon prices is indirect. *Simpson v. Union Oil Co., 377 U.S. 13, 16-22*; *Socony-Vacuum Oil Co., supra.*

There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings. See n. 7, *supra*. Some purchasers found and others believed that discount prices were lower than those available through the franchised dealers. *Ibid*. Certainly, complaints about price competition were prominent in the letters and telegrams with which the individual dealers and salesmen bombarded General Motors in **[**1332]** November 1960. [22] **[****37]** (Finding 38.) And although the District Court found to the

[21] The complaint in *Klor's* charged a violation of *§ 2* of the Sherman Act, as well as of *§ 1*. In the present case, the Government did not charge the appellees under *§ 2*, which 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 misdemeanor . . . ." *15 U. S. C. § 2 (1964 ed.)*.

[22] Evidence on this subject was admitted solely for the purpose of showing the dealers' state of mind, rather than to prove the existence of actual price-cutting by the discounters. But the collaborators' state of mind is of significance here.

contrary, there is evidence in the record that General Motors itself was not unconcerned about the effect **[***428]** of discount sales upon general price levels. [23]

[**38]**

[*148] ***LEdHN[11]***[] [11] ***LEdHN[12]***[] [12]The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot rspect 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.

Accordingly, we reverse and remand to the United States District Court for the Southern District of California in order that it may fashion appropriate equitable relief. See *United States v. Parke, Davis & Co., supra, at 47-48*.

It is so ordered.

Concur by: HARLAN

Concur

MR. JUSTICE HARLAN, concurring in the result.

Although I consider that *United States v. Parke, Davis & Co., 362 U.S. 29*, decided in 1960, represents basically unsound antitrust doctrine, see my dissenting **[****39]** opinion, *362 U.S., at 49*, I see no escape from the conclusion that it controls this case. *Parke Davis* held that a manufacturer cannot maintain resale prices by refusing to sell to those who do not follow his suggested prices if the refusal is attended by concerted action with his customers, even though he may unilaterally so conduct himself. See *United States v. Colgate & Co., 250 U.S. 300*. Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boycotting. **[*149]** The conclusion that *Parke Davis* governs the present case is therefore unavoidable, given the undisputed evidence that General Motors acted in concert with its dealers in enforcing the location clause. In my opinion, however, General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary.

On this basis I concur in the judgment of the Court.

References

Annotation References:

Extent of trader's **[****40]** right to exercise his own discretion as to persons with whom he will or will not deal. 68 L ed 448.

End of Document

[23] In an inter-office memorandum, circulated among General Motors officials immediately prior to formulation of corporate policy *vis-a-vis* the discounters, it was stated that "It would appear that one of the real hazards of condoning this type of operation is that discounted prices are freely quoted to a large portion of the public." Moreover, we note that some discounters advertised that they would finance new-car purchases at an interest rate of 5 1/2%, a rate substantially lower than that available at franchised Chevrolet dealers through G. M. A. C., a subsidiary of General Motors Corporation. See n. 7, *supra*. Finally, it is conceded that General Motors is intensely concerned that each of its dealers has an adequate "profit opportunity" (see Finding 17), a concern which necessarily involves consideration of the price realized by dealers.

American Infra-Red Radiant Co. v. Lambert Indus.

United States Court of Appeals for the Eighth Circuit

May 20, 1966,

Nos. 18054, 18055

Reporter

360 F.2d 977 *; 1966 U.S. App. LEXIS 6080 **; 149 U.S.P.Q. (BNA) 722 ***; 1966 Trade Cas. (CCH) P71,777

AMERICAN INFRA-RED RADIANT CO., Inc., a Delaware Corporation, and Hupp Corporation, a Virginia Corporation, Appellants, v. LAMBERT INDUSTRIES, INC., a Minnesota Corporation, Industrial Ceramics, Inc., a Minnesota Corporation, and Agard L. Lambert, Appellees. LAMBERT INDUSTRIES, INC., a Minnesota Corporation, Industrial Ceramics, Inc., a Minnesota Corporation, and Agard L. Lambert, Appellants, v. AMERICAN INFRA-RED RADIANT CO., Inc., a Delaware Corporation, and Hupp Corporation, a Virginia Corporation, Appellees

Disposition: **[**1]** Affirmed in part. Reversed in part.

Core Terms

patent, burner, invention, plate, infringement, anti-trust, plaintiffs', teaching, prior art, perforations, block, mixing, trial court, ceramic, surface, ratio, invalid, novelty, patent office, heat, tile, Infra-Red, air, specifications, variables, inventor, counterclaim, damages, figures, anticipated

LexisNexis® Headnotes

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Utility Requirement > Proof of Utility

HN1[] **Nonobviousness, Elements & Tests**

For a patent to be valid it must demonstrate three separate and distinct elements: "novelty," "utility," and "invention."

Patent Law > Anticipation & Novelty > Description in Prior Patents

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Anticipation & Novelty > Description in Publications

Patent Law > Statutory Bars > General Overview

HN2[] **Anticipation & Novelty, Description in Prior Patents**

Under patent law, the requirement of "novelty" means the patent must be new. As required by the statute, to be patentable the device must not have been known or used by others in this country, or patented or described in a printed publication in this or a foreign country. *35 U.S.C.S. § 102(a)*.

Patent Law > Nonobviousness > Elements & Tests > Claimed Invention as a Whole

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > General Overview

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN3[] **Elements & Tests, Claimed Invention as a Whole**

Under *35 U.S.C.S. § 103*, the third statutory requirement of patentability is called invention, or non-obviousness. The statute states in effect that a patent is not valid if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. In interpreting this statute, the United States Supreme Court refers to this requirement as the "test of obviousness."

Patent Law > Anticipation & Novelty > General Overview

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN4[] **Patent Law, Anticipation & Novelty**

To determine if a patent was anticipated because of its obviousness or lack of novelty, it is necessary to compare the various claims of the patent with the teachings of the prior art.

Patent Law > Anticipation & Novelty > General Overview

HN5[] **Patent Law, Anticipation & Novelty**

A patent cannot be properly granted for the discovery of a result that would flow naturally from the teaching of the prior art.

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN6[] Elements & Tests, Ordinary Skill Standard

"Invention" or "nonobviousness" of a patent will not be decided on the narrow issue of degree, and the mere changing of form, proportions, or size will not alone constitute "invention" or "nonobviousness." This is true even though the change brings about better results.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN7[] Standards of Review, Clearly Erroneous Review

Under patent law, the issue of whether an improvement constitutes mere mechanical skill or involves the exercise of invention is a question of fact which is conclusive unless clearly erroneous.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Governments > Courts > Authority to Adjudicate

HN8[] Reviewability of Lower Court Decisions, Preservation for Review

An appellate court has the prerogative to interpret exhibits for itself.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Patent Law > ... > Claims > Claim Language > Duplication & Multiplicity

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN9[] Standards of Review, Clearly Erroneous Review

Application of erroneous standards of invention, or nonobviousness, or misconceptions as to applicable patent law, in themselves make factual conclusions of patentability clearly erroneous.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN10[] Jurisdiction & Review, Subject Matter Jurisdiction

Although a patent is presumably valid, the ultimate question of patentability is for the courts. However, the court is not obliged to yield its judgment to a presumption that merely arises from the patent itself.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN11[] **Subject Matter Jurisdiction, Appeals**

The United States Court of Appeals for the Eighth Circuit holds that, when what is considered the most relevant of all prior art in a patent is not considered by the United States Patent and Trademark Office when examining the patent's application, the subsequent presumption of the patent's validity may be greatly weakened, if not destroyed.

Patent Law > Anticipation & Novelty > Elements

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

HN12[] **Anticipation & Novelty, Elements**

While a court may consider commercial success in determining whether a patent is void for obviousness, it certainly is not a prime consideration. Commercial success without invention, also known as nonobviousness, undoubtedly cannot support a patent. While commercial success may help in close questions, commercial success is certainly not decisive within itself. The relevancy of "commercial success" is based upon the assumption that public acceptance of a device is indicative of that device's novelty and invention over prior art in the field. Therefore, when explanations other than invention are brought forth to indicate reasons for the commercial success, the evidentiary weight of this factor is all but destroyed.

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Anticipation & Novelty > General Overview

HN13[] **Nonobviousness, Elements & Tests**

Under patent law, even an unsuccessful effort to embody a concept will suffice as invention so long as this effort discloses that the inventive idea was complete. Anticipation is not avoided by showing of lack of prior success if all that remains to be done to make the device successful are changes involving the application of mere mechanical skill.

Patent Law > ... > Defenses > Patent Invalidity > Fact & Law Issues

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN14[] **Patent Invalidity, Fact & Law Issues**

There can be no infringement upon an invalid patent.

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN15[] Prior Patents & Publications, Foreign Patenting

See 35 U.S.C.S. § 102(d).

Patent Law > ... > Utility Patents > Product Patents > Compositions of Matter

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN16[] Product Patents, Compositions of Matter

Germany has two distinct classes of invention protection. The Gebrauchsmuster gives a measure of, though limited, protection to useful or petty models which do not possess a sufficiently high standard of invention to meet the requirements of the regular German patent laws.

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN17[] Filing Requirements, Drawings

The German Gebrauchsmuster possesses the elements of the more conventional form of patent. The rights granted an inventor under the Gebrauchsmuster law gives a monopoly for a term of three years, renewable for an equivalent period, thus giving a total of six years of protection. The Gebrauchsmuster gives the inventor the exclusive right of use of the article and to recover damages for infringement, with the claims made and accepted measuring the scope of the protection afforded. There is also a limited publication of the Gebrauchsmuster. If the application is granted, the title, inventor, date, and file number are published in the official Patentblatt. Though specifications and drawings are not disclosed in any official publication, the application, which contains the specifications, drawings, and claims, is registered and the entire file is open to public examination in the patent office.

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN18[] Prior Patents & Publications, Foreign Patenting

Courts treat a German Gerbrauchsmuster as a foreign patent.

Patent Law > Invention Date & Priority > Activities Abroad

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN19[] Invention Date & Priority, Activities Abroad

The United States Patent and Trademark Office considers an application for a German Gebrauchsmuster to be an application for a patent in a foreign country, and consequently the right of priority of 35 U.S.C.S. § 119 can be based upon such an application. Additionally, patent examiners may use the Gebrauchsmuster as a prior patent effective as of the date of registration, in the same manner as they would use the patents of countries which do issue specifications in printed form.

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN20[] Prior Patents & Publications, Foreign Patenting

See *35 U.S.C.S. § 119*.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > Ownership > General Overview

Patent Law > Ownership > Patents as Property

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN21[] Ownership & Transfer of Rights, Assignments

The United States Eighth Circuit Court of Appeals holds that the general definition of the term "patent" includes a document granting the monopoly right to produce, use, sell, or get profit from an invention, process, etc. for a certain number of years, or a grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. The United States Eighth Circuit Court of Appeals holds the German Gebrauchsmuster falls within this definition of a patent.

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

Patent Law > ... > Specifications > Enablement Requirement > General Overview

HN22[] Prior Patents & Publications, Foreign Patenting

Congress makes no differentiation in the type of foreign patent that is affected by the statutes.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

HN23[] Congressional Duties & Powers, Copyright & Patent Clause

In allowing for the issuance of patents, the United States Constitution commands no precise length of time for the possession of a patent, only "limited times."

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > Statutory Bars > General Overview

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN24[] **Subject Matter Jurisdiction, Appeals**

The United States Eighth Circuit Court of Appeals holds that a German Gebrauchsmuster is a foreign patent within the purposes of *35 U.S.C.S. §§ 102(d)*, *119*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Royalties > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

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

HN25[] **Remedies, Damages**

Exclusive dealing contracts, especially when tied to another product's lease or sale, while not illegal per se, are carefully scrutinized by courts. When the effect of such arrangements may be to substantially lessen competition or tend to create a monopoly, they are made unlawful by § 3 of the Clayton Act. However, proof of an isolated violation of substantive law will not entitle a defendant to recovery. Before a party recovers treble damages he must be able to plead and prove actual monetary injury to his business or property resulting from the illegal act. *15 U.S.C.S. § 15*. Damages that are purely speculative, remote, or based upon conjecture cannot serve as a base for anti-trust recovery. Although the mere difficulty of exact proof will not deprive a party of relief, damages to be awarded must be susceptible of expression in figures founded upon some reasonable basis of computation.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN26[] **Clayton Act, Claims**

Section 3 of the Clayton Act, which affords the private cause of action, clearly requires a causal connection between the injury in business or property and the anti-trust violation in order to recover damages. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Defenses

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

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Patent Law > ... > Damages > Collateral Assessments > Costs

HN27[] **Remedies, Damages**

Patent litigation expense may only be considered in anti-trust counterclaims, where an infringement suit is brought as part of and in furtherance of a combination and conspiracy. Therefore, whenever the patent litigation is initiated pursuant to a lawful purpose and there is no causal connection between the bringing of the action and the illegal conduct, the cost of the defense of the suit cannot become an element of damage which is tripled under the Clayton Act.

Judges: Vogel, Chief Judge, and Blackmun and Gibson, Circuit Judges.

Opinion by: GIBSON

Opinion

[*724]** **[*981]** GIBSON, Circuit Judge.

This appeal and cross-appeal from the United States District Court, District of Minnesota, concerns a patent infringement case filed pursuant to Title *35, U.S.C., § 271* in which also is injected the issue of patent misuse and anti-trust. Jurisdiction is established by Title *28, U.S.C., § 1338*. At issue is the validity of two patents, the alleged infringement thereof, the alleged patent misuse, and the alleged anti-trust violation.

The District Court [1] (the Honorable Dennis Donovan) held the patents valid but not infringed, and found no patent misuse or anti-trust violation.

The patents in question were issued to plaintiff American Infra-Red Radiant Co., Inc., as assignor of the inventor, Gunther Schwank, with **[**2]** plaintiff Hupp Corporation serving as a nonexclusive licensee of American Infra-Red, with right to sue for patent infringement. Defendants are engaged in making and marketing devices similar to those covered in the patents and are charged by plaintiffs with infringement of both patents.

The subject matter of this litigation is an infra-red gas burner. U.S. Patent No. 2,775,294 ('294) is for the burner tile or plate, and U.S. Patent No. 2,870,830 ('830) is for the burner housing, exclusive of the burner plate. The two units when placed together constitute the operational infra-red gas burner device. Difficult as it is, we will attempt to be accurate, brief and intelligible in our description of the device.

The burner utilizes a dish-shaped housing assembly which contains at one end a venturi or mixing tube which is in open communication with a gas nozzle and an air intake space. The gas and air are partially mixed in this mixing

[1] The trial court's decision is reported in *238 F. Supp. 176 (1965)*.

tube and then **[*982]** discharged on to a deflecting and guiding surface at the opposite side of the unit. This surface reverses the flow of the gaseous mixture and guides it into a separate mixing chamber and in so doing effects a thorough **[**3]** and uniform distribution of the gas-air mixture within the chamber (Patent '830). This dish-shaped housing unit has a flat planer open top on which are mounted the perforated ceramic plates of the '294 patent. The plates are mounted individually or in multiples of two, four, six, etc., but will be hereafter referred to as the plate or ceramic plate. The plate covers the entire opening, thus making a confined chamber except for the mixing tube, which is in open communication with the air and gas inlets. The pressure in the mixing tube caused by the incoming gas and air is somewhat greater than the pressure in the mixing chamber immediately beneath the perforated ceramic plate which causes all of the combustible mixture to be expelled under low pressure through the apertures in the plate. This ceramic plate resembles a perforated disc that contains many small holes allowing the gas to pass to the outer side thereof, at which point combustion takes place. The burning of this gas-air mixture at the surface of the ceramic tile is almost flameless and it heats the surface of the tile to a reddish incandescent glow, which in turn radiates infra-red heat waves. These rays travel through **[**4]** the surrounding air without heating it. Upon striking an opaque object these infrared rays are then converted into heat.

In order for the burner to successfully operate, it is necessary that the gaseous mixture be ignited only on the surface of the ceramic plate and not in the mixing chamber behind the plate. When this premature ignition occurs in the mixing chamber it is known as "backfiring." To prevent this "backfiring" the ceramic burner plate must be of sufficiently low thermal conductivity to insulate the red hot outer surface (1500 to 1700 degrees Fahrenheit) from the necessarily cool interior. Furthermore, the perforations in the tile must be small enough to prevent heat from the burning gas to travel back into the mixing chamber, yet large enough to eliminate too much pressure from building up in the mixing chamber.

Another characteristic of this type of infra-red burner is that it is intended to operate at the relatively low "ordinary town gas pressures", with all of the air required for combustion being inspired into the mixing tube without the use of a compressor. If the perforations in the ceramic plate are too small in relation to the pressure of the incoming gas, **[**5]** the continuous and even flow of the gas and air through the perforations in the burner plate is restricted, thus causing a "back pressure." This "back pressure" results in insufficient inspiration of air into the mixing tube. So, the diameter and number of perforations in the burner plate are important in two respects: One, they must **[***725]** be small enough in size to prevent "backfire" from the hot surface of the plate, and two, they must be large enough in size and sufficient in number to keep "back pressure" from preventing inspiration of sufficient air into the mixing tube.

In addition to the above factors, due to the complex nature of gas flow, the thickness of the burner plate and consequently the length of the perforations through which the gas flows on its way to the burner surface is an important factor in the burner's efficient operation.

Finally, since different gaseous fuels have different ignition temperatures, ignition speeds, and inspirating qualities the type of fuel used is a factor to correlate with the other considerations mentioned. A change in the chemical composition of the gas may require a change or variation in the size and number of the holes in the ceramic tile. **[**6]** Thus the size of the perforations, the number, and the length thereof are of vital importance and must be properly correlated with each other and the other variables mentioned to achieve the desired result.

Patent '294 issued December 25, 1956, covering the ceramic burner plate, requires that the tile have generally parallel passages through which the gaseous mixture **[*983]** may pass, which passages must be evenly distributed over the area of the tile with the total cross-sectional area of the passages being not less than "about 20 per cent" of the total radiation area of the surface of the burner plate. The individual passages are to be not less than 5 millimeters (about 6/32 of an inch) in length and a cross-sectional area of not more than 4 square millimeters (about 6/1000 of an inch) each. A heat retarding medium of substantially lower thermal conductivity than the clay or refractory material of the plate is to be distributed throughout the plate with the thermal conductivity not exceeding "0.5 kc/hr. m. degree c." (.5 kilocalories per hour, per meter, per degree, centigrade). The heat retarding medium is composed of pockets of air or voids within the ceramic itself. The **[**7]** pockets are produced by sintering the clay or other material used to form the tile block; that is, by incomplete firing of the clay ceramic during its construction. The impurities in the clay are burned out without fusing the remaining material together in a solid mass. The result is small pockets or voids containing air which has 10 to 100 times less thermal conductivity than the surrounding solid ceramic.

Patent No. '830 issued January 27, 1959 is concerned with the general housing of the burner plate, including the positioning of the component parts and structural arrangement of the burner. The aim of the patent is to provide a maximum burning surface while having minimum overall dimensions, particularly depth, thus providing maximum heat while taking up a minimum of space.

Defendants manufacture and sell three types of ceramic burner plates, two with cylindrical passages and one with slotted passages; all of which allegedly infringe upon plaintiffs' '294 patent. The housing unit for the burner plate manufactured and sold by defendants is somewhat similar in design to the specifications in plaintiffs' patent, but there is some variation in the overall dimension.

In defending **[**8]** this infringement case, defendants have alleged that both of plaintiffs' patents are invalid and even if valid there was no infringement. In addition, they have asserted the affirmative defense of patent misuse and have counterclaimed for damages, alleging that the patent misuse was a violation of the antitrust laws entitling recovery of treble damages. The basis of the closely related patent misuse defense and the antitrust counterclaim is the license and sales agreement between American Infra-Red and Hupp Corporation. Defendant contends that the agreements constitute illegal exclusive dealing contracts and tie-in agreements.

The trial court held the patents valid on the ground that the "very heavy burden" [2] imposed on defendants to overcome the statutory presumption of validity was not met by defendants and on the basis of the admitted commercial success of the plaintiffs' commercial burner. The trial court went on to declare that neither patent had been infringed upon and that plaintiffs had not violated the anti-trust laws with their licensing and sales agreement.

[9]** Plaintiffs applaud that portion of the trial court's decision holding their patents are valid and that there has been no patent misuse or anti-trust violation, but assert that the holding of non-infringement is clearly erroneous. Defendants in turn applaud the court's decision of no infringement, but contend that the decision holding the patents **[***726]** valid and the holding of no anti-trust violation is clearly erroneous.

There being dual issues of validity and infringement, the proper procedure demands that we first determine the validity of the patents in question before **[*984]** we can approach the issue of infringement. We will first consider the validity of Schwank patent '294 (ceramic burner plate), after which we will discuss Schwank patent '830 (housing unit).

Validity of '294

It is fundamental that ***HN1***[] for a patent to be valid it must demonstrate three separate and distinct elements: "novelty," "utility" and "invention." We are concerned herein only with the elements of "novelty" and "invention" as "utility" is admitted or evident. **[**10]** When we say that a patent must possess ***HN2***[] "novelty" we mean that it must be new. As required by the statute, to be patentable the device must not have been "known or used by others in this country, or patented or described in a printed publication in this or a foreign country * * *." *35 U.S.C. § 102(a)*. In addition to "utility" the statutes have always demanded that a patent be novel. However, in addition to these two statutory elements of patent-ability the courts for over a hundred years have demanded of all patents an additional requirement of "invention." The exact definition of "invention" has varied from time to time and from court to court. However, it was generally agreed that a mere improvement over prior art which involved nothing more than what would have been obvious to a person skilled in the art and requiring nothing more than the application of mechanical skill could not be considered as "invention." See 2 Deller's Walker on Patents, § 104-106 (2nd Ed. 1964). The Patent Act of 1952 (*35 U.S.C. § 103*) codified this general judicial **[**11]** requirement as ***HN3***[] the third statutory requirement of patentability. The statute states in effect that a patent is not valid "if the differences

[2] In *Mumm v. Jacob E. Decker & Sons, 301 U.S. 168, 171, 57 S. Ct. 675, 81 L. Ed. 983* Chief Justice Hughes said: "* * * The burden of proving want of novelty is upon him who avers it * * * [and] his burden is a heavy one, as it has been held that 'every reasonable doubt should be resolved against him.'"

between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." In interpreting this statute the Supreme Court in the recent case of *Graham v. John Deere Company of Kansas City, 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545* (February 21, 1966) (cert. from 8 Cir., *333 F.2d 529*) prefers to call this time honored, now codified, judicial requirement, heretofore known as "invention," the "test of obviousness." The Court made it clear that the statute merely codified the decisional law and the necessary level of innovation previously demanded by the courts had not been changed by the statute. However, the Court felt that "obviousness" should be emphasized rather than "invention" and that the "test of obviousness" as set out in the statute be applied as the sole test for the third element of patentability. Therefore, in addition to "utility" **[**12]** and "novelty" patents must contain "non-obviousness."

The thrust of defendants' attack on the validity of patent '294 is concentrated on a demonstration of prior art not considered by the patent examiner. Defendants contend that this prior art conclusively demonstrates a lack of novelty and inventiveness in the Schwank patent. As prior art defendants rely primarily upon a 1915 British Patent Number 6312 by McCourt. This patent is admittedly very similar to the Schwank patent, a similarity that will soon be demonstrated in full. In addition to this McCourt patent, defendants cite two articles, one by Keller in 1949 and one by Trinks in 1942. Neither the McCourt patent or the prior art publications by Keller and Trinks were cited nor considered by the patent examiner.

HN4[] To determine if the Schwank patent has been anticipated because of its obviousness or lack of novelty, it is necessary to compare the various claims of the patent with the teachings of the prior art. Our attention is first directed to the general or broad characteristics of this patent as compared with the prior art in **[**13]** the field. In making such a comparison it clearly appears to us that the Schwank patent has all of the broad characteristics found in the prior McCourt patent, many of which also appear in the Keller and Trinks publications.

[*985] 1. Both patents deal with gas burners which produce infra-red heat rays using the same principles of physics.

2. As a heating unit both employ a block of refractory ceramic material.

3. Both construct their heating blocks with cavities or voids filled with air which serve as a heat retarding medium to lower the block's thermal conductivity.

4. Each perforates his block with uniformly distributed passages through which the fuel mixture flows to the surface of the block.

5. At the surface of the block the fuel mixture is ignited, causing the face of each of the blocks to become heated to incandescence.

6. Both mount this heating unit at the top of a chamber, in which air and **[***727]** gas are mixed before reaching the surface of the unit.

Not only are all of these general characteristics of Schwank anticipated by the McCourt patent, but all of the major problems and objectives of the burner were foreseen not only by McCourt but also by the **[**14]** Trinks and Keller publications.

1. The burners are designed to operate at normal "town" gas pressure.

2. The burners are designed to inspirate all of the air necessary for successful combustion without the need of a blower or compressor.

3. The burners are designed to prevent "backfiring."

In order to attain these three goals and to construct a successful radiant burner, Schwank set forth in his patent four specifications for his burner plate. 1) The cross-sectional area of each perforation in the block should be below a 4 sq. mm. maximum. 2) The thermal conductivity of the block should be less than.5 kilocalories per hour per meter per degree centigrade. 3) The thickness of the plate should be at least 5 mm. (6/32 of an inch). 4) The ratio of the perforation area to the surface area should be not less than "about 20%."

In comparing each of these four specifications for a successful burner set out by Schwank with the teachings of McCourt, the similarity between the patents is evident.

1. Cross-Sectional Area of the Individual Perforations. McCourt taught a measurement of 1.17 sq. mm. which clearly anticipated the 4 sq. mm. maximum set out by Schwank. (Plaintiffs' commercial **[**15]** block is very near the McCourt teaching with measurements of.8 sq. mm. and 1.3 sq. mm.).

2. Thermal Conductivity. A block constructed in accordance with the specifications of McCourt had a thermal conductivity of.181. Schwank taught a.5 maximum and was thus anticipated by the McCourt disclosure. (Duplicating almost exactly the McCourt figure, plaintiffs' commercial tile has a conductivity of.180).

3. Thickness of the Burner Plate. McCourt's block measured 12/32 of an inch, again anticipating the Schwank disclosure calling for an excess of 6/32 of an inch. (The thickness of the McCourt block is almost duplicated by plaintiffs' present block which measured 15/32 of an inch).

4. Ratio of Perforation Area to Surface Area. While Schwank calls for a ratio of not less than "about 20%", McCourt in his specific examples only had ratios of 14.3% and 16.2%. (Commercial blocks are manufactured by plaintiffs with various different ratios, such as 25%, 35% and 40%).

It is clear from the above comparison, from the statements of plaintiffs' own expert witnesses, and from the admission found in plaintiffs' supplemental brief, [3] that the Schwank patent has been anticipated in all **[**16]** ways save the possibility of one; this one being Schwank's teaching of a ratio of not less than "about 20%" while McCourt's patent **[*986]** lists ratios of only 14.3% and 16.2%. Our task then is to determine if this single difference found in the stated ratios as they appear on the face of the patents entitles Schwank to a patent monopoly on his burner plate. We do not believe that it does. We have two basic reasons for this conclusion. One, given a proper interpretation of the entire teachings of McCourt the conclusion is inescapable that the Schwank patent was invalid for want of novelty. Two, even if we were to rule that the apparent difference is novel, we believe that the advance would have been obvious to one skilled in the art. Therefore, this obvious step cannot constitute "invention" necessary to allow a patent monopoly.

Considering first "novelty", if all of the claims of the Schwank patent were first taught by McCourt, the law demands that the Schwank be held invalid. It is admitted that all but one of the Schwank claims have in fact been anticipated by the McCourt teaching. **[**17]** Further, upon close analysis of the sole alleged differences in the patents it is equally clear that no true difference actually exists. What appears at first glance to be a difference is illusionary. In all respects, therefore, McCourt anticipates the teaching of Schwank.

To illustrate, we believe it would be a mistake to interpret McCourt, as have the plaintiffs, as teaching nothing more in the area of ratios than the bare figures of 14.3% and 16.2%. On the contrary, McCourt gave complete general teachings in the area of radiant burners. The detail explanation of the experimentation process which McCourt sets out is as much a part of the existing art as the figures he gives. In this case the process is far more important than the figures.

In his patent McCourt taught that to construct a successful burner one had to account for a number of variables, such as the chemical composition of the gas, **[***728]** the pressure of the gas, the desired surface temperature, and the thickness of the block. To compensate for these variables he taught that it would be necessary to either change the number or the diameter of the perforations, which of course consequently alters the perforation to surface **[**18]** ratio. He specifically illustrated his discovery by teaching that if you changed the composition of the gas you would need to change the diameter of the perforations, but if you used a thicker block you had to increase

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[3] Plaintiffs-Appellees' brief, p. 10: "Since the greater than 20 per cent passage area to tile surface area ratio is the sole and outstanding structural difference over McCourt * * *"

the number of perforations. In order to determine the correct diameter and number of perforations under a given set of these variables McCourt taught that one had to construct a number of test burner plates and empirically experiment with each plate under each set of circumstances. The figures of 14.3% and 16.2% represent the results of two of these experiments. In themselves they were not considered to be teachings or rigid specifications. They were only the results of experiments with given variables and with variation in the variables the ratio figures would necessarily change. The importance of McCourt's teaching is found not in the illustrative figures, but in the discovery of the various factors that influence the operation of radiant gas burners and the teaching of empirical experimentation to obtain a workable burner plate when these factors are varied.

Having concluded that the difference in the ratio figures does not of itself indicate that the Schwank **[**19]** patent was novel, and that the ratio figures set out by McCourt were not a definitive part of his teachings, we must now examine the McCourt teachings themselves on the issue of ratio to see if they encompass the later ratio teachings of Schwank. "It is well settled that ***HN5***[] a patent cannot be properly granted for the discovery of a result which would flow naturally from the teaching of the prior art." *Application of Libby, 255 F.2d 412, 45 CCPA 944 (1958)*. As we have seen the McCourt patent pointed out the numerous variables to be considered. It told us how to compensate for these variables by changing either the diameter or the number of holes according to the variable affected. Finally, he taught that to correctly correlate **[*987]** a number of variables one had to resort to empirical experimentation. Therefore, given correct information on a set of variables and using this teaching, it appears to us that a mechanic could well construct a burner within the "about 20%" minimum ratio set out by Schwank. This opinion is to a large degree confirmed by one of plaintiffs' own **[**20]** expert witnesses and by the record fact that it is the McCourt method of empirical experimentation that is followed by the industry today when confronted with an untested variable. It is our conclusion that since a mechanic would be able to construct a burner following only the teachings of the prior McCourt patent, and the burner so constructed could well fall within all of the specifications and claims of the later Schwank patent, Schwank was not entitled to patent protection. If we were to hold otherwise, McCourt himself would be deprived of the right to exploit his invention in the face of the later Schwank patent. Such is clearly not the law. Therefore, it is our opinion that the burner described in the Schwank patent '294 "would flow naturally from the teaching of the prior art" and as such lacked the necessary "novelty" for patentability under *35 U.S.C. § 102(a)*.

Even were we to assume arguendo the ratio specified by Schwank as a minimum was not first taught in principle by McCourt, we do not believe that the addition of a few more holes per block or increasing the diameter of the existing holes can be considered "a creation of the inventive faculty" **[**21]** as set out in *Aro Equipment Corporation v. Herring-Wissler Co., 84 F.2d 619, 622* (8 Cir. 1936). In fact in applying the test of "obviousness" as promulgated by the Supreme Court in the *Graham* case, supra, we believe that such an advance, if any, would have been obvious at the time it was made to a person having ordinary skill in the art. The "obviousness" of Schwank's step is further emphasized when viewed in the light of McCourt's patent which clearly taught variation in the number and diameter of the perforations. We have held in the past and we continue to hold that ***HN6***[] "invention will not be decided on the narrow issue of degree", and that the mere changing of form, proportions, or size will not alone constitute "invention." *Swenson v. Boos, 156 F.2d 338* (8 Cir. 1946). This is true even though the change brought about better results. *Midland Flour Milling Co. v. Bobbitt, 70 F.2d 416* (8 Cir. 1934). Society has an interest to protect in patent litigation and its interests demand that the complete protection afforded by a patent not be allowed for **[**22]** petty, insignificant, and obvious advances. *Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 62 S. Ct. 37, 86 L. Ed. 58 (1941)*; *Ditto, Incorporated v. Minnesota Mining & Manufacturing Co., 336 F.2d 67* (8 Cir. 1964). Therefore, we conclude that even if "novel", patent '294 lacked **[***729]** the necessary "invention" or "nonobviousness" required by *35 U.S.C. § 103* and *Graham v. John Deere Company of Kansas City, supra.*

Though not to be considered as prior art, we could not help but note the decision of the patent offices of the countries of Western Germany and the Netherlands which were in evidence before the trial court. In lucid opinions following adversary type proceedings the patent offices of these two countries denied to Schwank a patent on a burner plate identical to the '294 patent. In March 1955 the German Patent Office denied Schwank a patent primarily on the basis of the McCourt patent. In a September 1959 decision the Netherlands Patent Office concluded "that the burner according to the application was known from Keller's paper." "The application does not *

* * contain any other indications than those **[**23]** already given by Keller." These decisions, while certainly not controlling, are evidence on the factual issue of "invention."

In reaching our conclusions herein we have not been unmindful of the rule set out in *Rota-Carb Corporation v. Frye Manufacturing Co., 313 F.2d 443* (8 Cir. 1963), that ***HN7***[] the issue of whether an improvement constitutes **[*988]** mere mechanical skill or involves the exercise of invention is a question of fact which is conclusive unless clearly erroneous. In the first place the validity of the Schwank patent did not revolve solely around the issue of "invention" versus "mechanical skill." Involved first was the question of "novelty" as set out in *35 U.S.C. § 102(a)*. A determination of this issue involved primarily a comparison of the prior McCourt patent with the later Schwank patent to ascertain if the teachings of the former were repeated in the latter. We concluded after making such a comparison that the Schwank device was in fact fully described in the McCourt patent and thus lacked the necessary "novelty" of patentability. **[**24]** Such a determination was based upon an examination and interpretation of two legal documents to determine if the statutory requirements of patentability had been fulfilled. Inasmuch as these documents are equally available to this Court, we do not believe that the trial court's particular interpretation is a factual conclusion binding under *Rule 52(a)*. ***HN8***[] The appellate court has the prerogative to interpret the exhibits for itself. *Nicholson v. Carl W. Mullis Engineering and Mfg. Co., 315 F.2d 532, 536* (4 Cir. 1963); *New Wrinkle, Inc. v. John L. Armitage & Co., 277 F.2d 409, 412* (3 Cir. 1960); *Kiwi Coders Corporation v. Acro Tool & Die Works, 250 F.2d 562, 568* (7 Cir. 1957).

Secondly, the part of the trial court's decision which found the element of "invention" in the Schwank patent we believe was induced by an erroneous view of the law. Even accepting "invention" as being a question of fact, [4] ***HN9***[] application of erroneous standards of invention or misconceptions **[**25]** as to the applicable law, in themselves make factual conclusions of patentability clearly erroneous. *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147, 71 S. Ct. 127, 95 L. Ed. 162 (1950)*; *Selmix Dispensers, Inc. v. Multiplex Faucet Co., Inc., 277 F.2d 884* (8 Cir. 1960).

[26]** There can be no doubt that the trial court applied an erroneous standard of invention in determining the validity of the Schwank patent. The trial court stated "A new combination resulting in improved construction which brings forth a new and more efficient result than prior art devices in patentable." The Supreme Court in the *Graham* case determined on this issue that a somewhat similar standard was incorrect and held that the "test of obviousness" was the *only* correct test to be applied in determining whether a new combination of known components amounts to "invention." The decision of the trial court clearly indicates that no standard of obviousness was applied.

Furthermore, in reaching its decision the trial court seemed to rely heavily on two conclusions of law. On the basis of *35 U.S.C. § 282* the trial court correctly ruled that the Schwank patent was presumed valid. Defendant, it said must bear a "very heavy burden" in overcoming this presumption of validity. Due to the conflict of expert testimony, the court said, that defendants had failed to shoulder this "very heavy burden." As a second point the trial court placed heavy emphasis on the **[***730]** **[**27]** commercial success of the Schwank commercial burner and on the fact that the McCourt burner did not work properly. Under the unique circumstances of this case we believe that the trial court's heavy reliance on the above law was misplaced.

[*989] ***HN10***[] Although a patent is presumably valid, the ultimate question of patentability is for the courts. *Continental Farm Equipment Co., Inc. v. Love Tractor, Inc., 199 F.2d 202* (8 Cir. 1952). This rebuttable presumption cannot be allowed to stand in the face of compelling contrary facts as we have herein. In such a case the court is

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[4] There is considerable doubt that "invention" should always be treated as a question of fact. See: 2 Deller's Walker on Patents § 105 (2nd Ed. 1964) pg. 67. *United States v. Esnault-Pelterie, 303 U.S. 26, 30, 58 S. Ct. 412, 82 L. Ed. 625 (1938)*; *Sbicca-Del Mac. Inc. v. Milius Shoe Co., 145 F.2d 389, 396* (8 Cir. 1944); *Rohr Aircraft Corporation v. Rubber Teck, Inc., 266 F.2d 613, 618* (9 Cir. 1959); *Hanovia Chemical & Mfg. Co. v. David Buttrick Co., 127 F.2d 888, 890* (1 Cir. 1942); *Fritz W. Glitsch & Sons v. Wyatt Metal & Boiler Works, 224 F.2d 331, 335* (5 Cir. 1955); *Nickerson v. Bearfoot Sole Company, Inc., 311 F.2d 858, 882* (6 Cir. 1962).

not obliged to yield its judgment to a presumption which merely arises from the patent itself. *Crosley Corporation v. Westinghouse Electric & Mfg. Co., 152 F.2d 895* (3 Cir. 1945).

Not only has this presumption of validity been overcome by the great weight of the evidence, but perhaps of prime importance, the presumption itself has been very much weakened, if not completely destroyed, by defendants' proof of pertinent prior non-considered art. We have already seen that the McCourt patent **[**28]** is an extremely relevant prior art reference. Even by plaintiffs' own charts in evidence McCourt is far more relevant than any art cited by the patent examiner. In addition, there were introduced the Keller and Trinks articles which demonstrate general principles later incorporated in the Schwank patent. It is clear that none of this very pertinent art was before the patent examiner when he granted the Schwank patent. Even without the benefit of this very pertinent art the patent office only granted Schwank his patent after considerable debate, hesitation, and discussion. Therefore, we have before us a borderline case in a crowded art, in which three pieces of extremely relevant prior art were not before the patent office. In such a case we believe that there is every possibility that the prior art of McCourt, Keller, and Trinks would have heavily tipped the scales against the granting of the patent had this prior art been known to the patent examiner. ***HN11***[] With a showing that this most relevant of all prior art was not considered by the patent office, we believe the normal presumption of **[**29]** validity was greatly weakened if not completely destroyed. *L. S. Donaldson Company v. La Maur, Inc., 299 F.2d 412* (8 Cir. 1962); *Heyl & Patterson, Incorporated v. McDowell Company, 317 F.2d 719* (4 Cir. 1963); *Cornell v. Adams Engineering Company, 258 F.2d 874* (5 Cir. 1958). In fact it is difficult to imagine how a patent has any presumption of validity over pertinent prior art references when these references were not before the patent examiner. *A.R. Inc. v. Electro-Voice Incorporated, 311 F.2d 508* (7 Cir. 1962); *Rohr Aircraft Corporation v. Rubber Teck, Inc., 266 F.2d 613* (9 Cir. 1959); *Mohasco Industries, Inc. v. E. T. Barwick Mills, Inc., 221 F. Supp. 191 (N.D.Ga.1963)* affirmed per curiam *340 F.2d 319* (5 Cir. 1965). Therefore, we are no longer dealing with a strong presumption of validity on the part of the Schwank patent, but with a presumption of validity that was greatly weakened. In such a situation the defendants obviously do not have to bear the heavy burden necessary to overcome a presumption at its full strength.

As a second pillar for its decision the trial court placed **[**30]** great reliance on plaintiffs' commercial success. As applied to the facts of this case, we believe that this reliance, too, was misplaced. ***HN12***[] While we recognize that a court may consider this factor, it certainly is not a prime consideration. Commercial success without invention undoubtedly cannot support a patent. *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., supra*; *Jungersen v. Ostby & Barton Co., 335 U.S. 560, 69 S. Ct. 269, 93 L. Ed. 235 (1949)*. While commercial success may help in close questions, commercial success is certainly not decisive within itself. *L. S. Donaldson Company v. La Maur Inc., 299 F.2d 412* (8 Cir. 1962); *Tropic Aire, Inc. v. Sears Roebuck & Co., 44 F.2d 580* (8 Cir. 1930). The relevancy of "commercial success" is based upon the assumption that public acceptance of a device is indicative of that device's novelty and invention over prior art in the field. Therefore, when explanations other than invention are brought forth to indicate reasons for the commercial success, the evidentiary weight **[**31]** of this factor is all **[*990]** but destroyed. *Day-Brite Lighting, Inc. v. Sandee Manufacturing Co., 286 F.2d 596* (7 Cir. 1960); 69 C.J.S. Patents § 70 at pages 323-324. We believe that there are many explanations for plaintiffs' commercial success other than the claimed invention or novelty of this particular patent.

In the first place there are a number of explanations why the McCourt burner never achieved financial success. In 1915 there was difficulty in mass producing on today's scale. The record contains evidence that McCourt's procedure for making these tiles was necessarily crude **[***731]** and time consuming. This, in itself, would make successful marketing unlikely. Secondly, it appears from the record that there was no widespread availability of inexpensive and constant quality gas until relatively recent times, which too would inhibit commercial exploitation of the device. Finally, there is every likelihood that in McCourt's time our society had not developed to the point where there was a substantial demand or market for radiant gas burners.

On the other side of the picture there are even more numerous explanations for the particular commercial success **[**32]** of plaintiffs. Perhaps foremost among these is the fact that the chemical composition and manufacturing process of the ceramic tile is a trade secret of plaintiffs not covered by the patent. In addition plaintiffs have made many modifications in the housing unit that, of course, are not covered by this patent. For instance we find a reduction in the size of the mixing chamber as found in patent '830 and many other non-patented modifications in the internal arrangement of the unit. In addition we see the addition of metal reflectors and protective screen. All of this has contributed to the effective and efficient operation of the burner, yet none are related to the invention of the patent in question. We also note that the burner plate used by plaintiffs vary markedly from the figures set forth in their patent. In addition we see that plaintiffs manufacture various sizes and types of burners thus appealing to a wide market. Some of the burners are very large, designed for use in industrial heating, and using natural gas as a fuel. Others are very small, use bottled gas, and are designed to warm the hands of the outdoor sportsman. In association with this adaptation to various **[**33]** uses, plaintiffs have undertaken an extensive advertising and promotion campaign. They have developed different models of burners for various uses and have extensively advertised and energetically promoted these markets. Last, but not least, plaintiffs have developed an organization for the manufacture and sale of these devices that is international in scope.

There being numerous explanations for the commercial success of plaintiffs' burner, it is difficult to say with any force that this success was due to the invention of the burner plate patent. Under the circumstances, commercial success is not a weighty factor in deciding the issue of patentability.

Finally, the trial court seemed to be strongly influenced by the feeling that the McCourt device did not work. Plaintiffs' evidence of the unworkability of the McCourt burner is far from being conclusive. In his patent, McCourt gave every indication that it worked properly, describing with particularity the red glow. The tests conducted by plaintiffs' experts, indicated that it did not work as well as plaintiffs' burner, but nonetheless did admit that it did gain some incandescence. Finally, as taught by McCourt the type **[**34]** of block for successful use will greatly be influenced by the type of gas you utilize. Knowing this, there is nothing to indicate that the tests conducted by plaintiffs in their laboratory or the tests conducted before the court utilized the type of gas necessary for the successful operation of the burner under the circumstances.

Furthermore, even if we accept the proposition that the McCourt burner did not work, we do not believe that undue emphasis should be placed on this factor. ***HN13***[] Even an unsuccessful effort to embody the concept will suffice as invention so long as this effort discloses that the inventive idea was complete. Anticipation **[*991]** is not avoided by showing of lack of prior success if all that remains to be done to make the device successful are changes involving the application of mere mechanical skill. *Simmons v. Hansen, 117 F.2d 49* (8 Cir. 1941); 1 Deller's Walker on Patents § 57 (2nd Ed. 1964) at page 240.

It is our conclusion, therefore, that the Schwank patent '294 is invalid for want of "novelty"; and even if novel, the patent certainly lacked **[**35]** the necessary "invention." The trial court's finding on this point is clearly erroneous in light of the evidence and in view of an application of erroneous standards of invention, and therefore must be reversed. *Rule 52(a), Fed.R.Civ.P.* Since '294 is invalid as a matter of law, the question of infringement is rendered moot. ***HN14***[] There can be no infringement upon an invalid patent. *Ditto Incorporated v. Minnesota Mining & Manufacturing Company, 336 F.2d 67* (8 Cir. 1964).

'830 Validity

Having thus disposed of patent '294 (burner plate), we now must determine the validity of the '830 (housing unit) patent. Defendants assert a statutory bar against the '830 patent based on *35 U.S.C. § 102(d)*. Apparently the inventor Gunther Schwank had the device, structure, or design of the burner housing which is the basis of the '830 patent also patented in Germany under a Gebrauchsmuster which is a lesser type of patent issued for petty or useful models and designs. Defendants contend that, if **[***732]** Gebrauchsmuster No. 1,660,844 issued to Schwank is a patent, United **[**36]** States Patent '830 is invalid under provisions of *35 U.S.C. § 102(d)* which holds in its pertinent part:

> "*Sec. 102* ***HN15***[] A person shall be entitled to a patent unless --
> "(d) the invention was first patented * * * in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States,"

This contention is correct. It is admitted that the Gebrauchsmuster application was made in Germany on May 22, 1953 which is more than twelve months prior to the application in the United States on October 28, 1954. The registration was effective or granted on July 9, 1953 with the name of the inventor, title, and registration number being published in the Patentblatt (Official Journal) on August 6, 1953. Obviously then the Gebrauchsmuster was granted prior to the United States application in October 1954. Although plaintiffs make some contention that defendants have not shown that the exact type of structure as is represented in the '830 patent is **[**37]** the basis of the Gebrauchsmuster, we feel that the record clearly discloses that the structures are the same. [5] In fact Schwank in his '830 application stated:

> "That no application for patent on this invention or discovery has been filed by me * * * in any foreign country * * * except as follows: Germany May 22, 1953."

The crucial premise, therefore, is whether a Gebrauchsmuster is a patent within the meaning of aforesaid *§ 102(d)*. If it is, *§ 102(d)* is a statutory bar to its validity. The District Court did not consider or rule on this issue.

Unlike the law in this country in which we generally only have one class of patent **[**38]** covering all types of patentable structures, processes, or compositions of matter, [6] ***HN16***[] Germany has two distinct classes of invention protection. It appears that in Germany the standard as regards patentable invention for regular patents is very high, making it difficult to secure such a patent for minor or simpler inventions. To meet this situation **[*992]** the Gebrauchsmuster law was adopted as supplementary legislation to give a measure of, though limited, protection to useful or petty models which do not possess a sufficiently high standard of invention to meet the requirements of the regular patent laws. Gebrauchsmusters, however, cover only structures, not processes, formulas, or compositions of materials; and there is no examination by the patent office for novelty, thus leaving the question of novelty to first arise when suit is brought.

[39]** In addition to being an important and integral part of the patent law of Germany it is apparent that ***HN17***[] the Gebrauchsmuster has the elements of the more conventional form of patent. The rights granted an inventor under the Gebrauchsmuster law gives a monopoly for a term of three years, renewable for an equivalent period, thus giving a total of six years of protection. The Gebrauchsmuster gives the inventor the exclusive right of use of the article and to recover damages for infringement, with the claims made and accepted measuring the scope of the protection afforded. There is even a limited publication of the Gebrauchsmuster. If the application is granted, the title, inventor, date and file number are published in the official Patentblatt. Though specifications and drawings are not disclosed in any official publication, the application which contains the specifications, drawings and claims is registered and the entire file is open to public examination in the patent office.

There are no judicial cases indicating how a Gebrauchsmuster should be treated under the provisions of *§ 102(d)*, and only scant authority as to how Gebrauchsmusters are to be treated under other provisions **[**40]** of our patent law. What authority there is, however, seems to indicate that the ***HN18***[] Gebrauchsmuster should be treated as a foreign patent. Judge Lindley in Permutit Co. v. Graver Corporation, a District Court decision reported at *37 F.2d 385, at page 390 (N.D.Ill.1930)* observed:

> "Evidently a Gebrauchsmuster is a patent within the meaning of the federal statute, as Judge Haight said in the case of *Safety Gas Lighter Co. v. Fischer Bros. & Corwin (D.C.) 236 F. 955, 962*: 'The rights conferred on an inventor by a German Gebrauchsmuster, except as to time, seem to be quite as extensive as those guaranteed by a patent in this country. Its grant is the act of the government. Although only the title is published, in the sense that it is printed in an **[***733]** official publication, the specifications and drawings of the patent are open and accessible to the public, as are also the claims, which measure the scope of the protection afforded to the inventor, as soon as the title, date of application, and registration are published in the Patentblatt. As it is not

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[5] A comparison of the drawings and disclosures of Gebrauchsmuster No. 1,660,844 (Ex. S-1) with the original application claims and drawings of the '830 show conclusively that the same device of a gas burner housing is the basis for both the Gebrauchsmuster and patent '830.

[6] The exception being ornamental design patents under *35 U.S.C. §§ 171- 173*.

essential that **[**41]** a foreign patent, to have the effect mentioned in section 4886 of the Revised Statutes, should be printed, but that the act of the officials in granting it and accessibility of its disclosures to the public are the decisive factors, I am at a loss to understand how the fact that only a title is printed, or how the scope of the invention which it protects, or that the examination made in the Patent Office before it is granted is limited, can have any effect on it under our laws.'"

This case was affirmed by the *Seventh Circuit, 43 F.2d 898* on other grounds and affirmed by the Supreme Court at 284 U.S. 52, *52 S. Ct. 53, 76 L. Ed. 163*. Certiorari was apparently granted by the Supreme Court because of holdings in other Circuits which had sustained the patent in question. Speaking for the Court, Mr. Justice Brandeis held the patent invalid without discussing the force and effect of a German Gebrauchsmuster.

In *Safety Gas Lighter Co. v. Fischer Bros. & Corwin, 236 F. 955* (D.C., D.N.J., 1916), affirmed *247 F. 1005* (3 Cir. 1918), the Court held a Gebrauchsmuster was available as a reference to anticipate and limit a later **[**42]** United States Patent and should be considered as part of the prior art.

Of considerable interest to us is the position of the United States Patent Office in regard to Gebrauchsmusters. It **[*993]** appears that for many years the Patent Office has treated the Gebrauchsmuster as a patent. This policy is illustrated by a discussion in the Official Gazette under date of November 2, 1965. In discussing the status of the Gebrauchsmuster the Gazette reads:

"1. Right of priority. -- ***HN19***[] An application for a Gebrauchsmuster is considered to be an application for a patent in a foreign country, and consequently the right of priority of *35 U.S.C. 119* can be based upon such an application. This was decided by the Board of Examiners-in-Chief (now Board of Appeals) in 1908 * * * and has been consistent practice ever since."

"3. Prior patents. -- The Examiners may use the Gebrauchsmuster, however, as a prior patent effective as of the date of registration, in the same manner as they would use the patents of countries which do issue specifications in printed form; * * **[**43]** *"

After making reference to *Ex Parte Smith 82 USPQ 83* (Board of Appeals) which held that Gebrauchsmusters were not patents under § 4886 (present *§ 102(a)(b)(c)*), it said:

"* * * But after this decision [Ex Parte Smith] Examiners have nevertheless used Gebrauchsmusters as prior patents, after consultation with the Solicitor's office, to reject applications or dissolve an interference for unpatentability of the counts."

The Gazette then sets forth an amendment to § 901.05(b) of the Patent Regulations by adding the following after the second paragraph on page 139:

"German Utility Models (Gebrauchsmuster) may be used as references as prior patents, but not as prior printed publications, effective as of their registration date. When necessary the Librarian will obtain the complete text of the specification from the German Patent Office. * * *"

From the entire publication we believe that it has been the past and the present practice of the Patent Office to treat the Gebrauchsmuster as a patent. We are not giving any retroactive effect to the recent amendment. We only believe that this amendment and the accompanying explanation **[**44]** codify what has been the historical practice of the Office when confronted with a Gebrauchsmuster.

Section 119 of Title 35 establishes a right of priority for foreign filed patents. Its pertinent part states:

HN20[] "An application for patent for an invention filed in this country by any person who has, * * * previously regularly filed an application for a patent for the same invention in a foreign country * * *, shall have the same effect as the same application would have if filed in this country on the date on which the application for patent for the same invention was first filed in such foreign country, if the application in this country is filed within

> twelve months from the earliest date on which such foreign application was filed; but no patent shall be granted on any application for patent for an invention which had been patented * * * more than one year before the date of the actual filing of the application in this country, * * *."

As we have seen it has long been the policy of the Government, both through international convention and **[***734]** internal policy to treat the Gebrauchsmuster **[**45]** as a patent entitled to the priority granted under *§ 119*. Since the Gebrauchsmuster is considered a patent for the purpose of *§ 119* in obtaining the benefit of an earlier filing date to establish its priority, the same construction should be placed on the word "patent" as used in *§ 102(d)*. It is receiving the advantage of being a patent under *§ 119*, therefore, it should be subject to the disadvantages imposed under that same section and under *§ 102(d)*.

The word "patent" has many general connotations and nuances but must be considered in the context in which it is used by Congress in implementing the Constitutional grant of authority conferred by Article I, Section Eight, Par. 8 of the Constitution: "To **[*994]** promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *." As used by Congress in the different sections dealing with the establishment of a patent system we must apply the particular connotation, which is to a certain extent a word of art, that would make effective the Congressional intent. Webster's **[**46]** ***HN21***[] New World Dictionary defines "patent" as (among other definitions) " n.1. A document open to public examination and granting a certain right or privilege; letters patent; especially, a document granting the monopoly right to produce, use, sell, or get profit from an invention, process, etc. for a certain number of years." Black's Law Dictionary generally defines a patent as "A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals." The German Gebrauchsmuster falls within these accepted definitions of a patent.

We note that ***HN22***[] Congress made no differentiation in the type of foreign patent that would be affected by the statutes. Therefore, we may assume that Congress intended to include in the term "patents" all foreign patents that fall within the well known classical definitions. Obviously the length of the period of protection is not decisive on this issue. Each country has the right to its own view and policy on this point. In fact our policy as expressed by Congress **[**47]** has changed, once granting only fourteen years of protection, now granting seventeen years; and is susceptible to further variation as a matter of legislative policy. ***HN23***[] Our Constitution commands no precise length of time, only "limited times." Therefore, as a matter of policy or Congressional intent it would not seem that the brevity of the Gebrauchsmuster would alter its essential nature.

For the above reasons ***HN24***[] we have concluded that a Gebrauchsmuster is a foreign patent within the purposes of *§ 119* and *§ 102(d)*. It is an important part of the German patent system. It has all of the attributes normally attributed to a patent which include an application setting forth claims, protection granted by the Government for a limited time, a right of action in the inventor to protect the invention against infringement, notice to the public in an official publication, and availability to the public of the specifications and claims. Furthermore, the Gebrauchsmuster falls within the general definition **[**48]** of "patent" in that it does command a sovereign grant of right of exclusive use for limited periods. Finally, the United States Patent Office has long treated it as a patent, granting it full rights of priority, with there being no statutory or Constitutional policy which would deny a lesser form of patent the force of a regular patent. We are, therefore, of the opinion that the Gebrauchsmuster No. 1,660,844 obtained by Schwank prior to his United States application on an application filed more than twelve months before the United States filing is a patent within the meaning of the patent law and as such is a statutory bar to the validity of patent '830 under *35 U.S.C. § 102(d)*.

Defendants have also argued the patent's invalidity due to want of invention (*35 U.S.C. § 103*), absence of proper oath (*35 U.S.C. § 115*), and lack of definiteness in description (*35 U.S.C. § 112*). We are of the opinion that none of these arguments possess substantial merit. Our above holding, however, renders these questions moot and consequently they will not be discussed further.

'830 Infringement

Since **[**49]** we have held patent '830 to be invalid because of *35 U.S.C. § 102(d)* any discussion of infringement is normally unnecessary because there can be no infringement of an invalid patent. Nonetheless, we would like to make a brief observation on this point. We believe that the trial court's finding of no infringement was proper. Though the Lambert burner manufactured by defendants is visibly similar to plaintiffs' structure, the depth of defendants' device **[*995]** is greater than the diameter of the mixing tube. Inventor Schwank, however, conditioned each of his claims on the "depth of the said dish-shaped body member between said wall and said flat fuel-outlet burner means being not substantially greater than the diameter of the said mixing **[***735]** tube. * * *" After being denied a patent by the Examiner, Schwank appealed to the Board of Appeals emphasizing this particular dimensional characteristic. The Board was favorably impressed and primarily on the basis of this dimensional achievement the patent was granted. Therefore, plaintiffs having been granted a patent in a very crowded field of art on the very narrow ground of dimensional variation are not in an equitable **[**50]** position to object when another party substantially varies these dimensions. *Smith v. Mid-Continent Inv. Co., 106 F.2d 622* (8 Cir. 1939). A person having a valid patent only by virtue of narrowly limited and strictly construed claims cannot expect the courts to construe a broad interpretation of the patent in order to find infringement. *Dominion Magnesium Limited v. United States, 320 F.2d 388, 162 Ct.Cl. 240 (1963)*; *Industrial Instrument Corporation v. Foxboro Company, 307 F.2d 783* (5 Cir. 1962). Under the circumstances of this case we believe that even if the patent were valid, plaintiffs have not borne their burden of proving infringement.

Anti-Trust Counterclaim

As a counterclaim for affirmative relief defendants have alleged that the licensing agreement between plaintiffs, American Infra-Red and Hupp Corporation, is a violation of the anti-trust law entitling them to treble damages.

We observe from the record that American Infra-Red, as the assignee of the inventor, granted to Hupp Corporation a so-called nonexclusive license to manufacture and sell radiant gas burners within the claims and specifications of patent '830. With **[**51]** the granting of this license Hupp agreed to purchase all of the tile (patent '294) that was resold to third parties or used in the manufacture of the burner from American Infra-Red. [7] Since there was no apparent payment for the license nor any agreement to pay royalties it would seem that the consideration for the license was Hupp's agreement to purchase all the necessary tile exclusively from American Infra-Red. This agreement, then, has the appearance of an exclusive dealing contract which was "tied", as a condition, to the issuance of the license. It is well known that ***HN25***[] exclusive dealing contracts, especially when tied to the lease or sale of another product, while admittedly not illegal per se, are carefully scrutinized by the courts. "When the effect of such arrangements 'may be to substantially lessen competition or tend to create a monopoly' they are made unlawful by section 3 of the Clayton Act." 2 Toulmin's Anti-Trust Laws, § 15.7 (1950).

[52]** We note, however, that proof of an isolated violation of substantive law will not entitle defendants to an affirmative recovery. Before a party is entitled to recover treble damages he must be able to plead and prove actual monetary injury **[*996]** to his business or property resulting from the illegal act. *15 U.S.C., § 15*; *Duff v. Kansas City Star Company, 299 F.2d 320* (8 Cir. 1962). It has long been the law that damages which are purely speculative, remote, or based upon conjecture cannot serve as a base for anti-trust recovery. *Siegfried v. Kansas City Star Company, 298 F.2d 1* (8 Cir. 1962). Although the mere difficulty of exact proof will not deprive a party of

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[7] The pertinent part of the licensing agreement dated July 1, 1956 is as follows:

"American Infra-Red hereby grants and agrees to grant to Hupp the following:

"(a) A royalty free, non-exclusive license to use and/or sell said radiant plates ['294] and a royalty free, non-exclusive license to make, have made, use and/or sell said gas burning equipment ['830] (but not including the license to make or have made said radiant plates, * * *)"

Section (b) provides that Hupp has the right to make or have made the radiant plates in the event that American Infra-Red is unable to supply them in the prescribed numbers. The pertinent part of the sales agreement dated July 1, 1956 is as follows:

"Buyer agrees to purchase and Seller agrees to sell to Buyer * * * all said radiant plates required for use or replacement in radiant gas burners * * * made by or for Buyer and all said radiant plates which Buyer resells to third parties."

relief, still damages to be awarded must be susceptible of expression in figures founded upon some reasonable basis of computation. National Wrestling Alliance v. Myers, 325 F.2d 768 (8 Cir. 1963).

The trial court held, "That there has been a failure of proof required to establish any violation of either the Sherman Act * * * or the Clayton Act * * * that would permit awarding damages to Defendants. Both of these Acts require damages to be proved **[**53]** beyond any evidence submitted and relied upon by Defendants." Upon reviewing the evidence and the arguments in this case we are in agreement with the finding of the trial court. Defendants have, indeed, failed to produce any concrete evidence of monetary damage and as a consequence are not entitled to recovery.

[*736]** As an element of damage defendants have argued that the agreement between American Infra-Red and Hupp has precluded them from selling tiles to Hupp. This allegation, however, does not serve as a basis for computing monetary loss. This mere reiteration of the substantive charge leaves the finder of fact completely at sea without any guide for effective assessment of actual injury. Defendants have produced no facts or figures as to how much business was lost due to being precluded from this part of the market or how many tiles they would have sold to Hupp had it not been for this agreement. The finding of monetary damage, under the circumstances, would have to be purely speculative and without evidentiary support in the record. Something more definite than this must be produced to show actual injury to defendants' business or property.

As a second point defendants allege **[**54]** that the expense of defending the patent infringement segment of this litigation could serve as a basis for awarding treble damages and cite three cases in support of this theory. Clapper v. Original Tractor Cab Company, 270 F.2d 616 (7 Cir. 1959); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10 Cir. 1952); Dairy Foods, Incorporated v. Dairy Maid Products Cooperative, 297 F.2d 805 (7 Cir. 1961).

In examining this contention we see that the ***HN26***[] statute, which affords the private cause of action, clearly requires a causal connection between the "injury in his business or property" and the anti-trust violation. 15 U.S.C. § 15; [8] Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2 Cir. 1959) cert. denied *361 U.S. 885, 80 S. Ct. 156, 4 L. Ed. 2d 121*. It follows, therefrom, that the expense of defending a patent infringement suit could not be considered as a per se element in determining treble damages in an anti-trust counterclaim. As stated in the Kobe **[**55]** case, supra, cited by defendants in 198 F.2d at p. 425, "If there was nothing more than the bringing of the infringement action, resulting damages could not be recovered. * *." In order, therefore to recover damages the law requires there be a showing of a causal connection between the infringement suit and the anti-trust activities. Upon a showing that the infringement litigation was initiated as part of the illegal scheme, it is conceivable that its defense could be considered as an "injury" under the anti-trust statutes. This, in fact, is exactly what defendants' cases say. ***HN27***[] Patent litigation expense may only be considered in anti-trust counterclaims, "Where an infringement suit is brought as part of and in furtherance of a combination and conspiracy * * *." **[*997]** Dairy Foods, Incorporated v. Dairy Maid Products Cooperative, 297 F.2d 805, 809 (7 Cir. 1961). Therefore, whenever the patent litigation is initiated pursuant to a lawful purpose and there is no causal connection between the bringing of the action and the illegal conduct, the cost of the defense **[**56]** of the suit cannot become an element of damage which is tripled under the Clayton Act. See, Malta Manufacturing Company v. Osten, 215 F. Supp. 114 (E.D.Mich.1963).

Applying this law to the facts of this case, there is no indication that the initiation of this suit was inspired by any monopolistic conspiracy or was a veiled attempt to unjustly drive plaintiffs' competitors to the wall. In fact, all indications point out that this suit was brought with clean hands in a good faith attempt to protect plaintiffs' patent rights, which they were fully entitled to do under the patent law. Indeed, the trial court specifically found that plaintiffs had been guilty of no patent misuse in the initiation of this suit. Further, it is our belief that this litigation was not precipitated by any monopolistic activity, but **[**57]** rather the dispute over the validity and infringement of these patents would have existed regardless of the particulars of the licensing agreement between the individual plaintiffs. The defense of this suit is, therefore, an expense attributable, not to the allegedly illegal contracts but

[8] 15 U.S.C. § 15 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 * *."

solely to a dispute over the two patents. There being no proof of any causal connection between the patent litigation and the allegedly illegal contracts, and it not being shown that the suit was initiated in furtherance of any monopolistic scheme or conspiracy, we believe that defendants have failed to prove these litigation expenses are anti-trust damages.

In addition we recognize the fact there is authority that no patent litigation expense may be recovered as treble damages in an anti-trust counterclaim. The leading case taking this approach is *Straus v. Victor Talking Machine Co., 297 F. 791* (2 Cir. 1924) and cited with approval by *Malta Manufacturing Company* ***[***737]*** *v. Osten, 215 F. Supp. 114 (E.D.Mich.1963)*. The rationale of these cases is that allowance of such a recovery would inhibit free resort to the courts.

Although we do recognize the abstract possibility that **[**58]** the contractual arrangements of plaintiffs, in their totality, might come into conflict with provisions of the anti-trust law, we have based our decision herein solely upon the judgment of the trial court on the basis that the ruling was not clearly erroneous. In no way is our decision to be interpreted as indicating whether we believe there has been a substantive violation of the anti-trust law. On this basis the judgment of the trial court on this issue is affirmed.

Costs

The trial court ruled that each party was to bear his own costs and disbursements. In view of the outcome of this appeal it is our conclusion that this division of costs should be modified.

Neither party has prevailed in his claim for affirmative relief. We have held both of plaintiffs' patents invalid, and even if not invalid aside from the statutory bar patent '830 could not be considered infringed upon. Defendants, on the other hand, have wholly failed to prove damages which would entitle them to recover on the anti-trust counterclaim. In this connection we observe that the bulk of this litigation was devoted to the patents, their validity and infringement, with only a minority of the courts' and **[**59]** parties' time being directed to the anti-trust allegations. We believe, therefore, that three-fourths of the cost of printing 30 copies of the record shall be borne by and assessed against plaintiffs, who initiated the patent litigation, and the remaining one-fourth of said cost shall be borne by and assessed against defendants, who are responsible for the anti-trust litigation.

Plaintiffs' appeal No. 18054 seeks reversal of the portion of the District Court's judgment finding no infringement upon the patents. Since we have held that U.S. Patents No. 2775294 and **[*998]** No. 2870830 are invalid and an invalid patent cannot be infringed, the awarding of judgment to defendants-appellees on the patent infringement action is affirmed.

Defendants' appeal No. 18055 seeks reversal of the portions of the District Court's judgment holding the two patents to be valid and denying relief on the anti-trust counterclaim. For the reasons set out herein the District Court's determination of validity is reversed and its denial of relief on the counterclaim is affirmed.

Therefore, on the patent infringement suit judgment shall be entered in favor of defendants-appellants on the basis that **[**60]** the patents in question are invalid. On the anti-trust counterclaim judgment shall be entered in accordance with the judgment of the District Court in favor of plaintiffs-appellees on the basis of failure of proof on damages.

Affirmed in part. Reversed in part.

[United States v. Von's Grocery Co.](#)

Supreme Court of the United States

March 22, 1966, Argued ; May 31, 1966, Decided

No. 303

Reporter
384 U.S. 270 *; 86 S. Ct. 1478 **; 16 L. Ed. 2d 555 ***; 1966 U.S. LEXIS 2823 ****; 1966 Trade Cas. (CCH) P71,780

UNITED STATES v. VON'S GROCERY CO. ET AL.

Prior History: [**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Disposition: *233 F.Supp. 976*, reversed.

Core Terms

merger, chains, Markets, concentration, Food, competitors, acquisitions, grocery, firms, Shopping, retail, largest, sales, single-store, top, market share, horizontal, Giant, lessen competition, grocery store, Clayton Act, combined, market-extension, monopoly, chain store, incipiency, arresting, smaller, legislative history, large number

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency."

Lawyers' Edition Display

Summary

The United States brought an action in the United States District Court for the Southern District of California charging that the acquisition by a corporation of its direct competitor, both large retail grocery companies in Los Angeles, California, violated 7 of the Clayton Act, as amended in 1950, which proscribes the acquisition by one corporation of the assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. After the District Court refused to grant the government's motion for a temporary restraining order, one of the corporations took over all of the other's capital stock and assets, including 36 grocery stores in the Los Angeles area. After hearing evidence, the District Court entered judgment for the defendants, concluding as a matter of law that there was not a reasonable probability that the merger would tend substantially to lessen competition or create a monopoly in violation of 7. (*233 F Supp 976*.)

On the government's direct appeal, the Supreme Court of the United States reversed. In an opinion by Black, J., expressing the view of six members of the Court, it was held that the merger violated 7, in view of the merging companies' share of the market, the substantial decrease of the number of single-store grocery firms in the market, both before and after the merger, and the concentration of the grocery business into the hands of fewer and fewer owners. The District Court was directed to order divestiture without delay.

White, J., joined the Court's opinion in a separate concurring opinion, pointing out that the merger not only disposed of a substantial competitor but increased the concentration in the leading firms.

Stewart, J., joined by Harlan, J., dissented on the ground that it was not shown that the effect of the merger may be substantially to lessen competition, or to tend to create a monopoly, as required by 7.

Fortas, J., did not participate.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger of grocery chain stores --
> Headnote:
LEdHN[1][] [1]

The prohibition in 7 of the amended Clayton Act (*15 USC 18*) of the acquisition by one corporation of the assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly is violated by a merger of two large retail grocery companies in Los Angeles, where the record showed that in the year of the merger (1960) the sales of the combined companies were 7.5 percent of the total $ 2,500,000,000 of retail groceries sold in the Los Angeles market each year; the merger created the second largest grocery chain in Los Angeles, with sales of almost $ 172,488,000 annually; the number of single-store grocery firms decreased from 5,365 in 1950 to 3,818 in 1961, and by 1963 had dropped still further to 3,590, while from 1953 to 1962 the number of chains with two or more grocery stores increased from 96 to 150; the small companies were continually being absorbed by the larger firms through mergers, 9 of the top 20 chains acquiring 126 stores from their smaller competitors in the period from 1949 to 1958.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of antitrust acts -- > Headnote:
LEdHN[2][] [2]

The purpose of the Sherman Antitrust Act and of the Clayton Act is to prevent economic concentration in the American economy by keeping a large number of small competitors in business.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > prohibition of mergers -- > Headnote:
LEdHN[3][] [3]

The 1960 Amendment (64 Stat 1125) of 7 of the Clayton Act (*15 USC 18*) broadens its scope so as to prohibit not only mergers between competitors the effect of which "may be substantially to lessen competition or to tend to create a monopoly" but to prohibit all mergers having that effect; these terms look not merely to the actual present effect of a merger but instead to its effect upon future competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > mergers -- > Headnote:
LEdHN[4][] [4]

Where concentration is gaining momentum in a market, the Supreme Court of the United States must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > mergers -- > Headnote:
LEdHN[5][] [5]

If ever a merger of two already powerful companies in a way which makes them even more powerful than they were before would not violate 7 of the Clayton Act (*15 USC 18*), it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner- competitors.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- impact on competition -- > Headnote:
LEdHN[6][] [6]

Determination of the question whether the effect of a merger "may be substantially to lessen competition" in the relevant market, so as to bring the merger within the prohibition of 7 of the Clayton Act (*15 USC 18*), requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.

APPEAL §1701 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §78 > reversal of dismissal of complaint -- divestiture order -- > Headnote:
LEdHN[7][] [7]

In a civil action charging a violation of 7 of the Clayton Act (*15 USC 18*) by one grocery company merging with another, wherein the defendants had knowledge of the antitrust charge prior to the effectuation of the merger, but the Federal District Court dismissed the complaint after a trial, the Supreme Court of the United States, determining that the merger violates 7, will not only reverse the District Court's judgment, but also direct it to order divestiture without delay.

Syllabus

The United States charged that the acquisition in 1960 by Von's Grocery Company of Shopping Bag Food Stores, a competitor in the retail grocery market in the Los Angeles area, violated § 7 of the Clayton Act. After a hearing the District Court concluded that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7 and entered judgment for the appellees. *Held*: The merger of two of the largest and most successful retail grocery companies in a market area characterized by a steady decline, before and after the merger, in the number of small grocery companies, combined with significant absorption of small firms by larger ones, is a violation of § 7 of the Clayton Act. Pp. 274-279.

(a) By the enactment of the Celler-Kefauver amendment to § 7 in 1950 Congress sought to preserve competition among small businesses by halting a trend toward concentration **[****2]** in its incipiency and thus the courts must be alert to protect competition against increasing concentration through mergers especially where concentration is gaining momentum in the market. Pp. 276-277.

(b) This case presents the precise situation which Congress intended to proscribe, where two powerful companies merge to become more powerful in a market exhibiting a marked trend toward concentration. Pp. 277-278.

(c) Section 7 requires not only an appraisal of the immediate impact of the merger on competition but a prediction of the merger's effect on competitive conditions in the future, to prevent the destruction of competition. *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362*. P. 278.

(d) Since the appellees were on notice of the antitrust charge, the judgment is reversed and the District Court is directed to order divestiture without delay. P. 279.

Counsel: Richard A. Posner argued the cause for the United States. With him on the brief were Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, James J. Coyle and John F. Hughes.

William W. Alsup argued the cause for appellees. With him on the brief were Warren M. **[****3]** Christopher and William W. Vaughn.

Henry J. Bison, Jr., argued the cause and filed a brief for the National Association of Retail Grocers of the United States, as amicus curiae, urging affirmance.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White; Fortas took no part in the consideration or decision of this case.

Opinion by: BLACK

Opinion

[*271] **[***557]** **[**1479]** MR. JUSTICE BLACK delivered the opinion of the Court.

On March 25, 1960, the United States brought this action charging that the acquisition by Von's Grocery Company of its direct competitor Shopping Bag Food Stores, both large retail grocery companies in Los Angeles, California, violated § 7 of the Clayton Act which, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, provides in relevant part:

HN1[] "That no corporation engaged in commerce . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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." [1]

On March 28, 1960, three days later, the District Court refused to **[****4]** grant the Government's motion for a temporary restraining order and immediately Von's took over all of Shopping Bag's capital stock and assets including 36 grocery stores in the Los Angeles area. After **[*272]** hearing evidence on both sides, the District Court made findings of fact and concluded as a matter of law that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7. For this reason the District Court entered judgment for the defendants. *233 F.Supp. 976, 985*. The Government appealed directly to this Court as authorized by § 2 of the Expediting Act. [2] The sole question here is whether the District Court properly concluded on the facts before it that the Government had failed to prove a violation of § 7.

[**5]** LEdHN[1][] [1]The record shows the following facts relevant to our decision. The market involved here is the retail grocery market in the Los Angeles area. In 1958 Von's retail sales ranked third in the area and Shopping Bag's ranked sixth. In 1960 their sales together were 7.5% of the total two and one-half billion dollars of retail groceries sold in the Los Angeles market each year. For many years before the merger both **[***558]** companies had enjoyed great success as rapidly growing companies. From 1948 to 1958 the number of Von's stores in the Los Angeles area practically doubled from 14 to 27, while at the same time the number of Shopping Bag's stores jumped from 15 to 34. During that same decade, Von's sales increased fourfold and its share of the market almost doubled while Shopping Bag's sales multiplied seven times and its share of the market tripled. The merger of these two highly successful, expanding and aggressive competitors created the second largest grocery chain in Los Angeles with sales of almost $ 172,488,000 annually. In addition the findings of the District Court show that **[*273]** **[****6]** the number of owners operating single stores in the Los Angeles retail grocery market decreased from 5,365 in 1950 to 3,818 in 1961. By 1963, three years after the merger, the number of single-store owners had dropped still further to 3,590. [3] During roughly the same period, **[**1480]** from 1953 to 1962, the number of chains with two or more grocery stores increased from 96 to 150. While the grocery business was being concentrated into the hands of fewer and fewer owners, the small companies were continually being absorbed by the larger firms through mergers. According to an exhibit prepared by one of the Government's expert witnesses, in the period from 1949 to 1958 nine of the top 20 chains acquired 126 stores from their smaller competitors. [4] Figures

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[1] 38 Stat. 731, as amended by 64 Stat. 1125, *15 U. S. C. § 18 (1964 ed.)*.

[2] 32 Stat. 823, as amended by 62 Stat. 989, *15 U. S. C. § 29 (1964 ed.)*.

[3] Despite this steadfast concentration of the Los Angeles grocery business into fewer and fewer hands, the District Court, in Finding of Fact No. 80, concluded as follows:

"There has been no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area either in the last decade or since the merger. On the contrary, economic concentration has decreased . . . ."

This conclusion is completely contradicted by Finding No. 23 which makes plain the steady decline in the number of individual grocery store owners referred to above. It is thus apparent that the District Court, in finding No. 80, used the term "concentration" in some sense other than a total decrease in the number of separate competitors which is the crucial point here.

[4] Appellees, in their brief, claim that 120 and not 126 stores changed hands in these acquisitions:

of a principal defense witness, set out below, illustrate the many acquisitions and mergers in the Los Angeles grocery industry from 1954 through 1961 including acquisitions made by Food Giant, Alpha Beta, Fox, and **[*274]** Mayfair, all among the 10 leading chains in the area. [5] Moreover, a table prepared by the Federal Trade Commission appearing in the Government's reply brief, but not a part of the record here, shows that **[****7]** acquisitions and mergers in the Los Angeles retail grocery market have continued at a rapid rate since the merger. [6] These facts alone are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7. Accordingly, we reverse.

From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly -- that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation's industries **[***559]** were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers. Several years later, in 1897, this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition "by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves in their altered surroundings." *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 323*. **[****9]** [7] The Sherman Act failed to protect the smaller businessmen **[*275]** from elimination through the monopolistic pressures of large combinations which used mergers to grow ever more powerful. As a result in 1914 **[**1481]** Congress, viewing mergers as a continuous, pervasive threat to small business, passed § 7 of the Clayton Act which prohibited corporations under most circumstances from merging by purchasing the stock of their competitors. Ingenious businessmen, however, soon found a way to avoid § 7 and corporations began to merge simply by purchasing their rivals' assets. This Court in 1926, over the dissent of Justice Brandeis, joined by Chief Justice Taft and Justices Holmes and Stone approved this device for avoiding § 7 [8] and mergers continued to concentrate economic power into fewer and fewer hands until 1950 when Congress passed the Celler-Kefauver Anti-Merger Act now before us.

LEdHN[2][] [2]***LEdHN[3]***[] [3]***LEdHN[4]***[] [4]Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. [9] In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market. [10] The period from 1940 to

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"It should also be noted here that the exhibit is in error in showing an acquisition by Food Giant *from itself* of six stores doing an annual volume of $ 31,700,000. Actually this was simply a change of name by Food Giant . . . ."

[5] **[****8]** These figures as they appear in a table in the Brief for the United States show acquisitions of retail grocery stores in the Los Angeles area from 1954 to 1961: See Appendix, Table 1, substantially reproducing the above-mentioned table.

[6] See Appendix, Table 2.

[7] Later, in 1945, Judge Learned Hand, reviewing the policy of the antitrust laws and other laws designed to foster small business, said, "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Co. of America, 148 F.2d 416, 429*.

[8] **[****10]** *Thatcher Manufacturing Co*. v. *Federal Trade Commission, 272 U.S. 554, 560*.

[9] See, *e. g., U.S*. v. *Philadelphia Nat. Bank, 374 U.S. 321, 362-363*; *United States v. Alcoa, 377 U.S. 271, 280*.

[10] Representative Celler, in introducing the bill on the House floor, remarked:

1947, which was at **[*276]** the center of attention throughout the hearings and debates on the Celler-Kefauver bill, had been characterized **[***560]** by a series of mergers between large corporations and their smaller competitors resulting in the steady **[****11]** erosion of the small independent business in our economy. [11] As we said in *Brown Shoe Co*. v. United States, 370 U.S. 294, 315, "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." To arrest this "rising tide" toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress **[**1482]** decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by "plugging its loophole" and broadened its scope so **[*277]** as not only to prohibit mergers between competitors, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big **[****12]** companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers. [12]

LEdHN[5][] [5] **[****14]** The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt. The number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards. This rapid decline in the number of grocery store owners moved hand in hand with a large number of significant absorptions of the small companies by the larger ones. In the midst of this steadfast trend toward concentration, Von's and Shopping Bag, two of the most successful and largest companies in the area, jointly owning 66 grocery stores merged to become the second largest chain in Los Angeles. This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor. [13] What we have on the contrary **[*278]** is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. **[***561]** If ever such a merger would not **[****15]** violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.

"Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration." 95 Cong. Rec. 11486.

Senator Kefauver expressed the same fear on the Senate floor:

"I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . ? Or on the other hand are we going to preserve small business, local operations, and free enterprise?" 96 Cong. Rec. 16450.

References to a number of other similar remarks by other Congressmen are collected in *Brown Shoe Co*. v. United States, 370 U.S. 294, 316, n. 28.

[11] **[****13]** H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, described this characteristic of the merger movement as follows:

". . . the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals. More than 70 percent of the total number of firms acquired during 1940-47 have been absorbed by larger corporations with assets of over $ 5,000,000. In contrast, fully 93 percent of all the firms bought out held assets of less than $ 1,000,000. Some 33 of the Nation's 200 largest industrial corporations have bought out an average of 5 companies each, and 13 have purchased more than 10 concerns each."

[12] See, *e. g., Brown Shoe Co*. v. United States, 370 U.S., at 346; *U.S*. v. Philadelphia Nat. Bank, 374 U.S., at 362. See also *United States* v. *du* Pont & Co., 353 U.S. 586, 597, interpreting § 7 before the Celler-Kefauver Anti-Merger amendment.

[13] See *Brown Shoe Co*. v. United States, 370 U.S., at 319.

LEdHN[6][] [6]Appellees' primary argument is that the merger between Von's and Shopping Bag is not prohibited by § 7 because the Los Angeles grocery market was competitive before the merger, has been since, and may continue to be in the future. Even so, § 7 HN2[] "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *U.S.* v. Philadelphia Nat. Bank, 374 U.S. 321, 362. **[****16]** It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce **[**1483]** this congressional command. [14] We adhere to them now.

[*279] LEdHN[7][] [7] **[****17]** Here again as in United States v. El Paso Gas Co., 376 U.S. 651, 662, since appellees "have been on notice of the antitrust charge from almost the beginning . . . we not only reverse the judgment below but direct the District Court to order divestiture without delay." See also *United States* v. *du* Pont & Co., 366 U.S. 316; United States v. Alcoa, 377 U.S. 271, 281.

Reversed and remanded.

[*562]** MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT.

TABLE 1.

Food store acquisitions in the Los Angeles metropolitan area 1954-61

Year	Acquiring firm	Acquired firm	Numberof stores acquired
1957	Piper Mart	Bi-Right & Big Bear	3
1958	Mayfair	Bob's Supermarket	7
1961	Better Foods	Border's Markets	3
1954	Kory's Markets	Carty Brothers	8
1958	Food Giant	Clark Markets	10
1956	Fox	Desert Fair	4
1959	Lucky	Hiram's	6
1958	Fox	Iowa Pork Shops	11
1961	Food Giant (and others)	McDaniel's Markets	16
1957	Food Giant	Panorama Markets	3
1958	Pix	Patton's Mkts	3
1958	Alpha Beta	Raisin Markets	13
1960	Piggly Wiggly	Rankins Markets	4
1959	Pix	S & K Markets	2
1960	Von's	Shopping Bag	37

[14] See, *e. g., Brown Shoe Co*. v. United States, 370 U.S. 294; *U.S*. v. Philadelphia Nat. Bank, 374 U.S. 321; United States v. El Paso Gas Co., 376 U.S. 651; United States v. Alcoa, 377 U.S. 271; United States v. Continental Can Co., 378 U.S. 441; FTC v. Consolidated Foods, 380 U.S. 592.

TABLE 1.

Food store acquisitions in the Los Angeles metropolitan area 1954-61

Year	Acquiring firm	Acquired firm	Numberof stores acquired
1959	Pix	Shop Right Markets	3
1958	Yor-Way	C. S. Smith	5
1957	Food Giant	Toluca Marts	2
1957	Mayfair	U-Tell-Em Markets	10
	Total		150

[**18] [*280]**

TABLE 2.

[1] ***Food store acquisitions in the Los Angeles metropolitan area 1961-64***

Year	Acquiring company	Acquired company (or stores)			Type of acquisition	
		Name	Number of stores	Sales (thousands)[2]	Horizontal	Other
1961	Acme Markets	Alpha Beta Food Markets	45	$ 79,042		X
1961	Boys Markets	Korys Markets	5	10,000	X	
	Food Giant Markets	McDaniels Markets	9	21,500	X[3]	
	Mayfair Markets	Yorway Markets	1	1,500	X	
		Alpha Beta Food Markets	1	1,700	X	
1962	Mayfair Markets	Schaubs Market	1	1,800	X	
		Fox Markets	1	2,200	X	
	Ralph's Grocery Co	Imperial Supreme Markets	1	916	X	
1963	Food Fair Stores	Fox Markets	22	44,419		X
	Kroger	Market Basket	53	110,860		X
	Mayfair Markets	Bi Rite Markets	1	2,569	X	

[1] Consists of Los Angeles and Orange Counties. (1963 census defined the Los Angeles metropolitan area as Los Angeles County only.)

[2] In most cases, sales are for the 12-month period prior to acquisition.

[3] According to a statement made by Von's counsel at oral argument, this acquisition did not take place in 1961, but instead Food Giant bought seven of McDaniel's stores in 1964. The acquisition in 1964 is listed in this table.

TABLE 2.

[1] ***Food store acquisitions in the Los Angeles metropolitan area 1961-64***

Year	Acquiring company	Acquired company (or stores) Name	Number of stores	Sales (thousands)[2]	Type of acquisition Horizontal	Other
		Dales Food Market	1	2,200	X	
		Food Giant Markets	1	1,700	X	
1964	Albertson's, Inc	Greater All American	14	30,308		X
	Mayfair Markets	Gateway Market	4	8,000	X	
		Pattons Markets	4	10,400	X	
	Ralph's Grocery Co	Cracker Barrel Super-market.	1	1,000	X	
	Food Giant Markets	McDaniels Markets	7	18,350	X	
	Total horizontal mergers.		38	83,835		
	Total market extension mergers.		134	264,629		

[**19]**

Concur by: WHITE

Concur

[*563]** **[**1484]** MR. JUSTICE WHITE, concurring.

As I read the Court's opinion, which I join, it does not hold that in any industry exhibiting a decided trend towards concentration, any merger between competing firms violates § 7 unless saved by the failing company doctrine; nor does it declare illegal each and every merger in such an industry where the resulting firm has as much **[*281]** as a 7.5% share of the relevant market. But here, in 1958 before the merger, the largest firm had 8% of the sales, Von's was third with 4.7% and Shopping **[****20]** Bag was sixth with 4.2%. The four largest firms had 24.4% of the market, the top eight had 40.9% **[***564]** and the top 12 had 48.8% as compared with 25.9%, 33.7% and 38.8% in 1948. All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10. Further, all but three of the top 10 had increased their market share between 1948 and 1958 and those which gained gained more than the three lost. Also, although three companies declined in market share their total sales increased in substantial amounts.

Given a trend towards fewer and fewer sellers which promises to continue, it **[**1485]** is clear to me that where the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary. Here Von's acquired Shopping Bag. Both were among the eight largest companies, both had grown substantially since 1948 and they were substantial competitors. After the merger the four largest firms had 28.8%, the eight largest had 44% and the 12 largest had 50%. The merger not only disposed of a substantial **[****21]** competitor but increased the concentration in the leading firms. In my view the Government sufficiently proved that the effect of this merger may be substantially to lessen competition or to tend to create a monopoly.

Dissent by: STEWART

Dissent

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

We first gave consideration to the 1950 amendment of § 7 of the Clayton Act in *Brown Shoe Co*. v. [United States, 370 U.S. 294]. The thorough opinion THE CHIEF JUSTICE wrote for the Court in that case made two **[*282]** things plain: First, the standards of § 7 require that every corporate acquisition be judged in the light of the contemporary economic context of its industry. [1] **[****22]** Second, the purpose of § 7 is to protect competition, not to protect competitors, and every § 7 case must be decided in the light of that clear statutory purpose. [2] Today the Court turns its back on these two basic principles and on all the decisions that have followed them.

The Court makes no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area. [3] Instead, through a simple exercise **[***565]** in sums, it finds that the number of individual competitors in the market has decreased over the years, and, apparently on the theory that the degree of competition is invariably proportional to the number of competitors, it holds that **[*283]** this historic reduction in the number of competing units is enough under § 7 to invalidate a merger within the market, with no need to examine the economic concentration of the market, the level of competition in the market, or the potential adverse effect of the merger on that competition. This startling *per se* rule **[****23]** is contrary not only to our previous decisions, but contrary to the language of § 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality.

Under § 7, as amended, a merger can be invalidated if, and only if, "the effect **[**1486]** of such acquisition may be substantially to lessen competition, **[****24]** or to tend to create a monopoly." No question is raised here as to the tendency of the present merger to create a monopoly. Our sole concern is with the question whether the effect of the merger may be substantially to lessen competition.

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[1] "[A] merger had to be functionally viewed, in the context of its particular industry." *Brown Shoe Co*. v. [United States, 370 U.S., at 321-322]. "Both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case." [Id., at 322, n. 38].

[2] "Taken as a whole, the legislative history illuminates congressional concern with protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co*. v. [United States, supra, at 320].

[3] This is the first case to reach the Court under the 1950 amendment to § 7 that involves a merger between firms engaged solely in retail food distribution. Kaysen & Turner, Antitrust Policy 40 (1959), have discussed this industry in the following terms:

"As a guess, we can say that the most important distributive trades, especially the food trades, are structurally unconcentrated in the metropolitan areas . . . . The significance of structural oligopoly in terms of policy is far different in [these trades] than in manufacturing and mining. . . . The traditional view that the local market industries are essentially competitive in character is probably correct . . . ."

The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies. [4] A major aspect of that fear was the perceived trend toward absentee ownership of local business. [5] Another, more generalized, congressional **[*284]** purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy. [6] These goals, Congress thought, could be achieved by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Brown Shoe Co*. v. *United States, supra, at 317*.

The concept of arresting restraints of trade in their "incipiency" was not **[****26]** an innovation of the 1950 amendment. The notion of incipiency was part of the report on the original Clayton Act by the Senate Committee on the Judiciary in 1914, and it was reiterated in the **[***566]** Senate report in 1950. [7] That notion was not left **[**1487]** undefined. **[*285]** The legislative history leaves no doubt that the applicable standard for measuring the substantiality of the effect of a merger on competition was that of a "reasonable probability" of lessening competition. [8] The standard was thus more stringent than that of a "mere possibility" on the one hand and more

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[4] See, *e. g*., H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, quoted in footnote 11 of the Court's opinion. Mention of the retail food industry is notably absent in the legislative history. Although it is clear that, in addition to the already highly oligopolized industries, Congress was also concerned with trends toward concentration in industries that were still highly fragmented, this case involves not even a remote approach to the "monster concentration" of which Representative Celler spoke in introducing the 1950 amendment in the House of Representatives. 95 Cong. Rec. 11486.

[5] **[****25]** See, *e. g*., Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on H. R. 2734, 81st Cong., 1st Sess., p. 12 (remarks of Senator Kefauver).

[6] Much of the fuel for the congressional debates on concentration in the American economy was derived from a contemporary study by the Federal Trade Commission on corporate acquisitions between 1940 and 1947. See Report of the Federal Trade Commission on the Merger Movement: A Summary Report (1948). A critical study of the FTC report, published while the 1950 amendment was pending in Congress, concluded that the effect of the recent merger movement on concentration had been slight. Lintner & Butters, Effect of Mergers on Industrial Concentration, 1940-1947, 32 Rev. of Econ. & Statistics 30 (1950). Two economists for the Federal Trade Commission later acquiesced in that conclusion. Blair & Houghton, The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940-1947, 33 Rev. of Econ. & Statistics 63, 67, n. 12 (1951).

[7] See S. Rep. No. 698, 63d Cong., 2d Sess., p. 1:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

See also S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4-5: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding;" *id*., p. 6: "The concept of reasonable probability conveyed by these words ['may be'] is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."

Thus, the Senate Reports on both the original Clayton Act and the 1950 amendment carefully delineate the "incipiency" with which the provisions are concerned as that of monopolization or classical restraints of trade under the Sherman Act. The notion that "incipiency" might be expanded to refer also to a lessening of competition first appeared in *Brown Shoe Co*. v. *United States, 370 U.S. 294, 317*.

[8] **[****27]** The Senate Report is clear on this point:

"The use of these words ['may be substantially to lessen competition'] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [*sic*] effect . . . . The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any lenient than that of a "certainty" on the other. [9] I cannot agree that the retail grocery **[*286]** business in Los Angeles is in an incipient or any other stage of a trend toward a lessening of competition, or that the effective level of concentration in the industry has increased. Moreover, there is no indication that the present merger, or the trend in this industry as a whole, augurs any danger whatsoever for the small businessman. The Court has substituted bare conjecture for the statutory standard of a reasonable probability that competition may be lessened. [10]

The **[***567]** Court rests its conclusion on the "crucial point" that, in the 11-year period between 1950 and 1961, the number of single-store grocery firms in Los Angeles decreased 29% from 5,365 to 3,818. [11] Such a decline **[*287]** should, of course, **[**1488]** be no more **[****29]** than a fact calling for further investigation of the competitive trend in the industry. For the Court, however, that decline is made the end, not the beginning, of the analysis. In the counting-of-heads game played today by the Court, the reduction in the number of single-store operators becomes a yardstick for automatic disposition of cases under § 7.

[**30]** I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined. [12] In any

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statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6.

See also 96 Cong. Rec. 16453 (remarks of Senator Kefauver). Cf. 51 Cong. Rec. 14463-14464 (amendment of Senator Reed).

[9] Although Congress eschewed exclusively mathematical tests for assessing the impact of a merger, it offered several generalizations indicative of the sort of merger that might be proscribed, *e. g.*: Whether the merger eliminated an enterprise that had been a substantial factor in competition; whether the increased size of the acquiring corporation threatened to give it a decisive advantage over competitors; whether an undue number of competing enterprises had been eliminated. H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *Brown Shoe Co*. v. *United States, 370 U.S. 294, 321, n. 36*. Only the first of these generalizations is arguably applicable to the present merger; the market-extension aspects of the merger, as well as the evidence of Shopping Bag's declining profit margin and weak price competition, suggest that any conclusion under this test would be equivocal. See *infra*, pp. 295-296; 298, n. 30. Senator Kefauver stated explicitly on the Senate floor that the mere elimination of competition between the merged firms would not make the acquisition illegal; rather, "the merger would have to have the effect of lessening competition generally." 96 Cong. Rec. 16456.

[10] **[****28]** Eighteen years ago, a dictum in *Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 46*, adverted to a "reasonable possibility" as the appropriate standard for the corresponding language ("may be to substantially lessen competition") under § 3 of the Clayton Act, *15 U. S. C. § 14*. The dictum provoked a sharp dissent in that case, *id., at 55, 57-58*, and the Court subsequently withdrew it, *Standard Oil Co*. v. *United States, 337 U.S. 293*, only to reinstate it again today. This issue, which appeared settled at the time of the 1950 amendment, provoked an acrimonious exchange during the Senate hearings. Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st & 2d Sess., pp. 160-168.

[11] The decline continued at approximately the same rate to 1963, the last year for which data are available, when there were 3,590 single-store grocery firms in the area. The record contains no breakdown of the figures on single-store concerns. In an extensive study of the retail grocery industry on a national scale, the Federal Trade Commission found that between 1939 and 1954 the total number of grocery stores in the United States declined by 109,000, or 28%. The entire decrease was suffered by stores with annual *gross* sales of less than $ 50,000. During the same period, the number of stores in all higher sales brackets increased. The Commission noted that the census figures, from which its data were taken, included an undetermined number of grocery firms liquidating after 1948 that merely closed their grocery operations and continued their remaining lines of business, such as nongrocery retailing, food wholesaling, food manufacturing, etc. Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing 48, 54 (1960).

[12] The generalized case against the Court's numerical approach is stated in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 312, n. 261:

"There are serious problems connected with the use of this yardstick. First, not every firm contributes equally to competition. In particular, there may be a fringe of firms too small to be able to affect price and production policies in the market as a whole. Alternatively, certain firms may be marginal in the sense that their costs and financial situations preclude them from having much, if any, impact on market conditions; indeed they may be able to remain in operation only because excessive profits are meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores **[*288]** themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes. [13] Affiliated **[***568]** with cooperatives that give the smallest store the buying strength of its largest competitor, new stores have taken full advantage of the remarkable ease of entry into the market. And, most important of all, the record simply cries out that the numerical decline in the number of single-store owners is the result of transcending social and technological changes that positively preclude the inference that competition has suffered because of the attrition of competitors.

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called "Mom and Pop" grocery stores -- the bakery and butcher shops, the vegetable and fish markets -- that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway. The transformation of American society since the Second World War has not completely shelved these specialty stores, but it has relegated them to a much less central role in our food economy. Today's **[****32]** dominant enterprise in food **[**1489]** retailing is the supermarket. Accessible to the housewife's automobile from a wide radius, it houses under a single roof **[*289]** the entire food requirements of the family. Only through the sort of reactionary philosophy that this Court long ago rejected in the Due Process Clause area can the Court read into the legislative history of § 7 its attempt to make the automobile stand still, to mold the food economy of today into the market pattern of another era. [14]

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being earned by the stronger firms. An [exit] of companies of this sort would have much less significance than a counting of corporate heads would imply."

[13] **[****31]** Between 1953 and 1961, the population of the Los Angeles metropolitan area increased from 4,300,000 to 6,800,000 and the average population per grocery store increased from 695 to 1,439. Additional opportunity for new stores in the area results from the geographical division of the city into numerous suburbs, as well as from the lack of specific store loyalty among new residents.

[14] Cf. *Ferguson v. Skrupa, 372 U.S. 726*. In criticizing a recent decision of the Federal Trade Commission, one commentator has stated, in terms applicable *mutatis mutandis* to the Court's decision in the present case:

". . . Any child alive in the 1950's could see that a restructuring of food retailing was then going on. The business was adjusting itself, through market mechanisms that included merger, to vast and profound changes in the American way of life. There is not a word in the FTC majority opinion that relates changes in the number of stores and chains to the proliferation of suburbs, the construction of shopping centers, and the final triumph of the supermarket -- an innovation in retailing that has since spread across the Western world. The most important single cause of these changes was the automobile revolution . . . which not even the FTC can stop.

. . .

". . . Plenty of living American men and women remember an era when virtually all groceries were sold through very small stores none of which had 'any significant market share.' Was this era the high point of competition in food retailing? Many little towns had, in fact, only one place where a given kind of food could be bought. In a typical city neighborhood, defined by the range of a housewife's willingness to lug groceries home on foot, there might be three or four relaxed 'competitors.' If she did not like the price or quality offered by them, she could take her black-string market bag, board a trolley car, and try her luck among the relaxed 'competitors' of some other neighborhood." Ways, A New "Worst" in Antitrust, Fortune, April 1966, pp. 111-112.

In the present case, the District Court found that in the era preceding the rise of the supermarkets, "the area from which the typical store drew most of its customers was limited to a block or two in any direction and if a particular grocery store happened to be the only one in its immediate neighborhood, it had a virtual monopoly of local trade." Thus, the Court's aphorism in *U.S.* v. *Philadelphia Nat. Bank, 374 U.S. 321, 363* -- that "competition is likely to be greatest when there are many sellers, none of which has any significant market share" -- is peculiarly maladroit in the historic context of the retail food industry. See also Hampe & Wittenberg, The Lifeline of America: Development of the Food Industry 313-372 (1964); Lebhar, Chain Stores in America 1859-1962, pp. 348-390 (1963).

[**33]** **[*290]** This **[***569]** is not a case in which the record is equivocal with regard to the status of competition in the industry in question. To the contrary, the record offers abundant evidence of the dramatic history of growth and prosperity of the retail food business in Los Angeles.

The District Court's finding of fact that there was no increase in market concentration before or after the merger is amply supported by the evidence if concentration is gauged by any measure other than that of a census of the number of competing units. Between 1948 and 1958, the market share of Safeway, the leading grocery chain in Los Angeles, declined from 14% to 8%. The combined market shares of the top two chains declined from 21% to 14% over the same period; for the period 1952-1958, the combined shares of the three, four, and five largest firms also declined. It is true that between 1948 and 1958, the combined shares of the top 20 firms in the market increased from 44% to 57%. The crucial fact here, however, is that seven of these top 20 firms in 1958 were not even in existence as chains in 1948. Because of the substantial turnover in the membership of the top 20 firms, the increase **[****34]** in market share of the top 20 as a group is hardly a reliable indicator **[**1490]** of any tendency toward market concentration. [15]

[*291] In addition, statistics in the record for the period 1953-1962 strongly suggest that the retail grocery industry in Los Angeles is less concentrated today than it was a decade ago. During this **[****35]** period, the number of chain store firms in the area rose from 96 to 150, or 56%. That increase occurred overwhelmingly among chains of the very smallest size, those composed of two or three grocery stores. Between 1953 and 1962, the number of such "chains" increased from 56 to 104, or 86%. Although chains of 10 or more stores increased from 10 to 24 during the period, seven of these 24 chains were not even in existence as chains in Los Angeles in 1953.[16]

Yet even these dramatic statistics do not fully reveal the dynamism and vitality of competition in the retail grocery business in Los Angeles during the period. The record shows that at various times during **[****36]** the period 1953-1962, no less than 269 separate chains were doing business in Los Angeles, of which 208 were two- or three-store chains. During that period, therefore, 173 new chains made their appearance in the market area, and 119 chains went out of existence as **[***570]** chain stores.[17] The vast majority of this market turbulence represented turnover in chains of two or three stores; 143 of the 173 new chains born during the period were chains of this **[*292]** size. Testimony in the record shows that, almost without exception, these new chains were the outgrowth of successful one-store operations.[18] There is no indication that comparable turmoil did not equally permeate single-store

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[15] See Joskow, Structural Indicia: Rank-Shift Analysis as a Supplement to Concentration Ratios, VI Antitrust Bulletin 9 (1961). In addition, the overall market share of the top 20 firms in fact showed a slight decline between 1958 and 1960. The statement in the concurring opinion in the present case, that "All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10," is based on conjecture. The record demonstrates only that the top four firms in 1948 were among the top 10 firms in 1958; the record neither identifies the remaining six of the top 10 firms in 1948 nor charts their subsequent history.

[16] For a similar study of the retail food industry at the national level, see Lebhar, Small Chain Virility a Bar to Monopoly, Chain Store Age, Jan. 1962, p. E20. See also Gould, The Relation of Sales Growth to the Size of Multi-Store Food Retailers 6 (1966) (inverse correlation found between sales growth and size of chains with four or more stores).

[17] Of these latter 119 chains, 66 went out of business altogether, 28 reduced their operations to a single store, and 25 were eliminated as separate competitors as a result of acquisitions by other chains.

[18] **[****37]** On the basis of these facts, one witness concluded:

"The apparent willingness and ability of grocers to expand and create new chain entities at the staggering rate of more than 17 a year, and the growth potential of new chains, precludes in my opinion the possibility that the retail grocery business in Los Angeles will become either monopolistic or oligopolistic in the foreseeable future. It must be remembered that in 1953, only 10 chains with as many as 10 stores each were operating in the area. These chains are recognized as being among the best managed, most successful and most aggressive supermarket operators in the country. They themselves have engaged in expansion programs of significant proportions since 1953. Yet, 10 years later, instead of having swept aside all competition and being left alone to compete among themselves, these same 10 chains are now faced with the necessity of competing against no less than 14 new chains of 10 or more stores each, a significantly greater number of smaller chains and a host of successful single store operators, of whom many are affiliated with powerful voluntary chains or other cooperative groups. . . . The growth operations in the **[**1491]** area.[19] In fashioning its *per se* rule, based on the net arithmetical decline in the number of single-store operators, the Court completely disregards the obvious procreative vigor of competition in the market as reflected in the turbulent history of entry and exit of competing small chains.

To support its conclusion the Court invokes three sets of data regarding absorption of smaller firms by merger with larger firms. In each of the acquisitions detailed **[*293]** in the Appendix, Tables 1 and 2 of the Court's opinion, the acquired units were grocery *chains*. Not one of these acquisitions was of a firm operating only a single store.[20] The Court cannot have it both ways. It is only among single-store operators that the decline in the unit number of competitors, so heavily relied upon by the Court, has taken place. Yet the tables reproduced in the Appendix show not a trace of merger activity involving the acquisition of single-store operators. And the number of *chains* in the area has in fact shown a substantial net increase during the period, in spite of the fact that some of the chains **[****39]** have been absorbed by larger firms. How then can the Court rely on these acquisitions as evidence of a tendency toward market concentration in the area?

The Court's use of market-acquisition data for the period 1954-1961,[21] prepared by the Government from **[***571]** the work sheets of a defense witness, is also questionable for another reason. During that period, Food Giant, Alpha Beta, Fox, and Mayfair were ranked 7th, 8th, 9th, and 10th, respectively, on the basis of the percentage of their sales in Los Angeles in 1958, so that the impact of their acquisitions, made in the face of competition by the top six chains, is considerably blunted. The remarkable feature disclosed by **[****40]** these data is that none of the top six firms in the area expanded by acquisition during the period.[22]

[*294] The Court's reliance on the fact that nine of the top 20 chains acquired 120 stores in the Los Angeles area between 1949 and 1958 does not withstand analysis in light of the complete record. Forty percent of these acquisitions, representing 48 stores with gross sales of more than $ 71,000,000, were made by Fox, Yor-Way, and McDaniels, which ranked 9th, 11th, and 20th, respectively, according to 1958 sales in the market. Each **[****41]** of these firms subsequently went into bankruptcy as a result of overexpansion, undercapitalization, or inadequate managerial experience. This substantial postacquisition demise of relatively large chains hardly comports with the Court's tacit portrayal of the inexorable march of the market toward oligopoly.

Further, the table relied on by the Court to sustain its view that acquisitions have continued in the Los Angeles area at a rapid rate in the three-year period following this merger indiscriminately lumps together horizontal and **[**1492]** market-extension mergers.[23] Only 29 stores, representing 13 acquisitions, were acquired in horizontal mergers, and the record reveals that nine of these 29 stores were acquired in the course of dispositions in bankruptcy. Such acquisitions of failing companies, of course, are immune from the Clayton Act. *International Shoe Co*. v. Federal Trade Commission, 280 U.S. 291, 301-303. Thus, at a time when the number of single-store concerns was well over 3,500, horizontal mergers over a three-year period between going concerns achieved at

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of independents into chains and of small chains into larger ones . . . demonstrates convincingly that small concerns don't have to remain small in Los Angeles."

[19] **[****38]** Data for 1960, the only year for which such figures are available in the record, reveal a comparable agitation of entry and exit among operators of single stores. Although there was a net loss of 132 single-outlet stores in 1960, 128 new single-outlet stores opened during the year.

[20] As to Table 1 in the Appendix of the Court's opinion, this fact is obvious on the face of the table. As to Table 2 in the Appendix, examination of the record discloses that each of the nine acquisitions listed as involving a single store represented purchases of single stores from chains ranging in size from two to 49 stores.

[21] See Table 1 in the Appendix of the Court's opinion.

[22] Table 1 in the Appendix of the Court's opinion is somewhat misleading in that it weights the data from which it is drawn in favor of the acquisition by grocery chains of other chains consisting of relatively larger numbers of store units. The complete data of the witness included several acquisitions of one- and two-store concerns, together with the disposition of one ten-store chain to various individuals.

[23] See Table 2 in the Appendix of the Court's opinion. This table, not a part of the record, was submitted by the Government in its reply brief, filed on the eve of oral argument.

most only the *de minimis* level of 10 acquisitions involving 20 stores. It cannot **[****42]** seriously be maintained that **[*295]** the effect of the negligible market share foreclosed by these horizontal mergers may be substantially to lessen competition within the meaning of § 7. Cf. *Brown Shoe Co*. v. *United States, 370 U.S. 294, 329*.

The great majority of the post-merger acquisitions detailed in Table 2 in the Appendix of the Court's opinion, *ante*, were of the market-extension type, involving neither the elimination of direct competitors in the Los Angeles market nor increased concentration of the market. There are substantial economic distinctions between such market-extension mergers and classical horizontal mergers. [24] Whatever the wisdom or logic of the Court's assumed **[***572]** arithmetic proportion between the number of single-store concerns and the level of competition within the **[****43]** meaning of § 7 as applied to horizontal mergers, it is simply not possible to make the further assumption that the mere occurrence of market-extension mergers is adequate to prove a tendency of the local market toward decreased competition.

Moreover, contrary to the assumption on which the Court proceeds, the record establishes that the present merger itself has substantial, even predominant, market-extension overtones. The District Court found that the Von's stores were located in the southern and western portions of **[****44]** the Los Angeles metropolitan area, and that the Shopping Bag stores were located in the northern and eastern portions. In each of the areas in which Von's and Shopping Bag stores competed directly, there were also at least six other chain stores and several **[*296]** smaller stores competing for the patronage of customers. On the basis of a "housewife's 10-minute driving time" test conducted for the Justice Department by a government witness, it was shown that slightly more than half of the Von's and Shopping Bag stores were not in a position to compete at all with one another in the market.[25] Even among those stores which competed at least partially with one another, the overlap in sales represented only approximately 25% of the combined sales of the two chains in the overall Los Angeles area. The present merger was thus three parts market-extension and only one part horizontal, but the Court nowhere recognizes this market-extension aspect that exists within the local market itself. The actual market share foreclosed by the elimination of Shopping Bag as an independent competitor was thus slightly less than 1% of the total grocery store sales in the **[**1493]** area. The **[****45]** share of the market preempted by the present merger was therefore practically identical with the 0.77% market foreclosure accepted as "quite insubstantial" by the Court in *Tampa Electric Co*. v. *Nashville Coal Co., 365 U.S. 320, 331-333*.

The irony of this case is that the Court invokes its sweeping new construction of § 7 to the detriment of a merger between two relatively successful, local, largely family-owned concerns, each of which had less than 5% of the local market and neither of which had any prior history of growth by acquisition. [26] In **[***573]** a sense, the defendants **[*297]** are being punished for the sin of aggressive competition. [27] The Court is inaccurate in its suggestions, *ante*,

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[24] See *Foremost Dairies, Inc., 60 F. T. C. 944*; *Beatrice Foods Co*., F. T. C. Docket No. 6653 (April 26, 1965); *National Tea Co*., F. T. C. Docket No. 7453 (March 4, 1966). Cf. *United States v. Penn-Olin Chemical Co., 378 U.S. 158*; *Procter & Gamble Co*., F. T. C. Docket No. 6901 (Nov. 26, 1963), rev'd *358 F.2d 74* (C. A. 6th Cir.); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313.

[25] Evidence introduced by the defendants indicated that the overlap between the Von's and Shopping Bag stores was significantly smaller than that proposed by the government witness.

[26] At the time of the merger in 1960, Von's operated 28 retail grocery stores in the Los Angeles area. It commenced operation as a partnership of the Von der Ahe family in 1932, during the depression, with a food concession in a small grocery store. Shopping Bag operated 36 stores in Los Angeles at the time of the merger; it commenced operation as a partnership in a small grocery store in 1930. So far as the record reveals, the competitive behavior of these firms was impeccable throughout their expansion, which took place solely by internal growth. In discussing the success of comparable firms *vis-a-vis* the Sherman Act, Judge Learned Hand stated, "The Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America, 148 F.2d 416, 430*.

[27] **[****47]** Nor is it altogether easy to escape the feeling that it is not so much this merger, but Los Angeles itself, that is being invalidated here. Cf. Adelman, Antitrust Problems: The Antimerger Act, 1950-60, 51 Am. Econ. Rev. 236, 243 (May 1961): "In

pp. 277-278, that the merger makes these firms more "powerful" than they were before, and that Shopping **[****46]** Bag was itself a "powerful" competitor at the time of the merger. There is simply no evidence in the record, and the Court makes no attempt to demonstrate, that the increment in market *share* obtained by the combined stores can be equated with an increase in the market *power* of the combined firm. And, although Shopping Bag was not a "failing company" within the meaning of our decision in *International Shoe Co*. v. *Federal Trade Commission, 280 U.S. 291, 301-303*, the record at **[*298]** least casts strong doubt on the contention that it was a powerful competitor. [28] The District Court found that Shopping Bag suffered from a lack of qualified executive personnel [29] **[**1494]** and that, although overall sales of the chain had been increasing, its earnings and profits were declining. [30] Further, the merger clearly comported with "the desirability of retaining 'local control' over industry" that the Court noted in *Brown Shoe Co*. v. *United States, 370 U.S. 294, 315-316*.

With regard to the "plight" of the small businessman, the record is unequivocal that his competitive position is strong and secure in the Los Angeles retail grocery industry. The most aggressive competitors against the larger retail chains are frequently the operators of single stores. [31] The vitality of these independents is directly **[*299]** attributable to **[***574]** the recent and spectacular growth in California of three large cooperative buying organizations. Membership in these groups is unrestricted; **[****49]** through them, single-store operators are able to purchase their goods at prices competitive with those offered by suppliers even to the largest chains. [32] The rise

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the antitrust dictionary, 'powerful' has no necessary connection with monopoly power or market control or even market share. It means . . . one four-letter word: size." Los Angeles is, to be sure, a big place. Although Shopping Bag's share of the Los Angeles market was only 4.2%, its sales in 1958 totaled $ 84,000,000. Compare the Court's statement in *Tampa Electric Co*. v. *Nashville Coal Co., 365 U.S. 320, 333-334*:

"It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $ 128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While $ 128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test . . . ."

[28] This is not a "merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market," *Brown Shoe Co*. v. *United States, 370 U.S. 294, 319*; cf. House Hearing, *supra*, n. 5, pp. 40-41; Senate Hearings, *supra*, n. 10, pp. 6, 51; 95 Cong. Rec. 11486, 11488, 11506; 96 Cong. Rec. 16436; H. R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 6-8; S. Rep. No. 1775, 81st Cong., 2d Sess., p. 4. However, the Court today in a gratuitous dictum, *ante*, p. 277, undercuts even that principle by confining it to cases in which competitors are obliged to merge to save themselves from *destruction* by a larger and more powerful competitor.

[29] **[****48]** Mr. Hayden, the president and principal stockholder of Shopping Bag, was advanced in years and was concerned over the absence of a strong management staff that could take over his responsibilities.

[30] Von's was a considerably more successful competitor than Shopping Bag. Shopping Bag's net income as a percentage of total sales declined from 1.6% in 1957 to 0.9% in 1959, and its net profit as a percentage of total assets declined from 6.6% to 3.2%. During the same period, the net income of Von's increased from 2.1% to 2.3%, and its net profits declined from 12.7% to 10.8%.

[31] One single-store operator, located adjacent to one supermarket and within a mile of two others, testified, "I have often been asked if I could compete successfully against this sort of competition. My answer is and always has been that the question is not whether I can compete against them, but whether they can compete against me."

Another single-store operator testified, "Competition in the grocery business is on a store-by-store basis and any aggressive and able operator like myself can out-compete the store of any of the chains because of personalized service, better labor relations, and being in personal charge of the store and seeing that it is run properly."

A third single-store operator testified, "The chains in this area are good operators, but when they grow too large, they are actually easier to compete with from an independent's viewpoint. If I had a choice, I would rather operate a store near a chain unit than near another independent."

[32] **[****50]** See generally Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing, c. VI, "Retailer-owned Cooperative Food Wholesalers"; c. VII, "Wholesaler-sponsored Voluntary Retail Groups" (1960). The annual sales of Certified Grocers of California, Ltd., a retailer-owned cooperative whose members do business principally in the Los Angeles area, rose fourfold from $ 87,000,000 in 1948 to $ 345,000,000 in 1962,

of these cooperative organizations has introduced a significant new source of countervailing power against the market power of the chain stores, without in any way sacrificing the advantages of independent operation. In the face of **[*300]** the substantial assistance available to independents through membership in such cooperatives, the Court's implicit equation between the market power and the market share resulting from the present merger seems completely invalid.

Moreover, it is clear that there are no substantial barriers **[****51]** to market entry. The record contains references to numerous highly successful instances of entry with modest initial investments. Many of the stores opened by new entrants were obtained through the disposition of unwanted outlets by chains; frequently the new competitors were themselves chain-store executives who had resigned to enter the market on their own. Enhancing **[**1495]** free access to the market is the absence of any such restrictive factors as patented technology, trade secrets, or substantial product differentiation.

Numerous other factors attest to the pugnacious level of grocery competition in Los Angeles, all of them silently ignored by the Court in its emphasis solely on the declining number of single-store competitors in the market. Three thousand five hundred and ninety single-store firms is a lot of grocery stores. The large number of separate competitors and the frequent price battles between them belie any suggestion that price competition in the area is even remotely threatened by a descent to the sort of consciously interdependent pricing that is characteristic of a market turning the corner toward oligopoly. The birth **[***575]** of dynamic new competitive **[****52]** forces -- discount food houses and food departments in department stores, bantams and superettes, deli-liquor stores and drive-in dairies -- promises unremitting competition in the future. In the more than four years following the merger, the District Court found not a shred of evidence that competition had been in any way impaired by the merger. Industry witnesses testified overwhelmingly **[*301]** to the same effect. By any realistic criterion, retail food competition in Los Angeles is today more intense than ever.

The harsh standard now applied by the Court to horizontal mergers may prejudice irrevocably the already difficult choice faced by numerous successful small and medium-sized businessmen in the myriad smaller markets where the effect of today's decision will be felt, whether to expand by buying or by building additional facilities. [33] And by foreclosing future sale as one attractive avenue of eventual market exit, the Court's decision may over the long run deter new market entry and tend to stifle the very competition it seeks to foster.

[**53]** In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under § 7 since the passage of the 1950 amendment. The sole consistency that I can find is that in litigation under § 7, the Government always wins. The only precedent that is even within sight of today's holding is *U.S*. v. *Philadelphia Nat. Bank, 374 U.S. 321*. In that case, in the interest of practical judicial administration, the Court proposed a simplified test of merger illegality: "We think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *U.S*. v. *Philadelphia Nat. Bank, supra, at 363*. [34] The merger **[*302]** between Von's and Shopping

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and the volume of its purchases exceeded that of all but the largest national chains doing business in Los Angeles. Most of the leading chains in the area began development in association with Certified Grocers, called the "mother" of the industry. In some cases the cooperatives were able to offer even lower prices to their members than competing chains could obtain. The District Court found that the cooperatives also provided their members with assistance in merchandising, advertising, promotions, inventory control, and even the financing of new entry.

[33] See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 302-303 (1960).

[34] In a footnote, the Court emphasized the corollary principle that, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *U.S*. v. *Philadelphia Nat. Bank, 374 U.S. 321, 365, n. 42*. That corollary, of course, has no application here, since the Los Angeles retail grocery market can in no sense be characterized as one in which "concentration is already great." Compare *United States v. Aluminum Co. of America, 377 U.S. 271*; *United States v. Continental Can Co., 378 U.S. 441*. The importance of a trend toward concentration in the particular industry in question was recognized in *Brown Shoe Co*. v. *United States, 370*

[1496]** Bag produced a firm with 1.4% of the grocery stores and 7.5% of grocery sales in Los Angeles, and resulted in an **[****54]** increase of 1.1% in the market share enjoyed by the two largest firms in the market and 3.3% in the market share of the six largest firms. The former two figures are hardly the "undue percentage" of the market, nor are the latter **[***576]** two figures the "significant increase" in concentration, that would make this merger inherently suspect under the standard of *Philadelphia Nat. Bank*. Instead, the circumstances of the present merger fall far outside the simplified test established by that case for precisely the sort of merger here involved. [35]

[**56]** **[*303]** The tests of illegality under § 7 were "intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. In *Philadelphia Nat. Bank*, the Court was at pains to demonstrate that its conclusion was consistent with cases under § 3 of the Clayton Act. See *U.S*. v. *Philadelphia Nat. Bank, 374 U.S. 321, 365-366*. The Court disdains any such effort today. Untroubled by the language of § 7, its legislative history, and the cases construing either that section or any other provision of the antitrust laws, the Court grounds its conclusion solely on the impressionistic assertion that the Los Angeles retail food industry is becoming "concentrated" because the number of single-store concerns has declined.

[*304] The emotional impact of a merger between the third and sixth largest competitors in a given market, however fragmented, is understandable, but that impact cannot substitute for the analysis of the effect of the merger on competition that Congress required by the 1950 amendment. Nothing in the present record indicates **[****57]** that there is more than an ephemeral possibility that the effect of this merger may be substantially to lessen competition. Section 7 clearly takes "reasonable probability" as its standard. That standard has not been met here, and I would therefore affirm the judgment of the District Court.

References

Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act (*15 USC 18*), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Right of one corporation to acquire stock in another as affected by the anti-trust acts. 74 L ed 431.

U.S. 294, 332. See also *Pillsbury Mills, Inc., 50 F. T. C. 555, 572-573*; *United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 604-607* (D. C. S. D. N. Y.); U.S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 124 (1955).

[35] **[****55]** As a result of the merger, the market share of the two largest firms increased from 14.4% to 15.5%, and the share of the six largest firms increased from 32.1% to 35.4%. The merger involved in *Philadelphia Nat. Bank* produced a single firm controlling 30% of the market, and resulted in an increase from 44% to 59% in the market share of the two largest firms in the market. The Court's opinion is remarkable for its failure to support its conclusion by reference to even a single piece of economic theory. I shall not dwell here on the barometers of competition that have been suggested by the commentators. But it seems important to note that the present merger falls either outside, or at the very fringe, of the various mechanical tests that have been proposed. See, *e. g*., Kaysen & Turner, Antitrust Policy 133-136 (1959) (horizontal merger with direct competitor is prima facie unlawful where acquiring company accounts for 20% or more of the market, or where merging companies together constitute 20% or more of the market; acquisitions producing less than 20% market control unlawful only where special circumstances are present, such as serious barriers to entry or substantial influence on prices by the acquired company); Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 176, 179-182 (1955) (acquisition unlawful if it produces a combined market share of 20% or more; acquisition permitted if the combined share is less than 5-10%); Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 308-329 (1960) (no merger by the dominant firm in an industry if its market share is increased by more than 2-3%; no merger by other large firms in the industry where the combined market shares of the two-to-eight largest firms after the merger are increased by 7-8% or more over the shares that existed at any time during the preceding 5-10 years; no merger where acquired firm has 5% market share or more). See also Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 521-522 (1957). The 40% rule promoted by the concurring opinion in the present case seems no more than an *ad hoc* endeavor to rationalize the holding of the Court.

FTC v. Brown Shoe Co.

Supreme Court of the United States

April 25, 1966, Argued ; June 6, 1966, Decided

No. 118

Reporter

384 U.S. 316 *; 86 S. Ct. 1501 **; 16 L. Ed. 2d 587 ***; 1966 U.S. LEXIS 2948 ****; 1966 Trade Cas. (CCH) P71,785

FEDERAL TRADE COMMISSION v. BROWN SHOE CO., INC.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Disposition: *339 F.2d 45*, reversed.

Core Terms

shoes, unfair, franchise, dealers, retail, customers, franchise agreement, practices, declare, Federal Trade Commission Act, competitors, lines

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > 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 > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN1[] **Public Enforcement, US Federal Trade Commission Actions**

Section 5(a)(6) of the Federal Trade Commission Act, *15 U.S.C.S. § 45 (a)(6)*, empowers and directs the Federal Trade Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. *15 U.S.C.S. § 45(a)(6)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

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 > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

See *15 U.S.C.S. § 45(a)(1)*.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN3[] **US Federal Trade Commission Actions, Remedial Powers**

The Federal Trade Commission (Commission) has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN4[] **Remedial Powers, Federal Trade Commission Act**

The Federal Trade Commission has power under § 5 of the Federal Trade Commission Act, *15, U.S.C.S. § 45*, to arrest trade restraints in their incipiency without proof that they amount to an outright violation of *§ 3* of the Clayton Act, *15 U.S.C.S. § 14*, or other provisions of the antitrust laws.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN5[] **US Federal Trade Commission Actions, Remedial Powers**

The Federal Trade Commission acted well within its authority in declaring a franchise program unfair whether it was completely full blown or not.

Lawyers' Edition Display

Summary

The Federal Trade Commission enjoined a large manufacturer of shoes from entering into franchise contracts with retail shoestore operators which obligated the manufacturer to give to the dealer, but not to the manufacturer's

other customers, valuable services, and in return required the dealers not to purchase conflicting lines of shoes from the manufacturer's competitors. On review, the Court of Appeals for the Eighth Circuit set aside the Commission's order on the ground that the manufacturer's practice was not an unfair method of competition in violation of 5 of the *Federal Trade Commission Act. (339 F2d 45*.)

On certiorari, the Supreme Court of the United States reversed. In an opinion by Black, J., expressing the unanimous view of the Court, it was held that the Commission acted well within its authority in declaring the manufacturer's franchise program unfair.

Headnotes

PRACTICES §56 > order of FTC -- review of findings -- > Headnote:
LEdHN[1][] [1]

A general conclusionary statement--made by a Court of Appeals in setting aside an order of the Federal Trade Commission which enjoined, as an unfair method of competition, a shoe manufacturer's entering into franchise contracts with retail shoestores requiring them not to purchase conflicting lines of shoes from competitors--that there was a complete failure to prove an exclusive dealing agreement which might be held violative of 5 of the Federal Trade Commission Act (*15 USC 45*) cannot be treated by the Supreme Court of the United States as intended to be a rejection of the Commission's findings of fact, where neither this statement nor any other statement in the opinion of the Court of Appeals indicates a purpose to hold that the evidence failed to show an exclusive dealing agreement as alleged in the complaint of the Commission, and moreover the crucial facts were admitted in the manufacturer's formal answer to the complaint.

PRACTICES §48 > unfair methods of competition -- powers of FTC -- > Headnote:
LEdHN[2][] [2]

Subject to judicial review, the Federal Trade Commission has power to find a shoe manufacturer guilty of an unfair method of competition in violation of 5(a)(6) of the Federal Trade Commission Act (*15 USC 45 (a)(6)*) upon a record showing that the manufacturer admitted to have entered into exclusive franchise agreements with a substantial number of retail shoestore operators and that the trial examiner found that the manufacturer's franchise program effectively foreclosed its competitors from selling to a substantial number of retail shoe dealers.

PRACTICES §44 > powers of FTC -- > Headnote:
LEdHN[3][] [3]

The Federal Trade Commission has broad powers to declare trade practices unfair, including trade practices which conflict with the basic policies of the Sherman (*15 USC 1 et seq.*) and Clayton (*15 USC 14*) Acts, even though such practices may not actually violate these laws.

MONOPOLIES §54 > PRACTICES §48 > exclusive franchise agreements -- > Headnote:
LEdHN[4][] [4]

A shoe manufacturer's program of making exclusive franchise agreements with retail shoestore operators requiring them not to purchase conflicting lines of shoes from the manufacturer's competitors, while conflicting with the central policy of both 1 of the Sherman Act (*15 USC 1*) and 3 of the Clayton Act (*15 USC 14*) against contracts which take away freedom of purchasers to buy in an open market, can be enjoined under 3 of the Clayton Act only upon proof by the government that the effect of the program may be to substantially lessen competition or tend to create a monopoly; however, no such proof is necessary where the government proceeds to enjoin this program as an unfair method of competition under 5 of the Federal Trade Commission Act (*15 USC 45*).

PRACTICES §44 > powers of FTC -- > Headnote:
LEdHN[5][] [5]

Under 5 of the Federal Trade Commission Act (*15 USC 45*), dealing with unfair methods of competition and unfair trade practices, the Federal Trade Commission has power to arrest trade restraints in their incipiency without proof that they amount to an outright violation of 3 of the Clayton Act (*15 USC 14*) or other provisions of the antitrust laws.

PRACTICES §43 > Trade Commission Act -- function -- > Headnote:
LEdHN[6][] [6]

The Federal Trade Commission Act is designed to supplement and bolster the Sherman Act and the Clayton Act by stopping incipient acts and practices which when full blown would violate those acts, as well as to condemn as "unfair methods of competition" existing violations of them.

PRACTICES §48 > unfair methods of competition -- > Headnote:
LEdHN[7][] [7]

The Federal Trade Commission acts well within its authority in declaring that a shoe manufacturer's franchise program is an unfair method of competition violating 5 of the Federal Trade Commission Act (*15 USC 45*), where under that program the manufacturer entered into franchise contracts with retail shoestore operators which obligated the manufacturer to give to the dealer, but not to the manufacturer's other customers, valuable services, and in return require the dealers not to purchase conflicting lines of shoes from the manufacturer's competitors.

Syllabus

The FTC filed a complaint against respondent, the country's second largest shoe manufacturer, under § 5 of the Federal Trade Commission Act, charging unfair trade practices by the use of a "Franchise Stores Program" through which respondent sells its shoes to more than 650 retail stores. In return for special benefits from Brown Shoe Company, the franchise stores agree to buy Brown shoe lines and to refrain from buying competitive lines. After hearings the FTC concluded that the restrictive contract program was an unfair method of competition and ordered respondent to cease and desist from its use. The Court of Appeals set aside the FTC's order, holding that there was "complete failure to prove an exclusive dealing agreement" violative of § 5 of the Act. *Held*: The FTC acted well within its authority under the Act in declaring respondent's franchise program an unfair trade practice. Pp. 319-322.

(a) On this record the FTC has power to find **[****2]** such anticompetitive practice unfair. *Federal Trade Comm'n v. Gratz, 253 U.S. 421*, relied on by the Court of Appeals, has been rejected by this Court. Pp. 320-321.

(b) The franchise program conflicts with the policy of *§ 1* of the Sherman Act and *§ 3* of the Clayton Act against contracts which remove freedom of purchasers to buy in an open market. P. 321.

(c) Under § 5 of the Federal Trade Commission Act the FTC has power to arrest restraints of trade in their incipiency without proof that they are outright violations of *§ 3* of the Clayton Act or other antitrust provisions. *F. T. C. v. Motion Picture Adv. Co., 344 U.S. 392, 394-395*. Pp. 321-322.

Counsel: Ralph S. Spritzer argued the cause for petitioner. On the brief were Solicitor General Marshall, Assistant Attorney General Turner, Robert S. Rifkind, Howard E. Shapiro, Milton J. Grossman, James McI. Henderson, Thomas F. Howder and Gerald J. Thain.

Robert H. McRoberts argued the cause for respondent. With him on the brief were Gaylord C. Burke and Edwin S. Taylor.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

Opinion by: BLACK

Opinion

[*317] **[***589]** **[****3]** **[**1502]** MR. JUSTICE BLACK delivered the opinion of the Court.

Section 5 (a)(6) of the Federal Trade Commission Act ***HN1***[] empowers and directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [1] **[****6]** Proceeding under the authority of § 5, the Federal Trade Commission filed a complaint against the Brown Shoe Co., Inc., one of the world's largest manufacturers of shoes with total sales of $ 236,946,078 for the year ending October 31, 1957. The unfair practices charged against Brown revolve around the "Brown Franchise Stores' Program" through which Brown sells its shoes to some 650 retail stores. The complaint alleged that under this plan Brown, a corporation engaged in interstate commerce, had "entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown." Brown's customers who entered into these restrictive **[****4]** franchise agreements, so the complaint charged, were given in return special treatment and valuable benefits which were not granted to Brown's customers who **[*318]** did not enter into the agreements. In its answer to the Commission's complaint Brown admitted that approximately 259 of its retail customers had executed written franchise agreements and that over 400 others had entered into its franchise program without execution of the franchise agreement. Also in its answer Brown attached as an exhibit an unexecuted copy of the "Franchise Agreement" which, when executed by Brown's representative and a retail shoe dealer, obligates Brown to give to the dealer but not to other customers certain valuable services, including among

[1] 38 Stat. 719, as amended, *15 U. S. C. § 45 (a)(6) (1964 ed.)*.

Section 5 (a)(1) of the Federal Trade Commission Act provides that ***HN2***[] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

others architectural plans, costly merchandising records, services of a Brown field representative, and a right to participate in group insurance at lower rates than the dealer could obtain individually. In return, according to the franchise agreement set out in Brown's answer, the retailer must make this promise:

"In return I will:

"1. Concentrate my business within the grades and price lines of shoes **[**1503]** representing Brown Shoe Company Franchises **[****5]** of the Brown **[***590]** Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

Brown's answer further admitted that the operators of "such Brown Franchise Stores in individually varying degrees accept the benefits and perform the obligations contained in such franchise agreements or implicit in such Program," and that Brown refuses to grant these benefits "to dealers who are dropped or voluntarily withdraw from the Brown Franchise Program . . . ." The foregoing admissions of Brown as to the existence and operation of the franchise program were buttressed by many separate detailed fact findings of a trial examiner, one of which findings was that the franchise program **[*319]** effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers. [2] Based on these findings and on Brown's admissions the Commission concluded that the restrictive contract program was an unfair method of competition within the meaning of § 5 and ordered Brown to cease and desist from its use.

On review the Court of Appeals set aside the Commission's order. In doing so the court said:

"By passage of the Federal Trade Commission Act, particularly § 5 thereof, we do not believe that Congress meant to prohibit or limit sales programs such as Brown Shoe **[****7]** engaged in in this case. . . . The custom of giving free service to those who will buy their shoes is widespread, and we cannot agree with the Commission that it is an unfair method of competition in commerce." *339 F.2d 45, 56*.

LEdHN[1][] [1]***LEdHN[2]***[] [2]In addition the Court of Appeals held that there was a "complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act." We are asked to treat this general conclusion as though the court intended it to be a rejection of the Commission's findings of fact. We cannot do this. Neither this statement of the court nor any other statement in the **[*320]** opinion indicates a purpose to hold that the evidence failed to show an agreement between Brown and more than 650 franchised dealers which restrained the dealers from buying competing lines of shoes from Brown's competitors. Indeed, in view of the crucial admissions in Brown's formal answer to the complaint we cannot attribute to the Court of Appeals a purpose to set aside the Commission's findings **[****8]** that these restrictive agreements existed and that Brown and most of the franchised dealers in varying degrees lived up to their obligations. Thus the question we have for decision is whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the Nation, to pay a valuable consideration to hundreds of retail **[***591]** shoe purchasers in order to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors. We hold that the Commission has power to find, on the record here, such an anticompetitive **[**1504]** practice unfair, subject of course to judicial review. See *Atlantic Rfg. Co*. v. *FTC, 381 U.S. 357, 367*.

[2] In its opinion the Commission found that the services provided by Brown in its franchise program were the "prime motivation" for dealers to join and remain in the program; that the program resulted in franchised stores purchasing 75% of their total shoe requirements from Brown -- the remainder being for the most part shoes which were not "conflicting" lines, as provided by the agreement; that the effect of the plan was to foreclose retail outlets to Brown's competitors, particularly small manufacturers; and that enforcement of the plan was effected by teams of field men who called upon the shoe stores, urged the elimination of other manufacturers' conflicting lines and reported deviations to Brown who then cancelled under a provision of the agreement. Compare *Brown Shoe Co*. v. *United States, 370 U.S. 294*.

LEdHN[3][] [3]**LEdHN[4]**[] [4]**LEdHN[5]**[] [5]**LEdHN[6]**[] [6]**LEdHN[7]**[] [7]In holding **[****9]** that the Federal Trade Commission lacked the power to declare Brown's program to be unfair the Court of Appeals was much influenced by and quoted at length from this Court's opinion in *Federal Trade Comm'n v. Gratz, 253 U.S. 421*.That case, decided shortly after the Federal Trade Commission Act was passed, construed the Act over a strong dissent by Mr. Justice Brandeis as giving the Commission very little power to declare any trade practice unfair. Later cases of this Court, however, have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that **HN3**[] the Commission has **[*321]** broad powers to declare trade practices unfair. [3] This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. [4] The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, unless faithless to their contractual obligations with Brown, substantially to limit their trade **[****10]** with Brown's competitors. This program obviously conflicts with the central policy of both *§ 1* of the Sherman Act and *§ 3* of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market. [5] **[****12]** Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly" **[*322]** which of course would have to be proved if the Government were proceeding against Brown under *§ 3* of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this *§ 3* element must be made for as we **[***592]** pointed out above our cases [6] hold that **HN4**[] the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of *§ 3* of the Clayton Act or other provisions of the antitrust laws. This power of the Commission was emphatically stated in *F. T. C*. v. *Motion Picture Adv. Co., 344 U.S. 392, at pp. 394-395*:

"It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster **[****11]** the Sherman **[**1505]** Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violations of them."

We hold that the **HN5**[] Commission acted well within its authority in declaring the Brown franchise program unfair whether it was completely full blown or not.

Reversed.

References

Annotation References:

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[3] See, *e. g., Federal Trade Comm'n v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310*; *Trade Comm'n v. Cement Institute, 333 U.S. 683, 693*; *Atlantic Rfg. Co*. v. *FTC, 381 U.S. 357, 367*.

[4] See, *e. g., Fashion Guild v. Trade Comm'n, 312 U.S. 457, 463*; *Atlantic Rfg. Co*. v. *FTC, 381 U.S. 357, 369*.

[5] *Section 1* of the Sherman Act, 26 Stat. 209, *15 U. S. C. § 1 (1964 ed.)*, declares illegal "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 . . . ."

Section 3 of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 14 (1964 ed.)*, provides in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to . . . make a . . . contract for sale of goods . . . for . . . 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 . . . condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[6] See cases cited in note 4, *supra*.

Validity and construction of statute creating Federal Trade Commission. 6 ALR 366, 11 ALR 797, 18 ALR 549, 30 ALR 1129, 32 ALR 792, 51 ALR 331, 68 ALR 847, 79 ALR 1200.

What constitutes false, misleading, or deceptive advertising or promotional practices subject to action by Federal Trade Commission. 65 ALR2d 225.

Validity, under 3 of the Clayton Act (*15 USC 14*), of contract by purchaser of goods to take his entire requirements from the seller. 5 L ed 2d 1105.

Contract by one party to sell his entire output to or to take his entire requirements of a commodity from the other party as contrary to public policy or anti-monopoly statute . 83 ALR 1173.

Right to enjoin business competitor from illegal acts or practices. 90 ALR2d 7.

Florida E. C. R. Co. v. United States

United States District Court for the Middle District of Florida, Jacksonville Division

June 8, 1966

No. 64-64-Civ. J.

Reporter

259 F. Supp. 993 *; 1966 U.S. Dist. LEXIS 8224 **

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, et al., Plaintiffs, v. UNITED STATES of America and Interstate Commerce Commission, et al., Defendants

Core Terms

merger, railroads, carriers, conditions, transportation, anti trust law, monopoly, employees, antitrust, public interest, Railway, consolidation, facilities, interstate commerce, elimination, benefits, provisions, approve, national transportation policy, present case, preserving, regulation, transit service, district court, instant case, Sherman Act, geographic, terminals, healthy, plenary

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN1[] **Interstate Commerce, Restraints of Trade**

Although 49 U.S.C.S. § 5(11) of the Interstate Commerce Act, does not authorize the Interstate Commerce Commission (ICC) to "ignore" the antitrust laws, there can be little doubt that the ICC is not to measure proposals for acquisitions by the standards of the antitrust laws. The problem is one of accommodation of 49 U.S.C.S. § 5(2) and the antitrust legislation. The ICC remains obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed acquisition and consider them along with the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the over-all transportation policy.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Transportation Law > Interstate Commerce > Federal Powers

HN2[] **Railroads & Rail Transportation, Rates & Tariffs**

A rail carrier cannot change rates without approval from the Interstate Commerce Commission (ICC), and the ICC can on its own initiative investigate and alter rates after proper findings. 49 U.S.C.S. § 15.

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Transportation Law > Interstate Commerce > General Overview

HN3[] Judicial Review, Standards of Review

The Interstate Commerce Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN4[] Reviewability, Questions of Law

On review, the court must find substantial evidence in the record to support the reasoning of the Interstate Commerce Commission (ICC) in clear and precise terms, and determine whether the ICC has correctly applied the proper standards in accord with that familiarity with the problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience.

Transportation Law > Interstate Commerce > Federal Powers

HN5[] Interstate Commerce, Federal Powers

See Interstate Commerce Act, 49 U.S.C.S. § 5(2)(c).

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN6[] Transportation, Railroads

Section 5(11) of the Interstate Commerce Act, 49 U.S.C.S. § 5(11), exempts participants in an approved merger from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction.

Transportation Law > Commercial Vehicles > Traffic Regulation

HN7[] **Commercial Vehicles, Traffic Regulation**

See 49 U.S.C.S. § 1, historical note.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN8[] **Transportation, Railroads**

The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the Interstate Commerce Commission from the antitrust laws. 49 U.S.C.S. § 5b.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Transportation Law > Interstate Commerce > Federal Powers

HN9[] **Interstate Commerce, Restraints of Trade**

The Interstate Commerce Commission (ICC) should be empowered to approve transactions which otherwise would be violative of the antitrust laws, if it is convinced that the public interest would thus be best served.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Transportation Law > Interstate Commerce > Federal Powers

HN10[] **Interstate Commerce, Restraints of Trade**

Whether the proposed unification would be consistent with the public interest involves consideration not only of the competition that would be eliminated, but also of the competition that would remain, and the advantages which would result from the unification.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Transportation Law > Interstate Commerce > Federal Powers

HN11[] Interstate Commerce, Restraints of Trade

In passing upon a proposed consolidation, the Interstate Commerce Commission (ICC) is required to give weight to the following considerations, among others: the effect of the proposed transaction upon adequate transportation service to the public; the total fixed charges resulting from the proposed transaction; and the interest of the carrier employees affected. The foregoing provisions supply the general statutory standards for guiding the ICC's judgment, and within their broad limits, its authority is exclusive and plenary.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Administrative Law > Agency Adjudication > Review of Initial Decisions

HN12[] Interstate Commerce, Restraints of Trade

The Interstate Commerce Commission (ICC) is to weigh, as an administrative matter, the effect of the merger on competitors, and on the general competitive situation in the industry.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN13[] Interstate Commerce, Restraints of Trade

The wisdom and experience of the Interstate Commerce Commission (ICC), not of the courts, must determine whether the proposed consolidation is consistent with the public interest. If the ICC did not exceed the statutory limits within which Congress confined its discretion, and its findings are adequate and supported by evidence, it is not the function of the court to upset its order.

Transportation Law > Interstate Commerce > Federal Powers

HN14[] Interstate Commerce, Federal Powers

49 U.S.C.S. § 5(3) of the Interstate Commerce Act permits the Interstate Commerce Commission (ICC) "to the extent" it deems appropriate to designate a person who is not actually a carrier as a carrier for the purpose of the Act, if such person is authorized to acquire control of an actual carrier in a transaction approved under § 5(2). Under § 5(3), it is clear that the ICC need not designate every person obtaining such control as a carrier.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Transportation Law > Rail Transportation > Personnel > General Overview

Transportation Law > Commercial Vehicles > Traffic Regulation

Transportation Law > Interstate Commerce > Federal Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN15[] **Railroads & Rail Transportation, Consolidation & Merger**

No merger may be approved that does not provide for a fair and equitable arrangement to protect the interests of the railroad employees affected. Moreover, Congress provided that the Interstate Commerce Commission (ICC) must insure that during the period of four years from the effective date of such order, such transaction will not result in employees of the carrier or carriers being in a worse position with respect to their employment.

Counsel: [1]** Robert W. Ginnane, Gen. Counsel, Interstate Commerce Commission, Washington, District of Columbia, Edward F. Boardman, U.S. Atty., Jacksonville, Florida, Lionel Kestenbaum, Antitrust Division, Dept. of Justice, Washington, District of Columbia, for defendants.

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Edwin H. Burgess, Baltimore, Maryland, for Mercantile-Safe Deposit and Trust Co.

Fred H. Kent, Jacksonville, Florida, A. Alvis Layne, Washington, District of Columbia, for Florida East Coast R. Co.

Wm. Graham Claytor, William D. McLean, John K. Mallory, Jr., Washington, District of Columbia, H. P. Osborne, Jr., Jacksonville, Florida, for Southern Railway System.

William G. Mahoney, Washington, District of Columbia, William H. Adams, III, Jacksonville, Florida, for Railway Labor Executives' Assn.

William Reece Smith, Jr., City Atty., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, **[**2]** Tampa, Florida, for City of Tampa.

MacFarlane, Ferguson, Allison & Kelly, Tampa, Florida, for petitioner Port Sutton Inc.

Judges: Rives, Circuit Judge, and Simpson and McRae, District Judges.

Opinion by: RIVES

Opinion

[*995] RIVES, Circuit Judge:

Our first opinion [1] **[**3]** in this case was vacated and remanded by the Supreme Court and we have now considered the Interstate Commerce Commission's action anew. The Interstate Commerce Commission, [2] by an order entered in December 1963, authorized the merger of the Atlantic Coast Line Railroad Company [3] with the Seaboard Air Line Railroad Company, [4] subject to certain routing and gateway conditions and employee protective

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1 *Florida East Coast Ry. Co. v. United States, D.C., 242 F. Supp. 14*, rev., *Seaboard Air Line R. Co. v. United States, 382 U.S. 154, 86 S. Ct. 277, 15 L. Ed. 2d 223 (1965)*.

2 Hereafter Commission or ICC.

3 Hereafter Atlantic or ACL.

conditions. Related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic, most prominently including the Louisville and Nashville Railroad Company, was also authorized. 320 I.C.C. 122 (1963). Florida East Coast Railway Company [5] brought suit in this Court asking that the ICC's order be enjoined, annulled and set aside.

A three-judge district court was convened pursuant to 28 U.S.C.A. § 2325. The Attorney General, representing the United States, opposed the merger and therefore the United States was realigned as a party-plaintiff. The Railway Labor Executives' Association, the Southern Railway Company, [6] and its affiliated companies in the Southern Railway System intervened as parties-plaintiff. At the hearing on remand the City of Tampa also intervened as a party-plaintiff. In addition to defendant ICC, the Mercantile-Safe Deposit and Trust Company, the Seaboard and the Atlantic, all intervened as parties-defendant. In this posture issue was joined.

After submission of briefs and full argument, in our first opinion we set **[*996]** aside the ICC's order and remanded the case to the **[**4]** Commission for further proceedings. Our reasoning was two-fold. First, we determined that the ICC's analysis of the merger was defective because it failed to apply proper product and geographic market criteria as explicated in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Second, we held that the Commission erred in not specifically determining whether the merger violated section 7 of the Clayton Act, *15 U.S.C.A. § 18 (1964 ed.)*. The Supreme Court vacated our judgment and remanded "for a full review of the administrative order and findings pursuant to the standards" they had previously "enunciated." *382 U.S. 154, 86 S. Ct. 277, 15 L. Ed. 2d 223 (1965)*. [7]

[5]** This case presents a head-on-collision between the antitrust laws and the Interstate Commerce Act. It is incumbent upon us to seek to rationalize the statutes involved here and make of them, to the extent that what Congress has written will permit, a harmonious functional body of law. Section 5(2) directs the Commission to approve voluntary rail mergers which it finds to be "consistent with the public interest," but reserves to the Commission power to approve the merger subject to such "terms and conditions" as it may find to be "just and reasonable." Section 5(2)(c) of the Interstate Commerce Act, which sets forth certain factors which must be considered by the ICC in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. However, since section 5(11) exempts carriers and individuals participating in an approved merger from the antitrust laws, the ICC has long been required

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[4] Hereafter Seaboard or SAL.

[5] Hereafter FEC.

[6] Hereafter Southern.

[7] In explaining the proper scope of review, the Supreme Court said:

"We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co. v. United States, 321 U.S. 67 [64 S. Ct. 370, 88 L. Ed. 544]* (1945), and *Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173 [80 S. Ct. 229, 4 L. Ed. 2d 223]* (1959). As we said in *Minneapolis at 186 [80 S. Ct. at 237]*:

> ***HN1***[] "'Although § 5(11), does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co. v. United States, 321 U.S. 67, 80 [64 S. Ct. 370, 88 L. Ed. 544]*, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." *321 U.S., at 85-86 [64 S. Ct. at 379]*. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." *321 U.S. at 87 [64 S. Ct. at 381]*.'" (*382 U.S. at 156, 86 S. Ct. at 278*.)

to give weight to the antitrust policy of the Nation in approving mergers. [8] It is the accommodation **[*997]** of the national transportation policy with the national antitrust policy with which **[**6]** this litigation is chiefly concerned.

[7]** The records and briefs in this case read far more like an antitrust case or FTC review proceeding than like an action to set aside an order of the ICC. This aspect can only be indicative of one fact - at some point the orderly administrative process envisioned by Congress has been derailed. All too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the "public interest" as expressed in the Interstate Commerce Act. Review of ICC proceedings, while in many respects quite similar in appearance to FTC review, is substantially different.

It is not without significance that Congress placed review of proceedings of the FTC in the Courts of Appeals and those of the ICC in a three-judge district court. Each has three judges, but there the comparison ends. The FTC is to administer a group of statutes whose meaning and content are primarily entrusted to the judiciary for rational extrapolation. There was no intention on the part of Congress that the FTC should become a plenary body, reshaping American industry to a model which the Commission in its own wisdom decided best served the Nation. On the contrary, the FTC was to **[**8]** prevent "unfair competition" in widely divergent industries, preserving the existing price system so fundamental to the American way of life.

Review of such proceedings could easily be fitted into the normal appellate process. A one-hour argument coupled with briefs sufficient to phrase out the issues with which courts of appeals routinely deal, allow a circuit court to give a carefully studied review.

The ICC stands in a uniquely different posture. Congress has vested the Commission with "exclusive and plenary" powers in the regulation of rail mergers. No one who reviews the history and language of the Interstate Commerce Acts can doubt that Congress has entrusted the ICC with plenary power to regulate almost every aspect of the rail industry and, for that matter, almost every aspect of the transportation industry save the airlines. [9] **[**9]** The ICC is in many ways a super-management, often making managerial-type decisions affecting the transportation industry, with but one overriding duty - to protect the public interest. [10] ***HN2***[] A rail carrier cannot change rates without ICC approval, and the ICC can on its own initiative investigate and alter rates after proper findings. [11]

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[8] *Georgia v. Pennsylvania R. Co., 324 U.S. 439, at 456, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*; *McLean Trucking Co. v. United States, 321 U.S. 67 at 79-80, 87, 64 S. Ct. 370, 88 L. Ed. 544 (1944)*. The Commission in the instant case clearly recognized this duty when it said (320 I.C.C. at 128-29, 206):

> "However, we may not disregard the policy underlying the antitrust laws even though carriers participating in a merger are relieved by section 5(11) from the operation of such laws. *Minneapolis & St. Louis R. Co. v. United States, supra [361 U.S. 173, 80 S. Ct. 229]*. Our primary task is to reconcile the objective of 'preventing injurious waste and in securing more efficient transportation service,' New York Central Securities Corp. v. United States, supra, [287 U.S. 12], at 26, [*53 S. Ct. 45, 77 L. Ed. 138]*, with the general concern of Congress 'that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time.' *Brown Shoe Co. v. United States, 370 U.S. 294, 346, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. In short, our 'problem is one of accommodation of section 5(2) and the antitrust legislation.' *Minneapolis & St. Louis R. Co. v. United States, supra*, [361 U.S.] at 186, *80 S. Ct. at 237*
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> * * *
>
> "Although section 5 transactions are immunized from the operation of the antitrust laws, the policy reflected by such laws is nevertheless an important element in determining public interest. As we have stated, we are confronted here with the task of accommodating section 5 and the antitrust laws, and in so doing, we must reconcile the numerous conflicting considerations that are inevitably involved."

[9] 49 U.S.C.A. § 1 et seq.

[10] In *United States v. Pierce Auto Lines, 327 U.S. 515 at 536, 66 S. Ct. 687, at 698, 90 L. Ed. 821 (1946)*, the Supreme Court said: "We think the court [below] misconceived * * * its own function. It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made

[*998] New services cannot be provided nor old ones discontinued **[**10]** without Commission approval. [12] No new railroad may enter the field without ICC permission; the Commission may compel an existing railroad to extend its line and provide new service. [13] We have, in effect, a government-protected monopoly for those already providing service. In the area of rail mergers and consolidations, Congress' intention to let the ICC plan the structure of the national transportation industry has long been apparent. [14] World War I with the government takeover of the rail system had left this Nation's primary transportation system in a state of dilapidation. War needs had diverted critical materials to other areas of the economy and needed rail repairs had been neglected.

Congress, therefore, determined that the **[**11]** health and vitality of the Nation's railroads could best be restored by merging them into fewer, more efficient systems than then existed. Congress realized that it was functionally not the appropriate body to study and determine which railroads should be combined. It had neither the time nor the facilities. The Transportation Act of 1920 thus for the first time conferred upon the ICC "exclusive and plenary" power over rail mergers. The Commission was directed to "prepare and adopt a [master] plan for the consolidation of the railway properties of the continental United States into a limited number of systems". [15] However, the Commission was not given power to force consolidation. It had to come voluntarily. Only mergers which were in harmony with the master plan could be approved. Approved mergers were exempt from the antitrust laws.

It was apparent almost from the outset that the master plan approach had set an impossible pattern. The Transportation Act of 1940 took a more realistic **[**12]** view. [16] It abandoned the idea of a master plan, as such, and adopted a more flexible approach which authorized the ICC to approve carrier-initiated voluntary plans for mergers if those plans conformed to a public interest test prescribed by the Act. A requirement relating to the preservation of competition contained in the 1920 Act was deleted by the 1940 Act. The initiative to formulate plans for consolidation or merger thus passed from the Commission to the rail carriers; but exclusive and plenary power to grant permission for such mergers subject to such conditions as might be prescribed was left with the ICC. [17]

[13]** Unlike review of FTC proceedings, review of ICC approved mergers involves the review of intricate, expert plenary judgments in a highly specialized area of our economy that has long been subject to direct precise regulation. [18] The ICC **[*999]** was authorized to make *ad hoc* determinations within the interstices of individualized

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such by the very terms of the statute. The function of the reviewing court is much more restricted." See *United States v. Chicago Heights Trucking Co., 310 U.S. 344, 60 S. Ct. 931, 84 L. Ed. 1243 (1940)*. This was the role in which the ICC saw itself cast in the instant case (320 I.C.C. at 206): "In fact, as guardian of the public interest, it is our responsibility to determine whether the proposed merger will, as required by the national transportation policy, contribute to the development and maintenance of a public transportation system which will meet the needs of our Nation's commerce and or national defense."

[11] 49 U.S.C.A. § 15.

[12] 49 U.S.C.A. §§ 1, 13a.

[13] 49 U.S.C.A. § 1.

[14] For a brief background note on the present section 5, see appendix to Justice Frankfurter's opinion in *St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298, at 315, 74 S. Ct. 574, at 584, 98 L. Ed. 710 (1954)*.

[15] 41 Stat. 481.

[16] 54 Stat. 905.

[17] While there were many who desired to give the Commission power to compel mergers, Congress declined the invitation to confer that power. *St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298, 74 S. Ct. 574, 98 L. Ed. 710 (1954)*; *Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D.Mich. 1963)*, aff'd, *375 U.S. 216, 84 S. Ct. 341, 11 L. Ed. 2d 270*.

[18] In *Ayrshire Corp. v. United States, 335 U.S. 573 at 592-593, 69 S. Ct. 278, at 288, 93 L. Ed. 243 (1949)*, the Supreme Court stated:

records. It is appropriate that initial review should be in a district court, where each case may be set for hearing individually with as much time as necessary allotted. This case is a good illustration. Our last hearings took a full day, and could not have been compressed into the short time usually provided for appellate arguments.

[14]** This Court must not shirk its duty by providing only a perfunctory review. But we are equally bound to keep our review within the limits intended by the statutory scheme of this particular agency. [19] **[**15]** We would be no friend of the administrative process if we were to leave the Commission at large, free to roam from one arbitrary or capricious act to another. If judicial review is to have a basis for functioning, the ICC must do more than announce its ultimate conclusions by way of unrationalized fiat. [20] ***HN4***[] The Commission must explain its reasoning in clear and precise terms. It must support its application of that reasoning to the instant case by substantial evidence in the record on which we must base our review. [21] **[**16]** It is for us to determine whether the ICC has correctly applied the proper standards, and thus exhibited that familiarity with the problems in the transportation industry which Congress anticipated the ICC **[*1000]** would achieve from its particularized experience. [22]

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade v. United States, 314 U.S. 534, 548 [62 S. Ct. 366, 372, 373, 86 L. Ed. 432]*; [State of] *New York v. United States, 331 U.S. 284, 347-349 [67 S. Ct. 1207, 1240, 1241, 91 L. Ed. 1492]*."

See *ICC v. Parker Motor Freight, 326 U.S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051 (1945)*; *American Trucking Association v. United States, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1952)*; *Hudson & Manhattan R. Co. v. United States, 313 U.S. 98, 61 S. Ct. 884, 85 L. Ed. 1212 (1941)*; *Carolina Scenic Stages v. United States, 202 F. Supp. 919 (W.D.S.C.1962)*; Penn. R. Co.-Merger-N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 505. In *East Texas Motor Freight Lines Inc. v. Frozen Food Express, 351 U.S. 49 at 54, 76 S. Ct. 574, at 577, 100 L. Ed. 917 (1956)*, the Supreme Court said: ***HN3***[] "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates."

[19] See, for example, comment in dissenting opinion of *Justice Frankfurter, Stark v. Wickard, 321 U.S. 288 at 311, 64 S. Ct. 559, 88 L. Ed. 733 (1944)*.

[20] *Florida v. United States, 282 U.S. 194, at 208, 211-212, 215, 51 S. Ct. 119, 75 L. Ed. 291 (1930)*; *S.E.C. v. Chenery Corp., 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943)*; Cf. *Brooks v. N.L.R.B., 348 U.S. 96, 75 S. Ct. 176, 99 L. Ed. 125 (1954)*; *United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S. Ct. 804, 81 L. Ed. 1186 (1937)*; *Morehouse v. United States, 194 F. Supp. 940 (D.Neb.1961)*, aff'd, ***368 U.S. 348, 82 S. Ct. 385, 7 L. Ed. 2d 342***; *Ayrshire Corp. v. United States, 335 U.S. 573, 69 S. Ct. 278, 93 L. Ed. 243 (1949)*; *Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D.Mich.1963)*, aff'd, *375 U.S. 216, 84 S. Ct. 341, 11 L. Ed. 2d 270*; *Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D.Iowa 1960)*; *Southern Railway Co. v. United States, 167 F. Supp. 747 at 753*, (M.D.Ga.1958).

[21] See *United States v. Pierce Auto Lines, 327 U.S. 515, 66 S. Ct. 687, 90 L. Ed. 821 (1946)*; *Boston & M. R.R. v. United States, 208 F. Supp. 661 (D.Mass.1962)*, aff'd, *371 U.S. 26, 83 S. Ct. 117, 9 L. Ed. 2d 95*; *Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D.Mich.1963)*, aff'd, *375 U.S. 216, 84 S. Ct. 341, 11 L. Ed. 2d 270*; *Atchison T. & S.F. Ry. v. United States, 244 F. Supp. 955 (N.D.Ill.1965)*, appeal pending. Cf. *Gray v. Macy, 239 F. Supp. 658 (D.Or.1965)*.

[22] See *Ayrshire Corp. v. United States, 335 U.S. 573, at 592-593, 69 S. Ct. 278, 93 L. Ed. 243 (1949)*; *American Trucking Association v. United States, 344 U.S. 298 at 313-314, 73 S. Ct. 307, 97 L. Ed. 337 (1953)*; see also, *United States v. Chicago Heights Trucking Co., 310 U.S. 344, 60 S. Ct. 931, 84 L. Ed. 1243 (1940)*; *Hudson & M. R. Co. v. United States, 313 U.S. 98, 61 S. Ct. 884, 85 L. Ed. 1212 (1941)*; *Chicago S.S. & S.B. R.R. v. United States, 221 F. Supp. 106 (N.D.Ind.1963)*; *Stark v.*

The plaintiffs, and particularly the United States through the Antitrust Division of the Justice Department, vigorously attack the standards applied by the ICC in this case. They argue that the ICC failed to properly assess the dangers of this merger, because it failed to apply or misapplied the teachings of modern sophisticated antitrust principles. To understand how national antitrust policy comes into play, it is well at this point for us to review the relationship **[**17]** of section 5(2)(c) and section 5(11) of the Interstate Commerce Act. In approving a rail merger or consolidation the ICC is required by section 5(2)(c) to

> ***HN5***[] "give weight to the following considerations, *among others*: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Any reference to antitrust policy must be read into the words "among others" by implication, since section 5(11) ***HN6***[] exempts participants in an approved merger

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved * * * and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

There is and could be no dispute that, in determining whether **[**18]** a given merger is in the public interest, the Commission should take into account the national antitrust policy of the United States. [23] Mr. Justice Black, speaking for the Court in *Northern Pacific Railway Co. v. United States, 356 U.S. 1 at 4, 78 S. Ct. 514, at 517, 2 L. Ed. 2d 545 (1958)*, clearly stated the essence of antitrust policy as follows:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Congress in 1940 enacted the following "National Transportation Policy":

> ***HN7***[] "It is hereby declared to be the national transportation **[**19]** policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, **[*1001]** without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; - all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy*." (49 U.S.C.A. Historical note following table of contents.)

The main **[**20]** thrust of plaintiffs' argument is that this merger eliminates substantial competition between Seaboard and Atlantic, and in some areas even creates an effective monopoly over the transportation of certain products. This it is argued violates not only the antitrust policy but also the transportation policy of the United States since it fails to "preserve the inherent advantages of each" mode of transportation. Proof of these allegations is sought in a resort to modern sophisticated antitrust principles.

Wickard, 321 U.S. 288 at 309-310, 64 S. Ct. 559, 88 L. Ed. 733 (1944); *Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D.N.H.1964)*.

[23] See n. 8, supra.

On remand the plaintiffs deny any intention to force the ICC to decide whether a violation of section 7 of the Clayton Act or of the Sherman Act has taken place. But at the same time they argue that the Commission must apply modern sophisticated antitrust market analysis and point to cases like *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* and the concepts of market definition there expressed as examples of how the ICC should have analyzed this merger. [24] It seems pointless to say that the Commission must employ market definition tools calculated to show whether an antitrust violation has taken place, and when it reaches the point where a **[**21]** conclusion may be properly drawn, it may then stop since it need not draw any conclusions. But this illogical mode of behavior would be the result of following both the plaintiffs' rationale and the Supreme Court's recent opinion in this case.

[22]** **[*1002]** Much confusion would have been eliminated in this case had everyone agreed that market analysis has but one function - to help pinpoint the danger areas. This tool is not a qualitative tool. It tells where one may expect a monopoly or a substantial lessening of competition in a given line of commerce carried on in a given geographical area. It does not tell whether this is good or bad. For purposes of the antitrust policy, Congress through its statutes has told us at what point restraints and monopolies are bad. For the purpose of the national transportation policy, Congress has told us that not all restraints and monopolies which violate the antitrust laws are bad. [25] **[**23]** The ICC in its wisdom, and not this Court, is to determine which are to be allowed and which are to

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[24] The Commission has recently rejected the plaintiffs' demand that it slavishly adhere to the *Brown Shoe* market analysis, Penn. R. Co.-Merger-N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 509. In Great Northern Pacific & Burlington Lines, Inc.-Merger-Great Northern Railway Co., I.C.C. (1966), (F.D. No. 21478) ms. pp. 65-66, the Commission, explained: "Since the *McLean* case [*321 U.S. 67, 64 S. Ct. 370, 88 L. Ed. 544]* requires an appraisal of adverse competitive effects following the merger, Justice and other opponents of the merger assert that it is appropriate, if not necessary, to determine the areas of effective competition through an analysis of the relevant geographic and product markets, as those terms are used in antitrust cases. Cf. *Brown Shoe Co. v. United States, 370 U.S. 294 [82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The Supreme Court in *Seaboard Air Line R. Co. v. United States, 382 U.S. 154, [86 S. Ct. 277, 15 L. Ed. 2d 223]* in reversing *Florida East Coast Ry. Co. v. United States, 242 F. Supp. 14 (M.D.Fla.1965)*, clearly held that the Commission need not determine whether the proposed merger, absent Commission approval, would violate Section 7 of the Clayton Act, and that in appraising the competitive effects of a proposed rail merger the Commission need not apply yardsticks developed for the purposes of the antitrust laws. The market criteria of *Brown Shoe* can be applied here, if at all, only with great caution and substantial qualification." Later in the report it said (ms. p. 91): "In making the necessary accommodation, the Commission is not required to employ market analysis techniques such as those described in *Brown Shoe Co. v. United States, 370 U.S. 294 [82 S. Ct. 1502, 8 L. Ed. 2d 510]* (1962); nor is the Commission required to determine whether, but for the presence of section 5(11), the proposed merger would violate the antitrust laws of the United States. These questions were recently settled in *Seaboard Airline R. Co. v. United States, 382 U.S. 154 [86 S. Ct. 277, 15 L. Ed. 2d 223]* (1965), affirming the McLean case and extending its rationale to mergers alleged to be inconsistent with the policy of section 7 of the Clayton Act."

[25] Compare the statement of the Commission in Penn. R. Co-Merger-N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 505:

> "The major goals of the antitrust laws are to preserve the independent competitive status of individual firms and to curb the undue concentration of the American economy without any special regard for the effects of this policy in a particular industry. Cf. *Brown Shoe Co. v. United States, 370 U.S. 294, 316-323 [82 S. Ct. 1502, 8 L. Ed. 2d 510]* (1962); *United States v. ALCOA, 377 U.S. 271, 279-280, [84 S. Ct. 1283, 12 L. Ed. 2d 314]* (1964). By contrast, in the transportation industry which is subject to extensive economic regulation, the worth of competition and not merely its preservation must be considered within the regulatory scheme enacted by Congress. The very fact that Congress has seen fit to enter into the comprehensive regulation of transportation contradicts the notion that competition is favored without qualification. Federal legislation affecting railroads is one of many areas of economic activity in which serious inroads have been made on an original policy favoring competition. *F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 92-93 [73 S. Ct. 998, 97 L. Ed. 1470]* (1952). It is only in a blunt, undiscriminating sense that we can speak of competition as an ultimate good. Ibid, 92 [*73 S. Ct. 998]*."

The history of the relationship between the Central Pacific Railway Co. (hereafter C.P.R.) and the Southern Pacific [Railroad] Company (hereafter S.P.) is a case in point. In 1914 the United States instituted suit to enjoin the S.P. from controlling the C.P.R., because it violated the antitrust laws. In 1917 the district court dismissed the suit. On direct appeal, the Supreme Court held that the combination of the two railroads "fetters the free and normal flow of competition * * * tends to monopolization [of the be considered bad. Our task is at an end when we satisfy ourselves that the Commission has made adequate findings supported by substantial evidence, that it has perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger. [26]

[*1003] We had felt that there is value in applying rational economic concepts embodied in modern sophisticated antitrust principles. This was what we undertook to demonstrate in our first opinion. However, as Justice Frankfurter aptly stated in his dissent in **[**24]** *ICC v. J-T Transport Co., 368 U.S. 81 at 129-130, 82 S. Ct. 204, at 235, 7 L. Ed. 2d 147*, (1961),

> "An order of the Commission cannot stand, it is true, if we cannot tell what has been decided or if it leaves unclear the basis for its conclusions. *United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 510-511 [55 S. Ct. 462, 467, 79 L. Ed. 1023]*. Findings are no doubt judicially more persuasive the more felicitously they are formulated and the less they require extraction from a diffuse report. But the Commission is not under statutory duty to set forth its findings in serried array. It is the Court's duty to sustain the Commission's findings if, as here, there is no real difficulty in determining what was decided and on what grounds.
> "It is not the Court's function to impose our standards of lucidity or elegance in exposition upon the Commission."

This proposition is one of the things that the Supreme Court told us when it vacated our first decision in this case. Therefore, while rational economic principles contained in antitrust cases may aid us in pinpointing the danger areas, we may not require the ICC to travel to its conclusions only by this route. **[**25]** [27]

One example of the use of rational economic criteria should suffice to demonstrate the problems engendered by this case. *Brown Shoe* adopts these criteria (*370 U.S. at 325-326, 82 S. Ct. at 1524*):

> [Product Market]
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> "*The outer boundaries* of a product market *are determined by the reasonable interchangeability of use or the cross-elasticity of demand* between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, 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." **[**26]**

The Court went on to define the Geographic Market (*370 U.S. at 336, 82 S. Ct. at 1530*):

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affected rail traffic]." *United States v. Southern Pacific Co., 259 U.S. 214 at 229, 42 S. Ct. 496, at 498, 66 L. Ed. 907 (1922)*. The Supreme Court went on to say (*259 U.S. at 230-232, 42 S. Ct. at 499*): "We reach the conclusion that the stock ownership in the Central Pacific acquired by the Southern Pacific is violative of the Sherman Act within the principles settled by this court * * * [which] collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress, or materially reduce the free and normal flow of competition in the channels of interstate trade." Following the remand of the *Southern Pacific* case, the C.P.R. and the S.P. applied for and received approval of their transaction by the ICC under section 5 of the Transportation Act of 1920. 76 I.C.C. 508 (1923). In *United States v. Southern Pacific Co., 290 F. 443 (D.Utah 1923)*, the district court sustained the ICC's ruling and entered an order effectuating the transaction even though it found it to be in violation of the Sherman Act.

[26] *American Trucking Ass'n, Inc. v. United States, 364 U.S. 1, 80 S. Ct. 1570, 4 L. Ed. 2d 1527 (1960)*; *East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49, 76 S. Ct. 574, 100 L. Ed. 917 (1956)*; *Ayrshire Corp. v. United States, 335 U.S. 573, at 592-593, 69 S. Ct. 278, 93 L. Ed. 243 (1949)*; *United States v. Pierce Auto Freight Lines, 327 U.S. 515, at 535-536, 66 S. Ct. 687, 90 L. Ed. 821 (1946)*; *Black Ball Freight Service v. United States, 223 F. Supp. 191 (D.Idaho 1963)*; *Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (D.Del. 1962)*, aff'd, ***372 U.S. 702, 83 S. Ct. 1017, 10 L. Ed. 2d 124***; *Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (D.N.H.1964)*; *Carolina Scenic Stages v. United States, 202 F. Supp. 919 (W.D.S.C. 1962)*; *Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D.Iowa 1960)*.

[27] See *United States v. Pierce Auto Lines, 327 U.S. 515 (1946)*, at 529, 523-533, *66 S. Ct. 687, 90 L. Ed. 821*.

> "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. * * * The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."

Part of the confusion in the present case is occasioned by the assumption that *Brown Shoe* brought something new to the analysis of antitrust problems, i.e., markets, submarkets, geographic area analysis originated with the approach adopted by *Brown Shoe*. This idea is erroneous. The exact same definitional approaches were long ago adopted to test Sherman Act violations. *United States v. Corn Products Refining Co., 234 F. 964 (S.D.N.Y.1916)*, 975-977 (per J. Learned Hand), appeal dismissed by agreement, *249 U.S. 621, 39 S. Ct. 291, 63 L. Ed. 805 (1919)*, cited *United States v. Aluminum Company of America, 377 U.S. 271, 84 S. Ct. 1283 at 1286, n. 3*. *12 L. Ed. 2d 314 (1964)*. The only difference between the Sherman Act approach and **[*1004]** the Clayton Act approach is **[**27]** the quantum of effect necessary before a violation is proved.

It is argued that the ICC's failure to utilize sophisticated antitrust market definition tools is evidence that it failed to properly assess the merger. This contention must be rejected. The ICC has never applied this approach formally, and yet, in spite of the fact that Judge Learned Hand used it as early as 1916, the Supreme Court has never considered this as evidence of the ICC's failure to properly consider a merger.

It may be helpful to apply this tool in the present case. Railroads have a decided economic advantage in carrying long-haul, heavy bulk products, e.g., phosphate rock mined principally in the western portion of central Florida. In terms of antitrust analysis, we submit that this service is a separate product market and Florida is the proper geographic area.

Some illustrations should demonstrate the point. Let us assume that railroads can haul phosphate rock 50% more cheaply than the next alternative mode of transportation, trucks. This means that if a truck could haul rock at $1 per pound, railroads could carry it at 50 cents per pound. Physically both of these services are interchangeable. If **[**28]** both modes set the price of hauling at $1, there would be "cross-elasticity of demand" between both.

However, if the railroad companies were owned separately from the trucks and if no products were available to bring a higher return and if space were available, railroads would set their price below $1 but above 50 cents, thus taking the business away from the trucks. Railroads are a submarket of long-haul, heavy, bulk products.

If there were competition by two or more railroads for the bulk business, the price would be set somewhere between $1 and 50 cents, but at such a price as would allocate the business between the roads based on market conditions. If, however, a monopoly is created, the monopoly may set the price at any level between $1 and 50 cents that will maximize its return, because it experiences no competition until the price reaches $1. The monopoly price may in fact be lower than the competitive price, depending on whether a change in the cost of transportation will appreciably affect the ultimate cost of the end product and thus increase or decrease its consumption. Thus a monopolist may pass on cost savings to achieve higher profits where a competitor will take **[**29]** the cost savings as higher profits without passing them on. The record in the present case gives us no data on which to predict what action will be taken by a railroad possessing a monopoly in the bulk-haul products market of central Florida. [28]

[30]** While railroads are able to take the long bulk-haul business from trucks, barges or water carriers enjoy a considerable cost advantage over railroads. Since shipment by barge takes longer than shipment by rail, the

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[28] With reference to revenue from phosphate rock, the Commission said (320 I.C.C. at 153):

> "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock. While the tonnage of phosphate rock rail shipments increased from 9.8 million tons in 1956 to 11 million tons in 1960, the revenue of the applicant railroads from phosphate rock was less in 1960 than in 1956 by approximately $1.1 million, or 4.5 per cent. This revenue decline is attributable in part to the fact that in 1960, the revenue per ton on phosphate rock was $2.21 as compared with $2.61 in 1956."

This, of course, may only indicate that railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place.

cheaper cost is somewhat offset. The record in this case does demonstrate that barges are not physically interchangeable with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, **[*1005]** nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments. See 313 I.C.C. 495 (1961) (railroads able to divert traffic from water carriers even at $1 higher rate than water transportation); 291 I.C.C. 689 (1954) (railroads able to divert traffic from water carriers even at 35 cents higher rate than water transportation). It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida. Before we could assess the meaning of any such monopoly, we would have to know much more about the competition experienced by phosphate rock and **[**31]** its end-products. If there are readily ascertainable substitutes, even a monopoly as to phosphate rock might have little meaning. Compare the discussion of bulk, heavy-loading and low-rate coal by rail in Pennsylvania R. Co.-Merger-New York Cent. R. Co., 327 I.C.C. 475 (1966) at 516-517.

The purpose of this example is to demonstrate that the plaintiffs' briefs are correct when they analyze the market structure and conclude that the merger, if allowed, creates a monopoly in parts of Florida and that that monopoly can have significant effects. But that is all market analysis shows. A careful reading of the ICC decision shows that the ICC clearly recognized this fact. The Commission referred to phosphate rock as "essentially a commodity normally handled by rail." 320 I.C.C. at 151. Throughout its report, the ICC recognized that a "monopoly" would be created in parts of Florida. It went on to say: "There is no question that there will be a significant reduction in rail competition in Florida." 320 I.C.C. at 166. [29] **[*1006]** Therefore, the ICC reached the same conclusion that the

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[29] In explaining the objections to the examiner's report, the Commission observed (320 I.C.C. at 139):

> "Of these exceptions, many of which obviously overlap, the most important relate to the anti-competitive consequences of the merger upon the shipping public, communities, and competing railroads. Justice and others contend that the examiner failed to make appropriate findings with respect to the anti-competitive effects and monopolistic consequences of the merger in Florida and in the Southeastern States generally. Their main argument on this issue is that the merger would eliminate or substantially reduce competition and create a potential monopoly in the Southeastern States. * * * Justice emphasizes that the merged company would operate 81 percent of all the class I railway mileage in Florida and would control 54.52 percent of the total southern region class I railroad mileage."

And at 163, the Commission found: "In both the 6-and 8-State areas the merged company would have more than 54 percent of the total railroad mileage, while Southern, its nearest competitor, would have about 34 percent. In Florida the merged company would have approximately 81 percent of the railway mileage in the State." The Commission did go into more detail on Florida (320 I.C.C. at 164-66):

> "The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa. The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroads except Seaboard and Coast Line. It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly, or an oligopoly if East Coast is included. On the basis of data contained in the the Official List of Open and Prepay Stations, 78 I.C.C. A-43, effective April 15, 1953, and considering only those points at which agents are maintained, Seaboard has been the only railroad serving approximately 60 points in Florida, whereas Coast Line has been the only railroad serving approximately 70 Florida points. Thus, the number of Florida points at which there has been no competition is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed. In our opinion, the diminution of competition within the State of Florida that would result from the proposed merger is largely a matter of degree. At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the duopoly which has long existed there and from which there have been no appreciable adverse competitive effects upon communities or the shipping public.
>
> "Although the merged company would have a preponderance of the railway mileage in Florida, its lines would connect with other rail carriers in that State at the following points:

"East Coast

Benson Junction, West Plam

Beach, Jacksonville, Lake

application of *Brown Shoe* type analysis would have reached, even though the ICC did it in a **[**32]** practical, not a theoretical, manner. Once we accept the fact that the Commission saw this problem, we can set to one side the mechanics of ***antitrust law*** and look to the only real issue, the accommodation of the national antitrust policy with the national transportation policy.

Harbor, Marcy Miami.

"GS&F (Southern subsidiary)

Jacksonville, Crawford,

Hampton, Lake City, Jasper,

Lake Butler, Palatka.

"L&N

Chattahoochee.

"Live Oak, Perry & Gulf

(Southern subsidiary)

Live Oak, Perry, Slade.

"South Georgia

(Southern subsidiary)

Perry, Greenville.

"Southern Railway

Jacksonville.

> "To illustrate further the anticipated effect of the merger upon the public in Florida, at the hearings in Tampa, the area in which the concern of monopoly is most prevalent, 19 shippers testified in support of the merger and 47 others would also have testified in support of it had the examiner not invoked the cumulative evidence rule. By contrast, only four shippers in the area testified in opposition to the merger. In any event, the percentage of railway mileage which would be operated by the merged company in Florida or the 6-and 8-State areas involved does not, standing alone, provide a suitable criterion for determining the sufficiency of the rail competition that would remain after the merger."

The Commission again noted the effect in Florida (320 I.C.C. at 211): "Except in portions of Florida, the overall reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the affected area."

[33]** As shown by the record, these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact. [30] The Commission appears to have assumed that the equivalent of a conspiracy to fix prices in Florida already exists. The Commission said (320 I.C.C. at 164-165): "It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly * * *. At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the dupoly which has long existed there * * *."

[34]** In *Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*, the State of Georgia invoked the original jurisdiction of the Supreme Court with a complaint against 20 railroads. Georgia alleged that the railroads had conspired together, through **[*1007]** the use of rate bureaus, committees, conferences, associations, etc., to establish arbitrary and unreasonable rates to and from the State of Georgia. These conspiracies, it alleged, had eliminated substantially all rail competition. The Supreme Court held that Georgia could pursue its request for an injunction. What Georgia won in the Supreme Court, it promptly lost in Congress. ***HN8***[] The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the ICC from the antitrust laws. 49 U.S.C.A. § 5b.

For our purposes, it is important to remember that the Reed-Bulwinkle Act preserves the potential of competition since individual railroad initiative is a legal requirement. If the instant merger is permitted, then that initiative will be irrevocably lost. Cf. *Northern Securities Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904)*. (This case may be viewed as **[**35]** advancing the proposition that a merger to solidify a conspiracy is illegal under the antitrust laws.) This Court has absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida. But whether this merger violates the antitrust laws by eliminating competition or potential competition is not the question before us.

The relationship of section 5 of the Interstate Commerce Act and the antitrust laws has been commented on by the ICC, the district courts and the Supreme Court on a number of occasions. In *New York Central Securities v. United States, 287 U.S. 12, 53 S. Ct. 45, 77 L. Ed. 138 (1932)*, the Supreme Court dealt with the predecessor of the present act, the Transportation Act of 1920. The ICC authorized the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway, and the Michigan Central Railroad Company. A minority stockholder of each sought to attack the ICC's order. The authority to acquire control was sought on the ground that it would facilitate revision of routes, and the physical improvements needed for new routes, **[**36]** and would make possible important economies in operation. The question presented was whether the control granted was in the "public interest," and whether that term was so vague as to make it an unconstitutional delegation. The Court said (*287 U.S. at 24-25, 53 S. Ct. at 48*):

> "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case, 261 U.S. 184, 189, 190 [43 S. Ct. 270, 273, 67 L. Ed. 605]*, adverted to that purpose, which was found to be expressed in unequivocal language: 'to attain it, new rights, new obligations, new machinery, were created.' The Court **[**37]** directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public,' 'the necessity * * * of enlarging (transportation) facilities,' and the measures which would 'best promote the service

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[30] As pointed out by the Southern Railway System at oral argument, nine bulk commodities handled by the merging railroads account for approximately 75-77% of their business. See dissent of Commissioner Webb, 320 I.C.C. 214, 230-32. The record does not show what portions of the merging companies' revnues or profits are generated by the carriage of long-haul bulk products originating in Central and Western Florida. Nor does the record show that effective competition for this type of carriage presently exists in Florida.

> in the interest of the public and the commerce of the people.' *Id. p. 189*, note [*43 S. Ct. p. 273]*. See, also, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Sante Fe Ry. Co., 270 U.S. 266, 277 [46 S. Ct. 263, 70 L. Ed. 578]*. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential **[*1008]** conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. * * *"

In the view of the Supreme Court, "The public interest is served by economy and efficiency in operation." *287 U.S. at 23, 53 S. Ct. at 47*.

In New York **[**38]** Central the carriers' lines were parallel and the plaintiffs argued that the acquisition would thus eliminate competition between the carriers. The Court answered (*287 U.S. at 25-26, 53 S. Ct. at 48*):

> "The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibitions in the regulation of interstate commerce, *Northern Securities Co. v. United States, 193 U.S. 197 [24 S. Ct. 436, 48 L. Ed. 679]*, had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920. See *New York v. United States, 257 U.S. 591, 601 [42 S. Ct. 239, 66 L. Ed. 385]*; *Colorado v. United States, 271 U.S. 153, 165 [46 S. Ct. 452, 70 L. Ed. 878]*. Exercising this paramount power, the Congress expressly provided in subdivision (8) of § 5, which has direct reference to subdivision (2), that 'the carriers affected by any order made under the foregoing provisions of this section' are 'relieved from the operation **[**39]** of the "antitrust laws,"' and 'of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.' The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."

The principal precedent and first case to deal with the scope of review in the context of modern ***antitrust law*** was Associated Transport, Inc., 38 M.C.C. 137 (1942), injunction denied, *McLean Trucking Co. v. United States, 48 F. Supp. 933 (S.D.N.Y.1942)*, aff'd, *321 U.S. 67, 64 S. Ct. 370, 88 L. Ed. 544 (1944)*. The ICC authorized seven large motor carriers (originally Arrow Carrier was to be an eighth, but dropped out after the ICC approved the consolidation) to merge, forming the largest motor carrier in the United States and the only "end-to-end" motor carrier from New England to Florida.

In the course of three pages of generalized language, **[**40]** the ICC detailed the benefits which it believed would accrue from the merger (38 M.C.C. 143-146): 1. Consolidation would result in a higher load factor on vehicles with a concomitant reduction in the number of vehicles required for service. 2. Unified garage and testing facilities would lead to safer operation. 3. Vehicles could be shifted more readily from one end of the system to the other in order to meet peak demands. 4. In some cities terminals could be consolidated; additional terminals could be established where before there was not enough traffic for any one of the companies to establish a terminal. 5. Relations with shippers and public regulatory bodies would be simplified. 6. Tracing of shipments and settlement of claims would be facilitated. 7. Economy would result by combining administration. The Commission concluded (38 M.C.C. 146):

> "We find: That the consolidation would result in improved transportation service, and that through movement of freight would be simplified and expedited, equipment would be more efficiently utilized, terminal facilities **[*1009]** would be improved, the handling of shipments would be reduced, relations with shippers and public **[**41]** regulatory bodies would be simplified, and safe operation would be promoted."

In the present case the ICC considered the benefits more carefully than in *Associated*, but concluded that they were present, citing almost the same factors. The ICC found the following benefits: 1. Consolidation of stations and terminals. 2. Consolidation of switching facilities and elimination of yard engines and yard diesels. 3. Consolidation would result in higher load factor on freight trains between major terminals with a concomitant reduction in the number of trains required. 4. Economy would result by combining administration. 5. Unified repair shops would result in more economical and safer operation, including the reduction of stores facilities (320 I.C.C. 154-59). The Commission concluded (320 I.C.C. 160-61):

> "In addition to the specific benefits above discussed, many other benefits can reasonably be expected to result from the elimination of wasteful and duplicative facilities and an *overall* improvement in operations. These benefits can be grouped as follows. In the area of improved service, it can be anticipated that benefits will be derived from (1) more flexible schedules **[**42]** and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of certain switching charges. A more adequate car supply, the availability of more specialized equipment, and more efficient utilization of equipment should result. There also are a number of advantages in dealing with a single corporate entity, such as convenience in the settlement of claims and the tracing of cars. Additionally, the merged company will make a significant contribution to the economic and industrial development of the Southeastern States through the promotion of new industrial sites, improvements in port terminal facilities, and in the stabilization of employment which will flow from greater financial stability of the merged company."

If it were only necessary that the Commission find what it perceived to be benefits "securing more efficient transportation service," our inquiry would **[**43]** be at an end. The ICC's decision is no more vague or speculative in the present case than it was in *Associated*.

One real difference between *Associated* and the instant case is in the facts surrounding the post-merger competitive picture. In their first brief, filed June 8, 1964, the United States cites *Northern Securities Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904)* and its progeny for the proposition that "elimination of competition between Seaboard and Coast Line" violates the antitrust laws and is so significant that it prevents the ICC from allowing a merger. Clearly, the Government is correct that the elimination of significant competition, as here, violates the antitrust laws. But *New York Central Securities, supra, 287 U.S. at 25, 53 S. Ct. 45, 77 L. Ed. 138*, cites *Northern Securities* to demonstrate that Congress had power to authorize the ICC to waive the antitrust laws and allow a combination that would eliminate significant competition between the parties.

Associated clearly authorizes the ICC to eliminate competition between the parties to the merger. In answering a contention by the Antitrust Division similar to that made **[**44]** in the present case, the ICC said (38 M.C.C. at 150):

> "Undoubtedly, *substantial competition exists between certain of the carriers involved, and consummation of the instant transactions would eliminate such competition*. However, such fact alone is not controlling. We are **[*1010]** unable to agree with the argument of the Antitrust Division that it was the intention of Congress in enacting section 5 that we approve only such transactions as would not result in an 'unreasonable' restraint of competition within the meaning of the antitrust laws, *regardless of benefits that might result or the adequacy of remaining competition*."

The Commission stated its understanding of the test to be applied as follows (38 M.C.C. at 150-151):

> "In our opinion, the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under section 5. The specific reference to the antitrust laws only emphasizes the Congressional intent that ***HN9***[] we should be empowered to approve transactions which otherwise would be violative of the antitrust laws, if we are convinced that the public interest would thus be best served. Stated differently, **[**45]** section 5 authorizes us to permit unifications which would, except for such approval, result in restraining competition contrary to the antitrust laws, where the disadvantages of such restraint are overcome by other advantages in the public interest, such as direct betterment in the public service of the carriers or indirect betterment through stabilization of the industry. Determination of the larger question as to ***HN10***[] whether the proposed unification would be consistent with the public interest involves consideration not only of the competition that would be eliminated, but also of the competition that would remain, and the advantages which would result from the unification."

Therefore, the affirmance of these principles in operation by both the district court and the Supreme Court should put to rest the argument that the elimination of competition between the parties is in itself enough to prevent an ICC approved merger where sufficient outside competition remained.

Before reaching the crux of the matter, "the competition that would remain," one other issue must be dispatched. The Government argues that the present merger is different in that it involves two healthy, stable **[**46]** railroads and not a failing company. *Associated* involved not only seven healthy trucking companies, but probably seven of the most healthy trucking companies in the United States. The national transportation policy and the Commission have always looked at benefits going far beyond the saving of a failing company. By restricting their authority to such companies, we would allow them to approve only those mergers that do not violate the antitrust laws. So far no court has been willing to take such a position and the Supreme Court has rejected it specifically. *McLean Trucking Co. v. United States, 321 U.S. 67 at 85-86, 64 S. Ct. 370, 88 L. Ed. 544 (1944)*.

The major difference between the record in *Associated* and that in the instant case is the substantial competition that remained after the merger in *Associated*. The Commission divided the Eastern United States into three regions - New England, Middle Atlantic, and the South. The ICC then analyzed the remaining competition in each of these regions in great detail. The Commission's analysis is subject to some criticism but it does show that substantial intramodal competition remained. The Commission concluded (38 M.C.C. **[**47]** at 159-160):

> "The foregoing clearly shows that, if the proposed transaction is consummated, there would remain ample competitive motorcarrier service throughout the territory involved. In addition, all of the principle points and many others are served by one or more rail carriers. Competition is also afforded by motor-vehicle contract carriers and by carloading and forwarding companies."

The ICC also recognized that trucking, unlike railroading, was an industry affording ease of entry. 38 M.C.C. at 161. It should be apparent that there are two **[*1011]** important differences between *Associated* and the present case - ease of entry and remaining competition.

The district court in *McLean* refused to enjoin the ICC order approving the *Associated* merger, explaining the problem of accommodating the antitrust laws and the Interstate Commerce Act as follows (*48 F. Supp. 933 at 936 (S.D.N.Y.1942)*:

> "Considerable light will be thrown on this problem at once by noticing the plain fact that while the Antitrust Acts and the Interstate Commerce Act are designed to bring about the conduct of business for the common good the former are also penal and are aimed at the **[**48]** evils of monopolies as such which unreasonably restrain trade or business while the latter, though it does not disregard such evils, is primarily concerned with creation and maintenance of adequate transportation service to the public."

The court went on to say (*48 F. Supp. at 937*):

> "What is needed for adequate service is a matter for the Commission to decide and it is likewise free to decide what amount of competition is in furtherance of the public interest and what is not. It is not bound to preserve or foster competition to a degree that will not best serve the public interest from the standpoint of adequate public transportation service and whether competition as such is adequate or not must depend upon its effect in furtherance of the attainment of the ends Congress sought to accomplish under the Interstate Commerce Act administered by the Commission. * * *
>
> "* * * We cannot review the weight of the evidence or the wisdom of the order."

In affirming the district court, the Supreme Court recognized that the merger would eliminate competition between the parties. *McLean Trucking Co. v. United States, 321 U.S. 67 at 71, 64 S. Ct. 370, at 372 (1943)*.

The Supreme **[**49]** Court said (*321 U.S. at 76, 64 S. Ct. at 375*):

> "In ***HN11***[] passing upon a proposed consolidation the Commission is required to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; * * * (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the

> carrier employees affected.' Section 5(2)(c). The foregoing provisions supply the general statutory standards for guiding the Commission's judgment; *and within their broad limits, its authority is 'exclusive and plenary*.' § 5(11)."

In discussing the accommodations of the antitrust laws and the Interstate Commerce Act, the Court said (*321 U.S. at 85, 64 S. Ct. at 379*):

> "And in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. Section 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the **[**50]** public - *an effective safeguard against the evils attending monopoly*, at which the Sherman Act is directed."

Later the Court explained (*321 U.S. at 86, 64 S. Ct. at 380*): "Congress recognized that the process of consolidating motor carriers would result in some diminution of competition *and might result in the creation of monopolies*." The Court says to "prevent the latter effect" the Commission was given "power to control such developments." One interpretation of this wording is that the Commission cannot allow monopolies to be formed. But the words are subject to a different explanation. The use of the word "effect" may mean the Commission's power to regulate monopoly **[*1012]** power, not a prohibition of the creation of any monopolies. The Commission was given broad, plenary powers and was to look at mergers as a part of the "national" transportation problem. Thus, there could be local or limited monopolies so long as they were controlled and contributed to the attainment of the national transportation policy objectives. Therefore, a limited monopoly, such as the one in the present case, might be allowed.

HN12[] The Commission is to weigh, "as an administrative **[**51]** matter," "the effect of the merger on competitors and on the general competitive situation in the industry." As the Supreme Court said (*321 U.S. at 87, 64 S. Ct. at 381*):

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong.Rec. 12207. ***HN13***[] 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

In the instant case, the Commission looked at and weighed all the factors it had examined in *Associated*. It is this weighing of factors and not the result that the statute comples. [31] The ICC considered those areas in Florida where a monopoly would **[**52]** be created, including the size of the cities involved and their relative importance. If we say that the Commission may do this where competition remains but not where some monopoly areas are produced, we will create an anomolous situation. Section 1 of the Sherman Act makes combinations in restraint of trade unlawful. The transactions involved in *New York Central Securities, supra*, and *Associated-McLean*, supra, by restraining trade would possibly violate Section 1, and on a proper finding, as there made, the Commission could waive this violation. Section 2 of the Sherman Act makes attempts to monopolize illegal. Therefore, to strike down the Commission's action in the instant case will, in effect, say it can waive Section 1 of the Sherman Act or the more stringent Clayton Act, but not Section 2 of the Sherman Act. Nothing in the legislation admits that interpretation. Compare the situation where the ICC grants the right to extend rail service to newly-discovered phosphate deposits to one railroad but not to its competitor. *Atlantic Coast Line R.R. v. United States, 243 F. Supp. 945 (E.D.Va.1965)*.

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[31] Cf. *Ayrshire Corp. v. United States, 335 U.S. 573 at 592-593, 69 S. Ct. 278, 93 L. Ed. 243 (1949)*, quoted supra, n. 18.

[53]** At oral argument the government attempted to clarify its "failing company" proposition. Counsel explained that not all healthy competitors should be prevented from merging. It was explained that the government's position really was that where two healthy competitors are involved economies or "dollar savings and other alleged benefits, transportation, service, and such other things" should *never* be enough to overcome severe "elimination of competition," such as here involved. This argument is cogent, and if made before the Commission would doubtless be given weight. [32] It **[*1013]** distinguishes the *Associated-McLean* case, supra, where substantial competition remained. But this argument cannot, as a matter of law, be used to rewrite the statute.

[54]** Congress has directed the ICC to give primary weight to four factors. *McLean Trucking Co. v. United States, 321 U.S. 67 at 76, 64 S. Ct. 370, at 375, 88 L. Ed. 544 (1943)* (quoted *supra, p. 1011*). To allow the government's argument to override those statutory standards even when the Commission has carefully applied them and found the merger justified would be, as the Supreme Court said in *ICC v. J-T Transport Co., 368 U.S. 81 at 89-90, 82 S. Ct. 204, 7 L. Ed. 2d 147*, (1961), equivalent to loading the scales in favor of but one factor.

In the present case it may not be entirely accurate to refer to Seaboard and Atlantic as financially healthy railroads. The Commission found (320 I.C.C. at 149): "While the past earnings record of both Seaboard and Coast Line is impressive, their rate of return has not been significantly high. Although it is above the average norm for class I railroads, it does not compare favorably with returns on investments in other industries or in other modes of transport." The ability of railroads to earn a rate of return sufficiently high to enable them to obtain funds for needed facilities in the capital market is a subject to which Congress has specifically **[**55]** directed attention. Congress in 1958 passed legislation designed to make funds available to railroads by allowing the ICC to guarantee loans in the aggregate amount of 500 million dollars. 49 U.S.C.A. § 1231, et seq. [33]

In describing the significance of Congress' action, the courts have said (*Southern Railway Co. v. United States, 167 F. Supp. at 754 (M.D.Ga.1958)*: "The whole import of this legislation is that funds for the development of needed facilities for the railroads are not available at current interest rates or in the capital market from ordinary commercial sources." Given this background, we must conclude that the ICC has broad discretion in determining how financially healthy railroads should be before their merger ceases to be in the public interest.

*Minneapolis & St. Louis R. Co. v. United States, **[**56]** 361 U.S. 173, 80 S. Ct. 229, 4 L. Ed. 2d 223 (1959)*, is of little help to the plaintiffs. That case did little more than repeat what was said in *McLean Trucking, supra.* In *Minneapolis*, the ICC had to choose between two possible mergers. The Supreme Court agreed that the ICC was correct in choosing the merger that maintained the greatest degree of competition. In the instant case there is no choice between equally advantageous mergers. If there is to be any "benefits" at all, competition must be reduced.

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[32] Cf. the Commission's statement in Great Northern Pacific & Burlington Lines, Inc. - Merger - Great Northern Railway Co., I.C.C. (1966) (F.D. No. 21478) ms. p. 90:

> "The second general observation we wish to make is that the financial strength of the applicants is not a bar to merger. Cf. Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Ry. Co. - Merger, 324 I.C.C. 1 (1964). Section 5(2) of the Act is not limited to transactions involving a union of the weak and the weak, the strong and the weak or the large and the small. On the other hand, the prosperous condition of the major applicants is a highly material fact. Where carriers are so impoverished that they are unable, individually, to constantly improve their transportation services and facilities, the public interest involved in a pooling of their resources is obviously stronger than in a case where, as here, the applicants are financially able to improve their plants and facilities in step with advances in rail technology."

See also the Commission's Discussion I.C.C., ms. pp. 96-97.

[33] See 1958 U.S.Code Cong. & Admin.News, p. 3456, for the legislative history of the Transportation Act of 1958. The Commission has now guaranteed loans in the aggregate of about 225 million dollars.

In our opinion, the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits. [34] The voluminous record amply supports its findings. The greatest problem that we have experienced **[*1014]** is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions.

[57]** Before this Court the government has presented able arguments. Had these been made before the Commission and had the government availed itself of the opportunity to build a record showing the basic facts it claims could be shown, this record might be made to tell a different story.

The government intervened before the ICC on the grounds that this merger was inconsistent with the antitrust policy of the United States. It was admitted at oral argument that out of 35 hearing days, the government managed to be represented only on 5 days. The government asked for an opportunity to have a special hearing at which it desired to produce evidence to support its contentions. The Commission granted that request and set a hearing in Washington, D.C. The government then decided not to present any evidence.

In reaching the conclusion that this merger was in the public interest, the ICC reviewed at some length the competitive growth of other modes of transportation and their impact on the rail industry. The Commission voiced the railroads' contentions as follows (320 I.C.C. at 151):

> "* * * the applicants emphasize that the railroads have not participated proportionately in the country's **[**58]** economic growth, and that competition from other modes of transport contribute to a large extent to the financial problems now plaguing the railroad industry."

The ICC went on to announce its policy on intermodal competition in the following terms (320 I.C.C. at 166-167):

> "While we recognize in general the desirability of preserving intramodal rail competition, it is no longer the all-important factor that it once was in the days when the railroads had a virtual monopoly in all inter-city freight traffic. With the development of intense competition in recent years from other modes of transport, the preservation of intramodal rail competition has lost much of its significance in the furtherance of the overall national transportation policy. Even after the merger herein is approved, effective competition among railroads will continue in most of the major industrial centers. * * *
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> "In other regulated industries, typically gas, electric, and telephone utilities, a single company frequently serves large metropolitan areas and often even significantly larger geographic or market areas. As public utilities are affected with a public interest and are essentially monopolistic **[**59]** by nature, they are subjected to strict regulation and supervision by State and Federal regulatory agencies. Under regulation, their services, as a general rule, are efficient and reasonably priced despite the absence of competition. While exact comparability does not exist between railroads and public utilities generally, it must be recognized that railroads are subject to equally stringent regulation. Moreover, as railroads have the basic economic characteristics of public utilities and are subject to regulation in the public interest at both the Federal and State levels, it is not realistic to insist that intramodal rail competition must be preserved at all places, at all times, and under all circumstances. For these reasons and weighing all the factors previously discussed, plus the further consideration that railroads today encounter increasingly strong competition from other modes of transportation, we conclude and specifically find that (1) the reduction of rail competition caused by the proposed merger will not be substantial; (2) ample competitive rail service will remain after the merger throughout most of the affected area, and (3) such reduction in competition as will **[**60]** result from the merger will have no appreciably injurious effect upon shippers and communities."

[*1015] Thus, the ICC in an attempt to insure "adequate transportation service to the public" has focused on that phase of the transportation problem President Kennedy emphasized in his transportation message to Congress - intermodal competition. [35] The Commission reasoned that to maintain healthy railroads in the long run, it must

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[34] "We have carefully evaluated the effects of the curtailment of competition that will result from the merger and when considered in connection with the advantages of the merger, including improved services, safer operations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages." 320 I.C.C. at 212.

foster competition at that level where it will have its most decisive effect. It reasoned that it could waive the antitrust laws where they prevent a rational transportation policy, and here it did waive those laws. The Commission took the position that the greatest good came from increasing competition in the Southeast as opposed to maintaining it in but a part of Florida. The plaintiffs object to these policy determinations because in their view they allow the Commission to resort to a broader statistical universe that minimizes the anticompetitive impact.

[61]** Of course, if judicial review is to have any meaning, extension of principles to meet new situations, such as the new policy on intermodal competition announced here, must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria to conclude that the new policy is in the public interest. Such a demonstration was made here. The Commission reviewed the impact of other modes of transportation on railroads. The ICC looked at the long-run needs of the different areas of the South to determine which was most important. We cannot say that based on this record a reasonable man could not reach the same conclusion which the Commission has reached. [36] **[**62]** Nor can we say its policy is inconsistent with the scheme of the regulatory statute. In short, nothing in the record before us indicates that the action taken by the Commission in accommodating the antitrust laws and the Interstate Commerce Act is arbitrary or capricious. That we may not have reached the same conclusion does not make the ICC wrong. [37]

[63]** Plaintiff, Florida East Coast Railway, attacked the protective provisions **[*1016]** announced by the ICC to shield this plaintiff from the effects of the merger. Businessmen, like government agencies, talk about business in the flowing terms that generals reserve for their favorite war maneuvers. As a Nation, we find ourselves today involved in a "war in Viet Nam," a "war on poverty," a "war on ignorance," et cetera. The ICC is no exception to this masculine jargonic function. In speaking of East Coast's ability to survive any aggressive tendencies of the newly-merged railroad, the Commission spoke of its "potentially strong counteroffensive weapon."

At oral argument the FEC bitterly attacked the use of such language, asserting it was devoid of any real substance and so were the protective provisions. The retaliatory language used by the Commission is expressive and to that end acceptable. In short, Southern and the FEC would have us substitute our ability to predict future effects for that of the Commission. The ICC is far more experienced in this area than any one given court. The Commission, and not we, must tailor the protection to fit its expert prediction of the **[**64]** future. On this record, we are in no position to say that its careful study has led to capricious results. When not plainly unreasonable, we must leave to the agency vested with congressionally assumed expertise this type of decision. [38] The question boils down to whether

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[35] 1962 U.S.Code Cong. & Admin.News, p. 4148, 108 Cong.Rec. 5509 (H.Doc. No. 384), Message of April 8, 1962; see also House Rep. No. 1922, 1958 U.S.Code Cong. Admin.News, pp. 3456, 3469-3471; 1955 Weeks Committee Report (Presidential Advisory Committee on Transport Policy and Organization).

[36] It is not our function to decide whether the Commission's conclusions as applied in this case were wise. It may be that more, not less, intramodal competition was needed in Florida. We are not at all certain that the government, had it availed itself of the opportunity provided, could not have shown how ineffective intermodal competition is in Florida. But the Commission went so far as to conclude that a monopoly in Florida was not too high a price to pay for increased intra and intermodal competition in the southeastern part of our Nation where improved transportation is needed. This was not an unreasonable conclusion for one to reach after reading the record in this case.

[37] See *Ayrshire Corp. v. United States, 335 U.S. 573 at 592-593, 69 S. Ct. 278, 93 L. Ed. 243 (1949)*; *United States v. Louisville & Nashville R. Co., 235 U.S. 314, 35 S. Ct. 113, 59 L. Ed. 245 (1914)*; *Gray v. Macy, 239 F. Supp. 658 (D.Or.1965)*; *Consolidated Freightways v. United States, 83 F. Supp. 811 (E.D.Wash.1949)*; *Assigned Car Cases, 274 U.S. 564, 47 S. Ct. 727, 71 L. Ed. 1204 (1927)*; *United States v. Chicago Heights Trucking Co., 310 U.S. 344 at 352-354, 60 S. Ct. 931, 84 L. Ed. 1243 (1940)*; *United States v. Pierce Auto Freight Lines, 327 U.S. 515, 66 S. Ct. 687, 90 L. Ed. 821 (1946)*; *United States v. New River Co., 265 U.S. 533, 44 S. Ct. 610, 68 L. Ed. 1165 (1924)*; *Black Ball Freight Service v. United States, 223 F. Supp. 191 (D.Idaho 1963)*; *Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (N.N.J.1964)*; *National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (D.D.C.1965)*; *Willey v. United States, 245 F. Supp. 669 (E.D.Ill.1965)*; *Legge v. United States, 244 F. Supp. 878 (W.D.Pa.1965)*; *Florida East Coast Ry. Co. v. United States (I), 242 F. Supp. 14*, rev. on other grounds, *382 U.S. 154, 86 S. Ct. 277, 15 L. Ed. 2d 223 (1965)*; *Atlantic Coast Line R. Co. v. United States, 243 F. Supp. 945 (E.D.Va.1965)*.

[38] See n. 37, supra.

the ICC acted wisely in not providing more protection. Statutorily we are not the all-wise of this field, and, while our crystal ball might indicate a different result than that of the Commission, [39] the record in this case supports its action.

[65]** The Commission determined that subsequent to the merger Mercantile-Safe Deposit and Trust Company [40] would have "power to control the merged company." 320 I.C.C. at 197. In reaching this ultimate conclusion the Commission detailed the relationship between Mercantile, Coast Line Company, the Louisville & Nashville Railroad, and the merging carriers. 320 I.C.C. at 142, 193-97.

By a combination of direct and indirect stock control, Mercantile will have control over the largest single block of stock in the merged company. The Commission's primary factual findings are supported by substantial evidence in this record. Its ultimate conclusion that control will result is a reasonable one, well within the province of its statutory power.

The Commission also concluded that (320 I.C.C. at 197):

> "Mercantile is an investment company engaged exclusively in the banking and trust business. Its direct interest in the merged company is merely incidental to its primary business of managing **[**66]** trusts and estates."

Section 5(3) ***HN14***[] permits the ICC "to the extent" it deems appropriate to designate a person who is not actually a carrier as a carrier for the purpose of the Interstate Commerce Act, if such person is authorized to acquire control of an actual carrier in a transaction approved under section 5(2). Under section 5(3) it is clear that the ICC need not designate every person obtaining such control as a carrier. *United States v. Marshall Transport Co., 322 U.S. 31, 41, 64 S. Ct. 899, 88 L. Ed. 1110*; Wellsville A. & G. Corp., Purchase and Control, 295 I.C.C. 115, 129.

[*1017] Under the "circumstances" of the instant case, the Commission decided not to exercise its section 5(3) power. The Commission's primary factual findings as to the character of Mercantile's activities are supported by substantial evidence in this record. We see no abuse of discretion in the Commission's ultimate conclusion based on those primary facts.

The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but in the long run the merger will provide greater job security and more stabilized conditions of employment **[**67]** for employees of the merged company. See 320 I.C.C. at 200. Approximately 4,257 jobs will be abolished and the location of employment will be changed for 4,439 other employees. 320 I.C.C. at 154. One of the four primary criteria to which section 5(2)(c) directs the ICC's examination is "the interest of the carrier employees affected" by the merger.

In our first opinion, since we remanded the case to the ICC for further proceedings, we did not find it appropriate to reach the question of employee protection. The policy adopted by Congress clearly contemplated that the accomplishment of economies and improved transportation through consolidation of the Nation's rail carriers will have an impact upon rail employees. In section 5(2)(f), Congress provided for the protection of employees by the Commission. ***HN15***[] No merger may be approved that does not provide for "a fair and equitable arrangement to protect the interests of the railroad employees affected." Moreover, Congress provided that the Commission must insure "that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers * * * being in a worse position **[**68]** with respect to their employment."

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[39] The Commission concluded (320 I.C.C. at 188):

"It is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening railroads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

[40] Hereafter Mercantile.

The intervening plaintiff, Railway Labor Executives' Association, [41] bitterly attacks as inadequate the protective conditions adopted by the ICC. In the instant case the Commission adopted the protective conditions it announced in Southern Railway Co.-Control-Central of Georgia Ry. Co., 317 I.C.C. 557, 729, 320 I.C.C. 377. The Association paints a sorry picture of confusion and utter chaos which it claims shrouds the *Southern Railway* conditions.

The Association points out that the *Southern Railway* conditions were imposed in a "control" case and argues that they cannot rationally be applied in a consolidation case. This contention is without merit. The problem created by acquisition of control or merger from the standpoint of affected employees is identical. This fact is amply demonstrated by the expected problem discussed by the district court which reviewed the *Southern Railway* conditions. That court commented (*Railway Labor Executives **[**69]** Ass'n v. United States, 226 F. Supp. 521 at 522*, (E.D.Va.1964) vacated on other ground, *379 U.S. 199, 85 S. Ct. 307, 13 L. Ed. 2d 338 (1964))*:

> "The Commission, in approving the transaction, was fully advised of the proposed consolidation of Central's freight agencies, yards, shops and accounting department into those of Southern, together with the resultant job losses entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions for the protection of the employees thus affected, which it determined more than met the statutory requirements of Section 5(a)(f) and would be fair and equitable."

The major argument of the Association is that the *Southern Railway* conditions are confusing and inadequate. The *Southern Railway* conditions codify the labor conditions previously employed by the Commission and are intended to provide a shorthand means of referring to those conditions when cited in cases such as the present merger. The basic employee **[*1018]** protection conditions may be traced to the ICC's 1941 decision in Texas & P. Ry. Co. Operation, 247 I.C.C. 285. That decision set forth conditions **[**70]** to protect affected employees who were displaced or dismissed during the four-year period following the effective date of the Commission's order.

In Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177 (1944) at 199-201, the ICC refined the protection contained in the *Texas & P.* conditions. Employees receiving the *Oklahoma* conditions were, in addition to the *Texas & P.* conditions, allowed moving expenses and losses on the sale of homes. The *Southern Railway* conditions in Article I carry forward the *Oklahoma* conditions as the Commission's basic four-year protective provisions.

In the New Orleans Union Passenger Terminal case, 282 I.C.C. 271 (1952), the Commission went a step further and extended financial compensation beyond the four-year period provided in the *Oklahoma* conditions. These protections are carried forward in Article II of the *Southern Railway* conditions. Thus, employees who are first affected during the first five years [42] after the effective date of the Commission's order are protected until they obtain the full benefits of what is called the Washington Agreement. [43] Moreover, the *Southern Railway* conditions provide a stronger **[**71]** arbitration provision than did earlier provisions.

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[41] Hereafter Association.

[42] This was conceded by the ICC's General Counsel at oral argument when he said: "In other words, we say that the employees first affected in the fifth year after the effective date of the Commission's Order get the same Washington agreement protection that they would have obtained under the New Orleans conditions. Nothing has been taken away from such an employee." (R. p. 143.)

[43] The "Washington Agreement," or the "Agreement of May 1936, Washington, D.C.," as it is sometimes called, is an agreement that was entered into by virtually all the railroads and railroad unions in the United States. This collective bargaining agreement provides some protection to employees affected by "coordinations" of facilities between two or more carriers. The Supreme Court ordered the Commission to clarify the relationship of the Southern Railway conditions and the Washington Agreement in *Railway Labor Executives' Association v. United States, 379 U.S. 199, 85 S. Ct. 307, 13 L. Ed. 2d 338 (1964)*. See Pittsburgh & Lake Erie Railroad Co., a Delaware Corporation - Merger - Pittsburgh & Lake Erie Railroad Co., a Pennsylvania Corporation, 324 I.C.C. 198 (1964), at 204; Atchison, Topeka & Santa Fe Railway Co. - Merger - Gulf, Colorado & Santa Fe Railway Co., 324 I.C.C. 254 (1965), at 260-61.

[72]** The Association seems to place a strained interpretation on the Commission's action. After reading the ICC's decision in this case and reviewing the background of the *Southern Railway* conditions, we do not think the Association's interpretation should prevail. Nor do we think there is merit in the argument that the Association never had an opportunity to argue against the *Southern Railway* conditions.

The Association had ample opportunity to argue for conditions it thought appropriate, and did in fact argue for an attrition clause. We must realize that the Commission's citation of the *Southern Railway* conditions is just a shorthand method of saying that, after consideration of all arguments, it applies the same conditions here as in *Southern*.

Some confusion may be engendered by the fact that the Virginia court [44] construed the *Southern Railway* conditions more narrowly than the Commission later said it had intended. The Commission has now abandoned any contention that it only went as far as the Virginia court thought, and we should not be confused by that interchange of occurrences. Read carefully and applied rationally, the use of the *Southern Railway* **[**73]** conditions in this case need cause no confusion. [45]

[*1019] After carefully examining the contentions of Railway Labor Executives' Ass'n, the Commission concluded (320 I.C.C. at 201):

> "We are unable to conclude that conditions requiring the retention of unnecessary employees in unnecessary positions [or the equivalent alternatives suggested by the Association] would be consistent with the public interest or sound business policy. The imposition of such conditions would unduly restrict carriers in the establishment of more economical operations, and would be in conflict with the objectives of the national transportation **[**74]** policy."

Based on the record in this case, we cannot say that the Commission's action has created inequitable or unfair labor conditions. What was said in *Brotherhood of Maint. of Way Employees v. United States, 221 F. Supp. 19 (E.D.Mich.1963)* at 29, aff'd, *375 U.S. 216, 84 S. Ct. 341, 11 L. Ed. 2d 270 (1963)*, is applicable here:

> "It is recognized that even though there will be some immediate hurt to railroad employees in the approval of mergers and affiliations, railroad employees, as well as all other members of the public, will, in the long run, find more and better opportunities if the country's total economic health is protected. We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation."

The Association also argues that the ICC misconstrued its statutory authority in one important respect. As the Association reads the words "employees of the carrier or carriers by railroad affected," the statute requires the Commission to protect not only the employees of the merging roads but also the employees of their competitors who may be affected.

The Commission has consistently construed this **[**75]** language as only requiring protection for the employees of carriers involved or participating in the transaction. [46] This consistent practice lends weight to what seems the logical interpretation of the statute. Taken in context, the provision is but one of many dealing with the Commission's treatment of merger applicants. When Congress spoke of "carriers" in section 5(2), it referred to the participants. For example, in section 5(2)(a)(i) the statute required ICC approval for "two or more carriers to consolidate or merge." In section 5(2)(c) the statute speaks of the "interest of the carrier employees affected,"

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[44] *Railway Labor Executives' Ass'n v. United States, 226 F. Supp. 521 (E.D.Va.1964)*, vacated in part, *379 U.S. 199, 85 S. Ct. 307, 13 L. Ed. 2d 338 (1964)*.

[45] See, for example, Atchison, Topeka & Santa Fe Railway Co. - Merger - Gulf, Colorado & Santa Fe Railway Co., 324 I.C.C. 254 (1965), at 260-61 (clarifying the use of such terms as "home road" in the *Southern Railway* conditions).

[46] See Detroit, Toledo & Ironton Railroad Co. - Control - Ann Arbor Railroad Co., 320 I.C.C. 325 (1964); Texas & Pacific Railway Co. - Control - Kansas, Oklahoma & Gulf Railway Co., 324 I.C.C. 309 (1964), at 339.

obviously meaning participating carrier. And when Congress wished to refer to nonparticipating carriers in 5(2)(d), it said "another railroad or other railroads." Taken in context, we think it clear that the "carrier or carriers" referred to in section 5(2)(f) are the carriers involved in the merger and most immediately affected by the Commission's action. We, therefore, hold that the statutory protection requirement is restricted to the carriers involved in the transaction.

[76]** We conclude that in formulating employee protection the Commission has not transcended its statutory bounds. Based on the record in this case, we also conclude that the Commission in approving this merger has not failed to "give weight to" "the interests of the carrier employees."

After considering the arguments which we have discussed and all other arguments in this case, we conclude that the ICC explained its reasoning and supported its application of that reasoning by substantial evidence. Since the ICC correctly applied the proper standards and thus exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience, we must and do sustain its order. The injunction prayed for is therefore denied.

District Judge SIMPSON concurs in the result.

FTC v. Dean Foods Co.

Supreme Court of the United States

March 28, 1966, Argued ; June 13, 1966, Decided

No. 970

Reporter

384 U.S. 597 *; 86 S. Ct. 1738 **; 16 L. Ed. 2d 802 ***; 1966 U.S. LEXIS 2985 ****; 1966 Trade Cas. (CCH) P71,788

FEDERAL TRADE COMMISSION v. DEAN FOODS CO. ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: *356 F.2d 481*, reversed and remanded.

Core Terms

court of appeals, merger, Writs, district court, injunction, proceedings, cases, preliminary injunction, enjoin, Clayton Act, appellate jurisdiction, preliminary relief, courts, acquisition, temporary, merits, orders, consummation, restraining, appeals, parties, administrative agency, appellate court, antitrust, decisions, vested, staff, authorization, vertical, milk

LexisNexis® Headnotes

Civil Procedure > Remedies > Writs > All Writs Act

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN1[] **Writs, All Writs Act**

The All Writs Act, *28 U.S.C.S. § 1651(a)*, empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN2[] **Remedies, Writs**

Where a case is within the appellate jurisdiction of the higher court a writ may issue in aid of the appellate jurisdiction which might otherwise be defeated.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN3[] **Remedies, Writs**

The authority of the appellate court is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN4[] **Reviewability, Jurisdiction & Venue**

There is a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Jurisdiction, Exclusive Jurisdiction**

Section 11(c) of the Clayton Act, *15 U.S.C.S. § 21(c)*, gives exclusive jurisdiction to review final orders by the Federal Trade Commission against illegal mergers, on application of any person required by such order to cease and desist from any such violation, to the courts of appeals for any circuit within which such violation occurred or within which such person resides or carries on business. This grant includes the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN6[] **US Federal Trade Commission Actions, Remedial Powers**

The ancillary power to bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated have always been treated as essential to the effective discharge of the Federal Trade Commission's responsibilities.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN7[] **Separation of Powers, Legislative Controls**

Courts do not draw the inference that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigation. Courts do not construe such requests by government agencies and the resulting nonaction of the Congress as affirmative evidence of no authority.

Lawyers' Edition Display

Summary

The Federal Trade Commission, which had commenced administrative action to determine whether a merger of two companies violated 7 of the Clayton Act, applied to the United States Court of Appeals for the Seventh Circuit for a temporary restraining order and a preliminary injunction to maintain the status quo until it determined the legality of the merger, alleging that if the merger was allowed to be completed, an effective remedial order would be virtually impossible, and the Court of Appeals would be deprived of its appellate jurisdiction over final Commission orders. The Court of Appeals entered a temporary restraining order, but after a hearing for a preliminary injunction, dissolved the restraining order and dismissed the petition, on the ground that the Commission had no authority to institute the proceedings. (*356 F2d 481*.)

On certiorari, the Supreme Court of the United States reversed and remanded. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that (1) the Court of Appeals had the power under the All Writs Act to issue a preliminary injunction upon a showing of the allegations in the Commission's petition, and (2) notwithstanding the absence of express statutory authority to request preliminary relief from a Court of Appeals under the All Writs Act, the Commission had standing to seek such relief under the circumstances alleged in the case at bar.

Fortas, J., joined by Harlan, Stewart, and White, JJ., dissented, expressing the view that the Commission had no power to seek a temporary injunction in any court, and that the Court of Appeals had no jurisdiction under the All Writs Act, or otherwise, with regard to such relief.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > temporary injunction against merger -- power of Court of Appeals -- All Writs Act -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

A Court of Appeals has the power under the All Writs Act (*28 USC 1651(a)*), which authorizes the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law, to temporarily enjoin the consummation of a merger of two companies upon the Federal Trade Commission's application for an injunction to maintain the status quo until the Commission determined the legality of the merger in proceedings before the Commission attacking the merger as violative of 7 of the Clayton Act (*15 USC 18*), upon a showing that an effective remedial order would be virtually impossible if the merger was allowed to be completed, thus rendering the enforcement of any final decree of divestiture futile and depriving the court of its appellate jurisdiction over final Commission orders.

APPEAL §1293 > dismissal of application for injunction -- considering allegations as true -- > Headnote:
LEdHN[2][] [2]

The Supreme Court of the United States must take as true the allegations of the Federal Trade Commission's application to a Court of Appeals for a preliminary injunction against the consummation of a merger, where the case comes to the Supreme Court from the lower court's dismissal on jurisdictional grounds.

COURTS §505 > All Writs Act -- appellate jurisdiction -- > Headnote:
LEdHN[3][] [3]

The exercise of the power under the All Writs Act, which authorizes the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law (*28 USC 1651(a)*), is in the nature of appellate jurisdiction where directed to an inferior court, and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > injunction against merger -- power of Courts of Appeals -- > Headnote:
LEdHN[4][] [4]

The grant of exclusive jurisdiction to the Courts of Appeals, under 11(c) of the Clayton Act (*15 USC 21(c)*), to review final orders by the Federal Trade Commission against illegal mergers on application of any person required by such an order to cease and desist from any such violation, includes the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > temporary injunction against merger -- Federal Trade Commission's power to seek -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

Notwithstanding the absence of an express statutory grant of authority to the Federal Trade Commission to request preliminary relief under the All Writs Act (*28 USC 1651(a)*), the Commission, which has been entrusted with the enforcement of the Clayton Act, has the incidental power to seek such preliminary relief from a Court of Appeals, which has jurisdiction to review final Commission action, where the Commission alleges that a temporary injunction against the merger of companies to maintain the status quo until the Commission determines the legality of the merger under 7 of the Clayton Act (*15 USC 18*) is necessary to allow entry of an effective divestiture order and to insure effective judicial review; the fact that Congress had not acted on requests of the Commission for statutory authority to issue preliminary relief itself, or to proceed in the District Courts for such purpose, has no relevance, since Congress gave no attention to the exercise of judicial power by the Courts of Appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished.

ADMINISTRATIVE LAW §109 > PARTIES §3.5 > temporary injunction -- agency's power to seek -- > Headnote:
LEdHN[6][] [6]

Absent explicit direction from Congress, a federal agency charged with protecting the public interest can request that a Court of Appeals having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act (*28 USC 1651(a)*) to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

EVIDENCE §167 > inference -- Congressional intent -- > Headnote:
LEdHN[7][] [7]

It cannot be inferred from the fact that Congress took no action on the Federal Trade Commission's request to grant the Commission or a District Court the power to issue a preliminary injunction against the merger of companies as violative of the Clayton Act that Congress thereby expressed an intent to circumscribe traditional judicial remedies.

Syllabus

Respondents, two substantial competitors in the sale of packaged milk in the Chicago area, signed a merger agreement following meetings with representatives of the Federal Trade Commission (FTC) who indicated that the merger would raise serious questions under the antitrust laws. At the time of the merger one of the respondents was the third or fourth largest packaged milk distributor in the area, the other at least the second largest, and together they accounted for 23% of area sales of packaged milk. The FTC filed a complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. Thereafter the FTC, under the All Writs Act, *28 U. S. C. § 1651 (a)*, petitioned the Court of Appeals for a temporary restraining order and a preliminary injunction to maintain the *status quo* until the FTC determined the merger's legality. The FTC alleged the probability of its **[****2]** finding an antitrust violation and that the need for injunctive relief was "compelling" since under the merger one of the respondents would no longer exist, its milk routes and certain of its plants and equipment would be sold and its remaining assets would be consolidated, precluding its restoration as a viable independent company if the merger were subsequently ruled illegal. The petition alleged that the Court of Appeals would consequently be deprived of its appellate jurisdiction over final FTC orders and the opportunity to enter a meaningful order of its own. The Court of Appeals on the hearing for a preliminary injunction dismissed the petition on the ground that the FTC had not entered a cease-and-desist order and had no authority to institute the proceeding, Congress having failed to enact bills introduced for such a purpose. The contract was then closed. MR. JUSTICE CLARK on application issued a preliminary injunction against material corporate changes in the acquired company and subsequently this Court granted certiorari. *Held*:

1. The Court of Appeals has jurisdiction to issue a preliminary injunction to prevent consummation of the merger agreement upon a showing **[****3]** that an effective remedial order would otherwise be virtually impossible once the merger had been implemented, thus rendering a final divestiture decree futile. Pp. 603-605.

(a) The All Writs Act extends to the potential jurisdiction of an appellate court where an appeal is not then pending but may later be perfected. Pp. 603-604.

(b) The grant in § 11 (c) of the Clayton Act to courts of appeals of jurisdiction to review final orders of the FTC against illegal mergers on application of any person required thereby to cease and desist such violations includes the traditional power to preserve the *status quo* while administrative proceedings are in progress to prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Whitney Nat. Bank v. New Orleans Bank, 379 U.S. 411*. Pp. 604-605.

2. The FTC, under the circumstances alleged in this case, has standing to seek preliminary relief under the All Writs Act. Pp. 605-612.

(a) It would stultify Congress' purpose in entrusting the FTC with enforcement of the Clayton Act and granting it the power to order divestiture if the FTC did not have the incidental power to ask the courts of appeals to **[****4]** exercise their authority under the All Writs Act. Pp. 606-612.

(b) The power of the courts of appeals to grant preliminary relief here derives from the All Writs Act, not the Clayton Act. P. 608.

(c) Congress' failure to enact proposals that the FTC be empowered itself to issue preliminary relief or to proceed in district courts for that purpose reflects no intent to circumscribe traditional judicial remedies. Pp. 608-611.

Counsel: Solicitor General Marshall argued the cause for petitioner. With him on the brief were Assistant Attorney General Turner, Richard A. Posner, Howard E. Shapiro and James McI. Henderson.

Hammond E. Chaffetz argued the cause for respondents and filed a brief for respondent Dean Foods Co.

L. Edward Hart, John Paul Stevens and Edward I. Rothschild filed a brief for respondent Bowfund Corp.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

Opinion by: CLARK

Opinion

[*599] **[***804]** **[**1740]** MR. JUSTICE CLARK delivered the opinion of the Court.

At issue here is the power of the Court of Appeals under the All Writs Act, *28 U. S. C. § 1651 (a) (1964 ed.)*, to temporarily enjoin the consummation of a **[****5]** merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, as amended, 64 Stat. 1125, *15 U. S. C. § 18 (1964 ed.)*. This case arose on the application of the Commission for a temporary restraining order and a preliminary injunction against respondents Dean Foods Company and Bowman Dairy Company to maintain the *status quo* until the Commission determined the legality of their merger. The Commission alleged that it had issued a complaint against respondents under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 15 U. S. C. § 45 (1964 ed.), and that from the facts underlying the complaint "it is probable that the Federal Trade Commission will enter an order finding a violation of these laws." The petition stated that there was a "compelling" need for preliminary relief since the "acquisition itself" will split Bowman in two -- Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments" for distribution to its stockholders. [1] In **[****6]** addition, it was alleged that Dean planned to dispose of most of Bowman's retail milk routes, certain of its plants and equipment, and to consolidate the remaining assets. The Commission thus argued that if the merger were **[***805]** allowed to be completed, "Bowman as an entity will no longer exist," and that it "will be 'extremely difficult and very probably impossible'" **[*600]** to restore Bowman as "a viable independent" company if the merger were subsequently ruled illegal. In other words, consummation of the agreement would "prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." As grounds for issuance of an extraordinary writ, the Commission asserted that the Court of Appeals "will, in effect, be deprived of its appellate jurisdiction [over final Commission orders] and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis* -- Bowman -- will have vanished."

[**7]** The Court of Appeals entered a temporary restraining order against respondents, as prayed. On the hearing for a preliminary injunction, however, it dissolved the temporary restraining order and dismissed the petition for the reasons that "no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and . . . we now hold that the Commission did not have authority to institute this proceeding in this court . . . ." In its final judgment the Court of Appeals supported **[**1741]** its refusal to grant relief at the request of the Commission by reference to the fact that:

"in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission." 356 F.2d 481, 482.

LEdHN[1A][] [1A]

A few hours after the Court of Appeals entered its **[****8]** order on January 19, 1966, the contract was closed and Dean acquired legal title to Bowman's operating assets. **[*601]** Upon application by the Solicitor General on behalf of the Commission, MR. JUSTICE CLARK, after consulting the other members of this Court, entered a preliminary injunction on January 24, 1966, restraining respondents from making any material changes with respect to Bowman's corporate structure or the assets purchased. This order provided that Dean might sell Bowman's retail home delivery routes upon terms and conditions acceptable to the Commission, but that any milk supplied by Dean to the purchasers of the routes must continue to be delivered under the Bowman label and from former Bowman plants. We granted certiorari on February 18, 1966, *383 U.S. 901*, and expedited consideration of this case. We conclude that the Court of Appeals erred and reverse its judgment.

I.

LEdHN[2][] [2]Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true. We need not detail the facts **[****9]** further than to say that Dean and Bowman were substantial competitors in the sale of packaged milk in the Chicago area, one of the largest markets in the United States for packaged milk. On November 2, 1965, attorneys for Dean and Bowman **[***806]** met with representatives of the Commission to discuss a proposal by Dean to purchase all

[1] Since consummation of the merger all assets of Bowman, with the exception of cash and marketable securities which were exempted from the purchase agreement, have been transferred to Dean. Bowman has ceased dairy operations and now acts as an investment fund, having received and invested the proceeds of the sale.

of Bowman's plants and equipment, the Bowman name, all customer and supplier lists together with the benefit of their relationships, and various other assets, all of which were situated in the Chicago area. Bowman would consequently cease doing a dairy business there. It was emphasized that the inquiry was merely to ascertain the views of the staff of the Commission and not to secure a formal advisory opinion. After investigation, on December 3, 1965, the Commission's staff advised Dean's counsel that it believed the acquisition would raise serious questions under the **[*602]** antitrust laws, and that on the basis of existing information the staff would recommend that the Commission issue a complaint against the acquisition if consummated. After further meetings, Dean's counsel informed the Commission's staff on December 14, 1965, that the agreement **[****10]** had been signed. A week later the Commission issued a formal complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act.

It appears that at the time of the merger Dean was the third or fourth largest distributor of packaged milk in the Chicago area; Bowman was at least the second largest in that market; and together they enjoyed approximately 23% of the sales of packaged milk in the same area, while the four largest dairy companies had a 43% share thereof. Affidavits attached to the Commission's application alleged that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57, and that in the four months prior to the filing of the complaint four more firms had been eliminated by acquisitions. From these statistics it was concluded that the effect of Dean's acquisition of Bowman would be to substantially **[**1742]** lessen competition. We place in the margin the Commission's summation of its complaint. [2]

[**11]** **[*603]** II.

LEdHN[3][] [3]***HN1***[] The All Writs Act, *28 U. S. C. § 1651 (a)*, empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. **[***807]** " The exercise of this power "is in the nature of appellate jurisdiction" where directed to an inferior court, *Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C. J.), and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected. Cf. *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C. J.). These holdings by Chief Justice Marshall are elaborated in a long line of cases, including *McClellan v. Carland, 217 U.S. 268 (1910)*, where Mr. Justice Day held: "we think it the true rule that ***HN2***[] where a case is within the appellate jurisdiction of the higher court a writ . . . may issue in aid of the appellate jurisdiction which might otherwise **[****12]** be defeated . . . ." At 280. And in *Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943)*, Chief Justice Stone stated that ***HN3***[] the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." **[*604]** At 25. Likewise, decisions of this Court

[2] The Federal Trade Commission alleged:

"(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

"(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

"(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

"(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

"(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States . . . thereby tending to bring about the adverse competitive effects described [elsewhere in the complaint];

"(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

"(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk."

"have recognized ***HN4***[] a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . . ." *Arrow Transp. Co*. v. *Southern R. Co., 372 U.S. 658, 671, n. 22 (1963)*. There the Court cited such authority as *Scripps-Howard Radio, Inc*. v. *Federal Communications Comm'n, 316 U.S. 4 (1942)*; *West India Fruit & S. S. Co*. v. *Seatrain Lines, Inc., 170 F.2d 775 (C. A. 2d Cir. 1948)*; and *Board of Governors v. Transamerica Corp., 184 F.2d 311* (C. A. 9th **[****13]** Cir.), cert. denied, *340 U.S. 883 (1950)*.

LEdHN[4][] [4]Section 11 (c) of the Clayton Act, as amended, 73 Stat. 243, *15 U. S. C. § 21 (c)*, ***HN5***[] gives exclusive jurisdiction to review final orders by the Commission against illegal mergers, on application of "any person required by such order . . . to cease and desist from any such violation," to the courts of appeals "for any circuit within which such **[**1743]** violation occurred or within which such person resides or carries on business." This grant includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Continental Ill. Nat. Bank v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 675 (1935)*. A recent case involving a similar statutory proceeding is dispositive of this issue. *Whitney Nat. Bank v. New Orleans Bank, 379 U.S. 411 (1965)*, raised the **[****14]** question whether holding companies were "lawfully entitled" to operate subsidiary banks within Louisiana, a question we held should be determined in the first instance by the Federal Reserve Board. We further concluded that the Board should reconsider its initial approval of such a plan in light of **[*605]** an intervening Louisiana statute, and so gave the parties, who had sought review of the Board's order before the Court of Appeals for the Fifth Circuit, an opportunity to move that the case be remanded to the Board. It was noted that the **[***808]** Court of Appeals had authority "to issue such orders as will protect its jurisdiction pending final determination of the matter," at 415, and that *§ 1651 (a)* empowered it to stay "the order of approval of the Federal Reserve Board pending final disposition of the review proceeding." At 425. In response to the argument that the stay would not be sufficient because the Comptroller of Currency nonetheless intended to issue a certificate to the bank, we stated that if "the Court of Appeals should find it necessary to take direct action to maintain the status quo and prevent the opening of the bank, it has ample power to do so" by **[****15]** an injunction against the applicants before the Federal Reserve Board themselves. At 426. Such action would be analogous to the relief requested here by the Commission. [3]

LEdHN[1B][] [1B]

These decisions furnish ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of this agreement upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile.

III.

[**16]** ***LEdHN[5A]***[] [5A]

Dean and Bowman insist, however, that as a creature of statute the Commission may exercise only those functions delegated to it by Congress, and that Congress has **[*606]** failed to give the Commission express statutory authority to request preliminary relief under the All Writs Act. [4] **[****18]** But the Commission is a **[**1744]**

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[3] Of course, the courts of appeals have traditionally framed *§ 1651 (a)* writs in the form of compulsory injunctions aimed at private parties. *E. g., Application of President & Directors of Georgetown College, 118 U. S. App. D. C. 80, 331 F.2d 1000*, cert. denied, ***377 U.S. 978 (1964)***. See Recent Cases, 77 Harv. L. Rev. 1539, 1542 (1964).

[4] For the proposition that the Commission must have express statutory authority to seek injunctions in the courts of appeals two cases are cited. The first, *Humphrey's Executor v. United States, 295 U.S. 602 (1935)*, has no relevance to our problem. And the other, *Federal Trade Comm'n v. Eastman Kodak Co., 274 U.S. 619, 623-625 (1927)*, even though apposite, has been repudiated. It held that in fashioning a final decree the Commission "exercises only the administrative functions delegated to it

governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act. [5] Indeed, **[***809]** the opinions **[*607]** in *Arrow Transp. Co*. and *Whitney Nat. Bank* necessarily recognized the standing of administrative agencies to seek such preliminary relief to ensure effective judicial review. Both decisions referred to *Board of Governors v. Transamerica Corp., supra*, **[****17]** where the Court of Appeals stayed a merger on application by the Federal Reserve Board. See also *Public Utilities Comm'n v. Capital Transit Co., 94 U. S. App. D. C. 140, 214 F.2d 242 (1954)*, and *West India Fruit & S. S. Co*. v. *Seatrain Lines, Inc., 170 F.2d 775, 779 (C. A. 2d Cir. 1948)*. There is no explicit statutory authority for the Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeals to defend its orders. Nor has it ever been asserted that the Commission could not bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect. ***HN6***[] Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities.

[**19]**

[*608] ***LEdHN[6]***[] [6]It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789. Congress has never restricted the power which the courts of appeals may exercise under that Act. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction. [6] In the absence **[**1745]** of explicit direction from Congress we have no basis to say that an agency charged with protecting the public interest cannot request that a court of appeals, having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

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by the Act," and, therefore, could not order divestiture of laboratories acquired through a stock purchase. This view was rejected in *Pan American World Airways, Inc*. v. *United States, 371 U.S. 296, 312-313*, nn. 17-18 (1963), the Court holding that "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority," citing *Gilbertville Trucking Co*. v. *United States, 371 U.S. 115 (1962)*.

[5] Such a holding would especially interfere with the functions Congress has given the Commission in the merger field. As THE CHIEF JUSTICE stated in *Brown Shoe Co*. v. *United States, 370 U.S. 294 (1962)*, the Congress "sought to assure the Federal Trade Commission and the courts the power to brake this force [business concentration] at its outset and before it gathered momentum." At 317-318. But without standing to secure injunctive relief, and thereby safeguard its ability to order an effective divestiture of acquired properties, the Commission's efforts would be frustrated. As MR. JUSTICE DOUGLAS said in *United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1944)*:

"The acquisition of a competing theatre terminates at once its competition. . . . And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock."

Here the plan of merger itself contemplates the sale of the acquired home delivery milk routes and certain milk plants. In addition, Bowman has retained its cash and securities, with the intention ultimately to distribute them to its stockholders. If consummation of the merger is not restrained, the restoration of Bowman as an effective and viable competitor will obviously be impossible by the time a final order is entered. This is not unusual. Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture. *E. g., Ekco Products Co*., Trade Reg. Rep. para. 16,879 (1964) (1963-1965 Transfer Binder), aff'd, *347 F.2d 745 (C. A. 7th Cir. 1965)*; *Foremost Dairies, Inc., 60 F. T. C. 944*, order modified per stipulation (C. A. 5th Cir. 1965) (Docket No. 18,815).

[6] Cf. *Public Utilities Comm'n v. Capital Transit Co., 94 U. S. App. D. C. 140, 214 F.2d 242, 245 (1954)*, where the Court of Appeals for the District of Columbia Circuit gave as one of its reasons for granting an injunction the fact that "the moving party in the litigation was the Public Utilities Commission of the District of Columbia, a governmental agency clothed by Congress with special responsibility in the matters involved."

[**20]** Respondents point -- as did the Court of Appeals -- to the fact that the Commission sought authority from the Eighty-fourth through the Eighty-ninth Congresses to grant preliminary injunctions itself or to **[***810]** proceed in the district court as the Department of Justice can under the Clayton Act. [7] **[****21]** Both former Chairman Gwynne and Chairman Dixon appeared in support of the measures, [8] and referred to *Federal Trade Comm'n v. International **[*609]** Paper Co., 241 F.2d 372 (C. A. 2d Cir. 1956)*, which held the Commission had no standing to seek preliminary injunctions from the courts of appeals. [9] **[****22]** In addition, several Congressmen made statements regarding the need for statutory amendment. [10] However, no proposal was put before the Congress relating to the authority of the Commission to secure preliminary relief before the courts of appeals in accordance with *§ 1651 (a)*. The proposals concerned only the power of the Commission itself to issue preliminary relief or to proceed in the district courts for that purpose.

LEdHN[7][] [7]Congress neither enacted nor rejected these proposals; it simply did not act on them. [11] Even if it had, the legislation as proposed would have had no effect whatever on the power that Congress granted the courts by the All Writs Act. We cannot infer from the fact that Congress took no action at all on the request of the Commission **[*610]** to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies. Cf. *Scripps-Howard Radio, Inc*. v. *Federal Communications Comm'n, 316 U.S. 4, 11 (1942)*. The decision in *Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)*, **[****23]** is apposite. Following an adverse decision in *Eisler v. **[**1746]** Clark, 77 F.Supp. 610 (D. D. C. 1948)*, the Department of Justice asked Congress for legislation exempting the Immigration Service from the Administrative Procedure Act. 60 Stat. 237, *5 U. S. C. § 1001 (1964 ed.)*. As was the case here, the appropriate committees of both Houses reported the proposal favorably but Congress adjourned without taking any action. The Department nonetheless insisted in *Wong Yang Sung* that hearings in deportation cases did not have to conform to the requirements of the Administrative Procedure Act. In **[***811]** his discussion of legislative history, Mr. Justice Jackson wrote for a unanimous Court that ***HN7***[] "we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." At p. 47. This Court has consistently refused to construe **[****24]** such requests by government agencies and the

[7] *E. g.*, H. R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess. (1956); H. R. 49 and 1574, 89th Cong., 1st Sess. (1965).

[8] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 35 (1956); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42-45 (1958) (testimony of Chairman Gwynne). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 85-86 (1961) (testimony of Chairman Dixon).

[9] They also directed attention to the denial of injunctive relief in *Federal Trade Comm'n* v. *Farm Journal, Inc*. (C. A. 3d Cir. 1955) (unreported). Both men failed to mention the contrary decision in *Board of Governors v. Transamerica Corp., 184 F.2d 311* (C. A. 9th Cir.), cert. denied, ***340 U.S. 883 (1950)***. In *Ekco Products Co*., Trade Reg. Rep. para. 16,879 (1964) (1963-1965 Transfer Binder), aff'd, *347 F.2d 745 (C. A. 7th Cir. 1965)*, Commissioner Elman stated that the question of the Commission's ability to obtain a preliminary injunction under the All Writs Act "has not been authoritatively answered." At 21,905, n. 10.

[10] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 156-157 (1958) (testimony of Congressman Celler). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 42-45 (1961) (statement of Congressman Patman).

[11] Cf. *Helvering v. Hallock, 309 U.S. 106, 120 (1940)*, where it was said that to give weight to the nonaction of Congress was to "venture into speculative unrealities."

resulting nonaction of the Congress as affirmative evidence of no authority. [12] Thus, in *United States* v. *du* *Pont & Co., 353 U.S. 586 (1957)*, MR. JUSTICE BRENNAN held:

"During the 35 years before this action was brought [in 1949], the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C., Report on **[*611]** Corporate Mergers and Acquisitions, 168 (1955), H. R. Doc. No. 169, 84th Cong., 1st Sess. Also, the House Committee considering the 1950 revision of § 7 stated that '. . . it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . .' H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed '. . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . .' (Emphasis added.)

"This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by **[****25]** Congress. . . . The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the [1914] Act." At p. 590.

Despite the representations of the Commission that the 1914 Act did not apply to vertical mergers, its sponsorship of legislation to so enlarge its coverage, and the passage of the 1950 Act by the Congress for this purpose, this Court nonetheless held that the 1914 Act included vertical mergers from its very inception, and thus required du Pont to divest its interest in General Motors stock, which had been acquired in 1915.

LEdHN[5B][] [5B]

[**26]** It is therefore clear that the "proceedings" in the Congress with reference to the authority of the Commission itself to issue or apply to the district courts for the issuance of preliminary injunctions in merger cases have no relevance whatever to the question before us. In short, Congress gave no attention to the exercise of judicial power by the courts of appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished. We thus hold **[*612]** that the Commission has standing to seek preliminary relief from the Court of Appeals under the circumstances alleged. As stated earlier, we must take the allegations of the Commission as true, and so do not pass upon whether a preliminary injunction should be issued. That is for the Court of Appeals **[**1747]** to decide on remand, as it would decide any application to it for relief under the All Writs Act.

Reversed and remanded.

Dissent by: FORTAS

Dissent

[*812]** MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The Court today decides that the courts of appeals must entertain original applications by the Federal **[****27]** Trade Commission for the issuance of preliminary injunctions to restrain mergers alleged to violate § 7 of the Clayton Act, *15 U. S. C. § 18 (1964 ed.)*, pending proceedings before the Commission to determine whether such mergers violate that section.

In so deciding, the Court determines that the Commission -- an administrative agency with defined and circumscribed powers -- is authorized to seek such relief in the courts of appeals; and that the courts of appeals,

[12] Cf. *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 348-349 (1963)*.

under the All Writs Act, *28 U. S. C. § 1651 (a) (1964 ed.)*, have power to entertain the Commission's petition and to grant the injunctive relief.

This decision cannot be supported. Not a single one of the prior decisions of this Court cited as authority sustains it, either specifically or indirectly, or by principle or analogy. No statute of the Congress can be appropriately summoned to the Court's aid. The plain, unmistakable intent of the Congress in defining the Commission's powers and the jurisdiction of the courts of appeals is that no such threshold injunctive power is available at the Commission's behest. The Act plainly and explicitly vests the governmental power **[****28]** to restrain and enjoin violations of the Act in the district courts, **[*613]** not in the court of appeals; and it plainly and explicitly empowers the United States attorneys "under the direction of the Attorney General" -- and not the Federal Trade Commission -- to institute such proceedings. *15 U. S. C. § 25 (1964 ed.)*.

Since 1956, the Federal Trade Commission has persistently requested the Congress to enact legislation giving the Commission itself the power to enjoin, or alternatively, to seek a district court order to enjoin mergers pending the outcome of the Commission's proceedings. Congress has just as persistently refused to do so.

Beginning in 1956, at least 37 bills have been introduced in the Congress, directed to providing the Commission with a threshold, temporary remedy. None has been enacted, despite the unequivocal statements of the three chairmen of the Commission who served during those years that the agency presently has no power to seek relief ancillary to its administrative proceedings. This Court now bestows what the Congress has withheld.

The statements in the Court's opinion indicating that its result is necessary unless we are **[****29]** to "stultify congressional purpose" fly in the teeth of the record, plainly written and repeatedly reiterated. Congress is keenly interested in enforcement of § 7. But it has demonstrated over and over again that it has no interest in arming the Commission with the power today conferred upon it. It created and equipped the Commission with administrative and quasi-judicial powers to serve a function quite distinct from that of a prosecutor or litigant. It has repeatedly declined the urgent request to revise the Commission's role and function. Indeed, Congress has refused to empower the Commission to ask for this relief in an otherwise suitable forum -- the district **[***813]** courts. But the Court today gives this agency, which Congress obviously regards as unsuitable for the purpose, power to resort to an unsuitable forum -- the courts of appeals -- for the same purpose.

[*614] The Commission, the Executive Branch of the Government, the Congress and all courts which have passed upon the point have until today proceeded on the expressed **[**1748]** premise that the Federal Trade Commission has no authority to seek such relief. [1] **[****31]** I have not found a single commentator **[****30]** in this much-

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[1] See *Federal Trade Comm'n v. International Paper Co., 241 F.2d 372 (C. A. 2d Cir. 1956)*; *Federal Trade Comm'n* v. *Farm Journal, Inc*. (C. A. 3d Cir. 1955). In *In the Matter of A. G. Spalding & Bros., Inc*. (F. T. C. Docket No. 6478), the Commission failed to obtain preliminary relief in the First Circuit, but did get respondent's commitment not to alter the *status quo* save on 30 days' notice. See *A. G. Spalding & Bros., Inc*. v. *F. T. C., 301 F.2d 585 (C. A. 3d Cir. 1962)*.

The sole instance where injunctive relief was obtained is *Board of Governors v. Transamerica Corp., 184 F.2d 311 (C. A. 9th Cir. 1950)*, cert. denied, ***340 U.S. 883***. In *Transamerica* the threatened action would have defeated the Board's jurisdiction entirely. The Board (whose role in § 7 enforcement is like the FTC's) argued both in the Court of Appeals and in opposition to the petition for certiorari, that if Transamerica were not restrained from disposing of stock holdings the legality of whose acquisition was in issue in the administrative proceedings, the effect under the pre-1950 version of § 7, as construed by this Court in *Arrow-Hart & Hegeman Electric Co*. v. *F. T. C., 291 U.S. 587*, would be to "oust the Board of its jurisdiction under Section 11 of the Clayton Act . . . [and to] defeat the exclusive jurisdiction of the Court of Appeals to enforce or affirm such order as the Board might make . . . ." Government's Brief in Opposition in *Transamerica Corp*. v. *Board of Governors* (Nos. 322 and 323, October Term, 1950), at pp. 5, 8-9, 15. See also *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 339, n. 17*, where *Transamerica* appears to have been distinguished from *International Paper, supra*, precisely on the ground that the writ there was necessary to protect the "jurisdiction" both of the agency and of the Court of Appeals -- a conventional use of the All Writs Act.

discussed field of law who has suggested that the Commission has such authority, and none is cited in the Court's opinion or in the briefs of the parties. [2]

[*615] I can only assume that the majority is motivated by a desire to lend all assistance to the Federal Trade Commission in its administration of § 7. However commendable this motivation may be in general, it is here entirely misdirected. Indulgence in this generous spirit unjustifiably burdens the courts of appeals with a fact-finding duty which they are unable to perform; disrupts the statutory division of functions between the Commission and the Department of Justice; and deprives parties of the opportunity for fair and careful consideration of their proposals which is promised by our law, by the decisions of this Court and the economic needs of the Nation.

The Clayton **[****32]** Act contains specific and comprehensive enforcement provisions. There is no vacuum to be filled by ingenuity. There is no room for improvisation. The Act is fully armed with a triple arsenal. Enforcement powers with respect to mergers under § 7 are vested in the Department of Justice, the Federal Trade Commission and private persons who claim injury as a result of the merger. Both the Department **[***814]** of Justice and private litigants are authorized to seek injunctive relief in the district courts. But the role and function of the Federal Trade Commission is differently conceived.

The powers of the Commission and the manner of their exercise and of review and enforcement of Commission orders are set out in meticulous detail. Whenever the Commission "shall have reason to believe that any person is violating or has violated" § 7, it shall issue a complaint. The complaint is to be served upon "such person and the Attorney General." **[**1749]** The Attorney General may intervene in the Commission's proceeding. He may institute actions in the district court for injunctive relief. **[*616]** The Commission is to hold a hearing; testimony is to be taken; the Commission is **[****33]** to "make a report in writing"; and it is empowered to issue an order to cease and desist and to compel the respondent *to "divest itself of the stock . . . or assets . . . held . . . contrary to the provisions of* [*§ 7*]." *15 U. S. C. § 21 (b) (1964 ed.)*. (Emphasis supplied.) The respondent may obtain review of the order in an appropriate court of appeals in the manner and with the consequences meticulously defined in the Act, as hereinafter discussed.

There is no question -- I submit that there can be no question -- that Congress from the outset intended that the Federal Trade Commission should not have other or different or supplementary or additional power to enforce § 7. [3] **[****35]** The Commission was created in the same **[*617]** year that the Clayton Act was adopted. It was

[2] On the contrary, the common view is that such authority is entirely lacking. See, *e. g*., Kaysen & Turner, Antitrust Policy 258 (1959); Duke, Scope of Relief Under Section 7 of the Clayton Act, 63 Col. L. Rev. 1192, 1206, n. 85 (1963); Note, 79 Harv. L. Rev. 391, 404 (1965); Note, 40 N. Y. U. L. Rev. 771 (1965); Comment, 32 N. Y. U. L. Rev. 1297 (1957).

[3] The Court's opinion asserts, in alleged demonstration of the "ancillary powers" which have been inferred on the Commission's behalf, that it may bring "contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect." The Court errs. The Commission's powers in this respect are not "implied." The machinery by which the Commission procures compliance with its orders is, and always has been, spelled out by statute. Until 1959, one could with impunity violate an FTC Clayton Act order. Such an order was not final until the respondent sought judicial review and a Court of Appeals granted enforcement. Disobedience thereafter was a contempt of court. In the event the respondent did not seek review, the Commission was required to ascertain that he was violating its order and then proceed, *pursuant to express statutory provision* (*15 U. S. C. § 21*), to seek enforcement in the courts of appeals. See *28 U. S. C. § 2112 (1964 ed.)*, authorizing the courts of appeals to promulgate rules for enforcement proceedings; and see, *e. g*., *1st Cir. R. 16*. Cf. *Fed. Rule Civ. Proc. 70*. A violation thereafter constituted contempt of court. The courts declined to infer any more convenient substitute for this three-step process. See *Federal Trade Comm'n v. Henry Broch & Co., 368 U.S. 360, 365*; *Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 477-479*.

The statute was amended in 1959. An FTC order under the Clayton Act is now final upon expiration of the time allowed respondent to seek judicial review. If he does not appeal the order and violates its terms after it becomes final, the Government may proceed, *pursuant to statute* (*15 U. S. C. §§ 21 (g)* and (*l*)), to seek civil penalties of up to $ 5,000 per violation.

In short, and contrary to the suggestion in the Court's opinion, the Commission's power to enforce compliance with its orders is and has been wholly statutory. Nothing has been left to implication.

supposed to be an expert, administrative agency. It was not intended to be a litigation arm of the United States except as its own final orders might be involved. [4] It was not intended to have power to seek or deliver the quick result, even in emergencies. This power, so far as the Government is concerned, was explicitly, carefully confined to the district courts on application **[****34]** of the **[***815]** United States attorney "under the direction of the Attorney General."

Section 15 of the Clayton Act, *15 U. S. C. § 25*, expressly authorizes the Department of Justice to proceed in the district courts of the United States to obtain preliminary relief against allegedly unlawful mergers. *Section 16* makes the same remedy available on application of private litigants. *15 U. S. C. § 26 (1964 ed.)*. Nowhere is such power given to the Commission. It would be incredible to suggest that this omission was an oversight -- or even an error. It was by design -- and, I suggest, by rational design.

The Commission was not intended to -- it has no power to -- it should not -- **[**1750]** make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. Cf. **[*618]** § 5 (c) of the **[****36]** Administrative Procedure Act of 1946, *5 U. S. C. § 1004 (c) (1964 ed.)*.

The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injunction, it must -- without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts -- file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted *in limine*. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monopoly, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission **[****37]** is supposed objectively to consider the same issues on the basis solely of the record.

The clear design of the statute is that the authority to decide, on behalf of the Government, to seek the powerful remedy of preliminary injunction, and the power to do so, are vested in the Attorney General. That is his business -- his type of function. It is deliberately withheld from the Commission. That is not its business. The Commission is supposed to be an expert agency, acting deliberately, bringing to bear upon the complex economic problems of a merger, that judgment and experience which can emerge only from careful factual inquiry, the taking of evidence and the formulation of a report. The Federal Trade Commission was not intended **[*619]** to be a gun, [5] **[****38]** a carbon copy of the Department of Justice. [6]

[*816]** It has steadily been acknowledged by spokesmen for the Commission, by leading members of the Congress, and by officials of the Executive Branch that the FTC has no basis in statute to seek the relief the Court today makes available to it. In the Appendix to this opinion, I refer to these acknowledgments and I describe the

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[4] See 51 Cong. Rec. 1963, 13047, 8977 (1914); Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666 (1925).

[5] Where Congress has determined that it is appropriate for the Commission to seek threshold relief in order to protect the public, it has expressly so provided -- directing that the Commission proceed in an appropriate tribunal, the United States District Courts. See § 13 (a) of the Federal Trade Commission Act (Wheeler-Lea amendments), *15 U. S. C. § 53 (a) (1964 ed.)*; § 302 of the Food, Drug, and Cosmetic Act, *21 U. S. C. § 332 (1964 ed.)*; § 7 (b) of the Wool Products Labeling Act, *15 U. S. C. § 68e (b) (1964 ed.)*; § 9 (b) of the Fur Products Labeling Act, *15 U. S. C. § 69g (b) (1964 ed.)*; § 6 (a) of the Flammable Fabrics Act, *15 U. S. C. § 1195 (a) (1964 ed.)*; and § 8 of the Textile Fiber Products Identification Act, *15 U. S. C. § 70f (1964 ed.)*.

[6] See Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387-388 (1964).

unsuccessful, oft-repeated efforts of the Commission to obtain legislation to give it the power it has now successfully obtained from this Court. [7]

[**39]** **[*620]** In **[**1751]** short, the Commission has no power to decide that a proposed merger should be enjoined *pendente lite*; it has no authority to seek such relief, temporary or permanent, in any court -- trial or appellate; and Congress has repeatedly turned a deaf ear to its requests for such power.

It should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do -- upon determining that it has "reasonable cause to believe" that § 7 is being or has been violated, it should issue a complaint, hold a hearing, make a report, and issue an order. If exigencies require, it may refer the matter to the Attorney General for consideration as to whether the Department of Justice should seek a preliminary injunction in the appropriate district court. [8] If **[*621]** the merger is consummated, **[***817]** the Commission should, if warranted, exercise the enormous power that the statute expressly gives it: to require the offender to "divest itself of the stock, or other share capital, or assets, held . . . contrary to the provisions" of § 7. It is a cliche of doubtful truth in this situation that an omelette cannot be unscrambled. **[****40]** This Court, as well as the Commission, has entered such orders of divestiture after -- and sometimes long after -- the merger has been consummated. See, *e. g., United States* v. *Von's Grocery Co., ante*, p. 270 (decree six years after merger); *United States v. El Paso Gas Co., 376 U.S. 651* (decree seven years after merger). Unscrambling may be difficult; but Congress may well have been justified in the view that the extra effort is warranted in the interests of securing what it hoped would be careful administrative consideration of the merits of proposed mergers. Not every merger deserves sudden death. In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy. [9] **[****42]** **[**1752]** I respectfully submit that this Court should not encourage the machinegun approach to the vastly important and difficult merger problem. It should indulge the

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[7] The Court declares that these materials are irrelevant because Congress had before it proposals to authorize the Commission itself to issue restraining orders *pendente lite* or to apply to the district courts for such relief. But the fact that no one proposed and Congress did not consider providing that the Commission might have recourse to the courts of appeals merely emphasizes the extreme and extraordinary nature of the device which the Court today creates. The plain fact, and the short answer, is that Congress refused to authorize preliminary restraints at the command of the Commission. Its refusal to authorize such relief in the district courts demonstrates, *a fortiori*, that it would not create such a remedy in the courts of appeals.

The Court also suggests that it would be improper to draw conclusions from congressional inaction. The inference that I draw from congressional refusal to make preliminary injunctive relief available to the FTC is that such inaction confirms (a) that Congress in devising the statutory plan did not intend the Commission to have such power, and (b) that the relief sought is not consonant with the congressional plan for administering § 7. In fact, this is not a situation where the agency went to Congress in the belief that its authority was unclear, or to remove doubts concerning it. Compare *United States v. Speers, 382 U.S. 266, 274-275*; *United States* v. *du Pont & Co., 353 U.S. 586, 590*; *Wong Yang Sung v. McGrath, 339 U.S. 33, 47-48*. Here, there is no doubt that the agency sought *additional* powers, not clarification. It admitted -- it asserted -- that it had no present authority to obtain preliminary relief (see Appendix to this opinion). It sought what it confessedly did not have. It sought this not once, but repeatedly, over a period of 10 years. Congress did not grant its request. Nor should we. See *Fribourg Navig. Co*. v. ***Commissioner, 383 U.S. 272, 279-286***; *Blau v. Lehman, 368 U.S. 403, 412-413*.

[8] Spokesmen for the FTC have frequently acknowledged the availability of such a course. See, *e. g*., Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 101-102 (testimony of Paul Rand Dixon) (1961); Kintner, The Federal Trade Commission in 1960 -- Apologia Pro Vita Nostra, 1961 ***Antitrust Law*** Symposium 21, 41.

The Commission also has on occasion successfully employed the technique of obtaining an agreement of the parties to segregate assets so as to facilitate divestiture should it be decreed. See, *e. g., A. G. Spalding & Bros., Inc*. v. *F. T. C., 301 F.2d 585, 588 (C. A. 3d Cir. 1962)*.

[9] For example, in some situations the merger of relatively small competitors may result in creation of an enterprise capable of meaningful competition with a company otherwise in unchallenged domination of an industry. See *Brown Shoe Co*. v. *United States, 370 U.S. 294, 319*, and legislative materials therein cited.

Congress in its desire that at least the Federal Trade Commission should be required to move with caution and deliberation. A "preliminary" injunction, in effect during the years required to complete the Commission's proceedings, **[****41]** often -- probably usually -- means that **[*622]** the plans to merge will be abandoned. [10] We should not beguile ourselves by ignoring this point. "Preliminary" here usually means final. And I respectfully suggest that it is permissible for Congress to insist that the merits of mergers should be carefully considered.

I come now to the second phase of the Court's opinion. Having satisfied itself that the Commission may apply to the courts of appeals for preliminary injunctions, the Court turns to the question of the jurisdiction of the appellate courts to entertain such applications. It finds jurisdiction in the courts of appeals by reason of the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *28 U. S. C. § 1651 (a)*.

This is, in my opinion, a totally unjustified employment of the All Writs Act. That Act is an implementing statute, designed to authorize the courts to supply deficiencies in procedure so as to enable them effectively to exercise their jurisdiction. The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it. **[****43]** The reason why this Court may not command or vindicate the exercise of **[***818]** jurisdiction by the courts of appeals to issue, as an original matter, injunctions against claimed violations of § 7 are overwhelming. In summary, they are:

1. The courts of appeals have no jurisdiction with respect to § 7 except to review an order entered by the Commission after statutory proceedings. Until such an order is entered, they have no jurisdiction, either existing or potential, which an injunctive order may implement.

[*623] 2. By express statutory provision, even after a Commission order has been entered, the courts of appeals have no jurisdiction as to the merits of the merger, on application of the Commission. Only a party affected by the Commission's order may file a petition to review. If one does not, the Commission's sole remedy is to seek penalties in the district courts under *15 U. S. C. § 21* (*l*). [11]

3. The statute contains its own "all writs" **[****44]** provision which is clearly and specifically limited to instances in which the court of appeals' jurisdiction has already attached upon petition to review a Commission order filed by a person who is the target of that order.

4. There is not a single precedent of this Court which supports the Court's conclusion. None of the cases of this Court cited in the majority opinion lends it the slightest support.

5. Exclusive jurisdiction to issue preliminary injunctions against mergers is vested in the district courts, upon application of the Department of Justice or a private person. The courts of appeals have no jurisdiction to enter such orders.

6. The courts of appeals are not equipped to make the original, complex factual determinations necessary to decide whether a prospective merger should **[**1753]** be enjoined. To burden them with this task is to distort their function; to saddle them with a function which they cannot perform; to load upon them the necessity of twice passing upon a challenged merger; and to deprive the parties of an opportunity for a hearing in a forum equipped to make original factual determinations.

. . . . .

The jurisdiction and powers of the courts of **[****45]** appeals with respect to Commission proceedings under § 7 are defined by the statute in specific and exhaustive detail. **[*624]** A petition to review may be filed with an appropriate court of appeals by "any person required by [an] order of the commission" to cease or desist or to divest itself of

[10] See Kaysen & Turner, Antitrust Policy 248 (1959); Note, 40 N. Y. U. L. Rev. 771, 772, n. 7 (1965), and cases cited therein.

[11] See note 3, *supra*.

stock or assets. 15 U. S. C. § 21 (c). The Court's jurisdiction attaches upon the filing of the petition, *ibid*., and becomes exclusive upon filing of the record with it. 15 U. S. C. § 21 (d). The Commission's findings as to the facts are conclusive if supported by substantial evidence. 15 U. S. C. § 21 (c). If additional evidence is to be taken, the Court must remand to the Commission; it cannot itself take evidence. *Ibid*. The Court may affirm, modify or set aside the Commission's order. It may enforce the Commission's order as affirmed and may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." *Ibid*.

The Court does not -- it could not -- contend that these provisions lend the slightest support **[****46]** to its conclusion. **[***819]** They clearly, emphatically, and pointedly contradict it. The courts of appeals have jurisdiction when and if, and only if and when, a Commission order has been entered and a petition for review is filed -- not by the Commission but by the aggrieved person. [12] When a petition for review **[*625]** is filed, the court of appeals has "plenary" jurisdiction, implemented by the self-contained all-writs provision; and when the record is filed, that jurisdiction is exclusive. Prior to the entry of the Commission's order, the courts of appeals simply have no jurisdiction, existing or potential. The general All Writs Act is limited to writs "in aid of their respective jurisdictions." It is not a charter to be used at the behest of an administrative agency in order to supply it with a weapon which Congress has withheld. This is clear enough; and nothing in our prior decisions expands the meaning of the All Writs Act to cover the present situation.

[**47]** The Court cites a number of cases to prove that an appeal need not have been perfected to call into play the power of the appellate courts to issue protective writs. This is clear and obvious as applied in those cases. Each of them involved issuance of a writ to prevent action or inaction by a trial court which would otherwise mean that the case would not be adjudicated on its merits and therefore could not be reviewed on appeal. The typical case involves the issuance of mandamus to the trial court to compel it to proceed with the adjudication of a pending **[**1754]** case. In this category are the first three cases cited on the point by the Court. [13]

[**48]** The fourth case cited by the Court clearly demonstrates the correct principle and the error of the Court's decision in the present case. In Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943), the respondent was **[*626]** indicted for price fixing. It filed a plea in abatement based upon an alleged fault in the authorization of the indictment. The District Court dismissed the plea. On application for a writ of mandamus, the Court of Appeals reversed, but this Court reversed the Court of Appeals because whatever might have been the merits of the District Court's dismissal of the plea in abatement, that dismissal did not defeat appellate jurisdiction. The District Court would proceed to adjudicate the **[***820]** merits of the case, and appellate jurisdiction would thereafter be available. The Court (per Chief Justice Stone) stated that "while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." Id., at 26. The Court said that "The traditional use of the writ in aid of appellate jurisdiction **[****49]** . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Ibid*. Since the District Court was proceeding to adjudicate the case, and any error it might have committed would come to the appellate courts upon appeal, the Court held that the Court of Appeals erred in issuing the writ.

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[12] Indeed, there is no certainty that the particular court of appeals selected by the FTC on its application for preliminary relief will ever undertake to review an ultimate cease-and-desist order. Section 11 (c) of the Clayton Act, 15 U. S. C. § 21 (c), provides that a person against whom such an order is entered may appeal "in the court of appeals . . . for any circuit within which such violation occurred or within which such person resides or carries on business." In the present case, review of any final FTC order might lie not in the Court of Appeals for the Seventh Circuit, but in the Sixth or Eighth Circuit where both Dean and Bowman carry on business. See *Transamerica Corp*. v. Board of Governors, 206 F.2d 163 (C. A. 3d Cir. 1953), cert. denied, ***346 U.S. 901***, setting aside an injunction issued by the Ninth Circuit; *A. G. Spalding & Bros., Inc*. v. F. T. C., 301 F.2d 585 (C. A. 3d Cir. 1962), enforcing an FTC order as to which an injunction unsuccessfully had been sought in the First Circuit seven years earlier.

[13] *Ex parte Crane*, 5 Pet. 190, 193; *Ex parte Bradstreet*, 7 Pet. 634; McClellan v. Carland, 217 U.S. 268. From its excerpt from *McClellan*, the Court omits the italicized portion: "[A] writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated *by the unauthorized action of the court below*." 217 U.S., at 280.

These decisions, therefore, are far from supporting the Court's decision in the present case. They are to the precise contrary. They demonstrate the obvious meaning of the language of the All Writs Act: that it is to be employed "in aid of" appellate jurisdiction -- not to vest general restraining power in the courts of appeals, but to authorize them to overcome action or inaction which would prevent the case from proceeding to judgment and then to appellate review in the ordinary course. Nothing of the sort -- nothing resembling it -- appears in the present situation. The Commission may proceed with its hearings, as provided by statute. As provided by **[*627]** statute, it may enter an order requiring respondents to divest themselves of the acquired assets. It may even -- although **[****50]** I express no opinion on the issue -- require action by the respondents, if they have irretrievably disposed of some or all of the assets, to take additional action to make available assets, customers, etc., for purchase by others so as to re-create a competitor, perhaps even if such action involves disposition of nonacquired assets. [14] And the appropriate court of appeals and this Court will have full, complete appellate jurisdiction with respect to its order.

The Court cites four of its prior decisions involving the availability of the All Writs Act in connection with administrative proceedings. These provide no assistance to it. First, it refers to *Arrow Transp. Co*. v. *Southern R. Co., 372 U.S. 658*. **[****51]** This case is precisely *contra* to the Court's conclusion here. After a "brief and informal" hearing which led to a tentative conclusion that the increase was "unreasonable," **[**1755]** the ICC suspended respondent's proposed rate increase and instituted a formal proceeding to adjudicate the reasonableness of the increase. The proceeding was still in progress when the maximum time provided by statute for suspension of the increase expired. Petitioner sued in the District Court, seeking an injunction pending the Commission's decision. This Court sustained denial of the injunction. It held that the Commission's jurisdiction was exclusive of any power in the courts to grant the relief, and that Congress' action in vesting power in the Commission left no latitude for court action even though it might mean that the small shipper could not continue in business under the higher rate. MR. JUSTICE BRENNAN, speaking for **[*628]** the Court, observed, in words that are **[***821]** applicable here, that if the courts were to entertain petitioner's application for an injunction against the effectiveness of the rates pending Commission decision, they would in effect be prejudging the **[****52]** case and prejudicing administrative action. "Such consideration," he said, "would create the hazard of forbidden judicial intrusion into the administrative domain." *Id., at 670*. Correspondingly, I suggest that it is unlikely in the real world that if the Federal Trade Commission made representations to a court of appeals that a merger should be enjoined pending Commission proceedings, and if the court issued such an injunction, the Commission's ultimate determination would be uninfluenced by these powerful factors. I respectfully suggest that this is not a tolerable result. [15]

[**53]** I come now to the case which the Court's opinion characterizes as "dispositive" of "this issue." *Whitney Bank v. New Orleans Bank, 379 U.S. 411*. [16] It is indeed a **[*629]** square holding on an issue that is not anywhere near the problem of this case. *Whitney* holds that a court of appeals may enter such orders as will protect its

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[14] Compare *United States v. Aluminum Co. of America, 247 F.Supp. 308, 316 (D. C. E. D. Mo. 1965)*, aff'd, ***382 U.S. 12***, with *Reynolds Metals Co*. v. *F. T. C., 114 U. S. App. D. C. 2, 309 F.2d 223 (1962)*. See Duke, *op. cit. supra*, note 2.

[15] The Court's opinion today eschews the result in *Arrow Transportation* and fastens instead on footnote 22, ***372 U.S., at 671***, which merely reserves judgment as to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . ." The footnote adds that "such power has been deemed merely incidental to the courts' jurisdiction to review *final* agency action, and has *never* been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." (Emphasis supplied.) The cases cited demonstrate the conventional use of the extraordinary writs referred to in the footnote. In *Scripps-Howard Radio, Inc*. v. *F. C. C., 316 U.S. 4*, a stay was issued ancillary to an appeal already taken pursuant to statute. Its purpose was to suspend, pending action by the court in which the appeal was lodged, changes authorized by completed agency action. For the thoroughly conventional nature of *Transamerica*, also cited in the footnote, see note 1, *supra*.

[16] *Continental Ill. Nat. Bank v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 675*, cited by the Court in connection with its assertion that courts have power to preserve the *status quo* while administrative proceedings are in progress, relates instead to the power of a bankruptcy court to enjoin the sale of collateral pledged by a debtor.

jurisdiction -- *its jurisdiction having fully attached by a prior appeal from a final order of the Federal Reserve Board, in accordance with statute*. Briefly stated, the Federal Reserve Board had entered an order permitting a New Orleans bank to operate a subsidiary in Louisiana through a holding company. A petition to review that order was duly filed, pursuant to statute, in the Court of Appeals for the Fifth Circuit. While this was pending, Louisiana enacted a statute bearing on the problem. Meanwhile, the Comptroller of the Currency indicated that he would issue a certificate to the new bank. Competing banks filed in the District Court for the District of Columbia an action for injunction **[**1756]** against the Comptroller. The injunction was granted and the Court of Appeals for the District of Columbia Circuit **[****54]** affirmed. It was the latter action that was before this Court, on certiorari. This Court held that the District Court had no jurisdiction to pass on the merits of the controversy by enjoining the Comptroller; that exclusive jurisdiction as to the authorization of the new bank was vested in the Federal Reserve Board. But it stayed its mandate for 60 days to **[***822]** give the parties time to move in the Fifth Circuit for a remand to the Federal Reserve Board for reconsideration of its order in light of the subsequent Louisiana statute. On remand, the Court stated, "the Fifth Circuit's power to protect its jurisdiction is beyond question," *id., at 426* -- this in a case which had been in the Court of Appeals for three years following final agency action.

[**55]** **[*630]** This is entirely in accord with the traditional and established construction of the All Writs Act, and with the statute governing proceedings of the Federal Reserve Board. Jurisdiction had properly been acquired by the Court of Appeals for the Fifth Circuit. Of course, it had power to issue whatever orders were necessary to preserve its jurisdiction, pending remand or otherwise. The Court's statement that it is "analogous" to the relief requested by the Commission is simply in error. It is analogous only if we disregard the facts that in *Whitney*, a final order had been entered by the administrative agency, appeal taken and the jurisdiction of the Court of Appeals had attached. Whereas in the present case none of these has occurred and we are bluntly asked to vest the courts of appeals with authority to consider issuing an injunction as a matter of original jurisdiction -- without an agency order, without an appeal, and without statutory jurisdiction.

The net of the matter is simply, plainly and clearly that the decision of the Court in this case is novel -- totally novel. It is in direct contravention of the careful, specific plan and directions of the Congress **[****56]** with respect to the administration of § 7 of the Clayton Act. It is in direct conflict with the purpose and office of the All Writs Act. It is totally unsupported by prior decisions of this Court and contrary to both *Roche, supra*, and *Arrow Transportation, supra*. It is unwise in terms of the administration of § 7. It places an unwise, unjustified and disruptive burden on the courts of appeals and saddles them with original jurisdiction which they cannot properly exercise and a fact-finding function in elaborate, complex situations, which they should not be asked to undertake.

The courts of appeals are not courts of original jurisdiction. They have neither the facilities nor the institutional aptitude for determining in the first instance **[*631]** whether a particular merger should be halted. This is always intensely a question of fact -- hotly controverted -- turning upon factual-economic problems such as the ascertainment of facts as to the "line of commerce," the "section of the country" and the probable effect upon competition. And these are questions committed in the first instance to the FTC and not to the courts. See *Whitney Bank v. New Orleans Bank, supra, at 421*. **[****57]**

Without any findings of the Commission or a court, the courts of appeals are now burdened with the task of deciding these questions. The fact of the matter is that the Court's decision commands the courts of appeals to be trial courts for purposes of those § 7 cases which the Commission chooses to bring before them. I share the view expressed by my Brother BLACK and joined by my Brother DOUGLAS that:

"The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt **[***823]** and delay **[**1757]** their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work." *United States v. Barnett, 376 U.S. 681, 724* (dissenting opinion).

Yet the responsibility today imposed upon appellate courts requires them to try cases. This is precisely what is required in determining whether a merger should be restrained during the years required to complete an FTC hearing on the merits. [17] **[****59]** Frequently, perhaps generally, **[*632]** **[****58]** to enjoin a merger "temporarily" is equivalent to entering a final order. The financial and commercial commitments involved in an agreement to acquire or to merge are apt to be so restrictive of the managerial flexibility of the parties, and so dependent upon transient circumstances, that they cannot be maintained in limbo while an FTC proceeding wends its leisurely way toward a wearying conclusion. Because the result of the application for temporary relief may be conclusive for all time, there is a discernible and understandable tendency on the part of the parties to put in a full case. [18]

Few § 7 cases are so simple that summary treatment is appropriate. See, *e. g., United States v. Bethlehem Steel Corp., 157 F.Supp. 877, 879* (summary judgment denied), *168 F.Supp. 576 (D. C. S. D. N. Y. 1958)* (merger enjoined after full factual hearing). The risk involved in deciding an application for "preliminary" injunction on affidavits is so great that to invite it, as the Court here does, is to invite the administration of justice which is rough and ready, to say the least. On the other hand, to impel the courts of appeals to take testimony in these cases is an anomaly **[****60]** that should not be tolerated.

[*633] This Court has recognized that there is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation. In *White Motor Co*. v. *United States, 372 U.S. 253*, the Court reversed summary judgment for the Government. It held that summary judgment was inappropriate and a trial should be had with respect to the Government's charge of illegal vertical territorial limitations. It specifically relied upon the "analogy from the merger field that leads us to conclude that a trial should be had." *Id., at 263*. The Court said (per DOUGLAS, J.) that in cases "involving the question whether a particular merger will tend 'substantially to lessen competition'" or whether "the acquired **[***824]** company was a failing one," "a trial rather than the use of the summary judgment is normally necessary." *Id., at 264*. See also *United States v. Diebold, Inc., 369 U.S. 654*, where factual issues paralleling those in the present case were held unsuitable for summary judgment.

[1758]** Similarly, in *La Buy v. Howes Leather Co., 352 U.S. 249*, **[****61]** this Court refused to permit reference of antitrust cases to a master. It held (per CLARK, J.) that "most litigation in the antitrust field is complex," and that this is "an impelling reason for trial before a regular, experienced trial judge" rather than a master. *Id., at 259*.

By its decision today, however, this Court commands that these admittedly difficult, complex cases be heard and adjudicated by the courts of appeals on original applications for "temporary" injunctions. I cannot reconcile this result with the facts, with this Court's awareness of the complexity of the task, or with proper regard for the courts of appeals. Apart from the judicial problem which this invention creates, we must recognize that the interposition of the courts, without congressional direction, at the threshold of the administrative process **[*634]** is contrary to the congressional plan and the reiterated holdings of this Court. As the Court said in *Arrow Transportation, supra*, judicial "consideration," prior to final administrative adjudication, "would create the hazard of forbidden judicial intrusion into the administrative domain." *372 U.S., at 670*. **[****62]** This Court's insistence upon the "primary jurisdiction" of administrative agencies illustrates its sensitivity to the point. The Court has even insisted that "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course."

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[17] The Commission's estimate in the present case that its proceedings would endure for at least one year seems unprecedentedly optimistic. In *A. G. Spalding & Bros., Inc*. v. *F. T. C., 301 F.2d 585 (C. A. 3d Cir. 1962)*, where the FTC unsuccessfully sought an injunction *pendente lite*, more than seven years elapsed between complaint and enforcement. *Pillsbury Mills, Inc*. (FTC Docket No. 6000) was in the Commission for eight and one-half years; *Crown Zellerbach Corp*. v. ***F. T. C., 296 F.2d 800 (C. A. 9th Cir. 1961)***, for nearly four years, and it was another four years before the Commission's order was affirmed. These delays were not unknown to Congress. See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, p. 86 (1961).

[18] See *United States v. Ingersoll-Rand Co., 218 F.Supp. 530* (D. C. W. D. Pa.), aff'd, *320 F.2d 509 (C. A. 3d Cir. 1963)*, where the hearing on an application for preliminary relief took five days. See also *United States v. FMC Corp., 218 F.Supp. 817* (D. C. N. D. Cal.), appeal dismissed, *321 F.2d 534* (C. A. 9th Cir.), application for preliminary injunction denied, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).

Pan American World Airways v. United States, 371 U.S. 296, 313, n. 19; see also *United States v. Western Pac. R. Co., 352 U.S. 59*; *Far East Conference v. United States, 342 U.S. 570*; *United States Nav. Co*. v. *Cunard S. S. Co., 284 U.S. 474*.

The present case illustrates the profound difficulties that the Court of Appeals will face in reaching a decision, within the practical limits of its available time and procedures, as to whether it should issue a "preliminary" injunction. There are here sharp factual disputes concerning the financial status of Bowman and the availability to it of the so-called "failing company" defense. There is a claim that Dean Foods is about to lose its largest customer and that as a result the merged company will be smaller than Bowman was before the merger. And the bona fides of the "interested" prospective **[****63]** purchaser uncovered by the Commission's staff is in dispute.

The Court of Appeals will have to make a judgment concerning these issues, as well as the other, complex factors that are determinative. It will get little comfort from the label of the relief sought as "preliminary" because it will know that the patient may die while the "temporary" anesthesia is in effect. And it will know that, realistically, it has no control over the length of the proceedings -- whether the Commission's hearings will **[*635]** last a year or eight years, or something in between. **[***825]** By contrast, when the Department of Justice or a private person seeks a "preliminary" injunction in a district court, as provided by statute, the proceedings on the merits are in the same court. That court controls the proceedings, and it is admonished by the statute to proceed "as soon as may be, to the hearing and determination of the case." *15 U. S. C. § 25*. This is an essential admonition, insisted upon by the Congress to mitigate the consequences of preliminary restraints imposed by the district courts upon effectuation of mergers. The courts of appeals will be in the unhappy position **[****64]** of either attempting to supervise Commission proceedings in the predictably vain effort to secure expedition, or accepting the fact that the "preliminariness" of their order is totally subject to the destructive delays characteristic of Commission procedures. See Kaysen & Turner, Antitrust Policy 248-249 (1959).

In effect, today's decision represents radical surgery upon the administration **[**1759]** of § 7 of the Clayton Act. This is done contrary to statute, without basis in law or precedent, and is motivated by reasons, which while they may have superficial appeal, are unwise and disruptive. In effect, the Court condones and encourages the Commission to turn aside from its designated function as an expert, administrative agency to become a prosecutor and litigant.

When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problems of antitrust and unfair competition the "specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods -- [hopefully] characteristic of the administrative process." Elman, **[****65]** Rulemaking Procedures **[*636]** in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387 (1964).

Every conceivable merger case involves the danger that the merger, unless enjoined, will be effectuated, and the incentive to the Commission to shop among the statutorily available courts of appeals and to seek "preliminary" injunctions will be great. This, I repeat, is a radical change from the pattern that Congress has ordered, and one which is profoundly undesirable in its effects upon the parties, the courts of appeals, and upon the national interest in a careful assessment of mergers for the purpose of tolerating those which are permissible and liquidating those which violate the national policy expressed in § 7.

I would affirm the decision below.

APPENDIX TO OPINION OF MR. JUSTICE FORTAS, DISSENTING.

The FTC first solicited the assistance of Congress in 1956. In January of that year it submitted to the appropriate committees of the Eighty-fourth Congress a staff study containing various legislative proposals. The study observed that "A very serious loophole in the Antimerger Act [§ 7] is the lack of a provision which enables the Federal Trade **[****66]** Commission either to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." [1]

[*826]** The study informed the committees that in 1955 the FTC had twice sought to secure preliminary injunctions from courts of appeals, but that the courts had found **[*637]** no basis in existing law to authorize such applications. [2] In hearings conducted upon proposals of the FTC and others, the Commission through its then chairman, John W. Gwynne, urged Congress to enact legislation which would empower it in § 7 cases to apply to United States District Courts for preliminary relief. [3] **[****68]** Chairman Gwynne was pessimistic **[**1760]** about the prospects for success under the all-writs statute, noting that it "is a very general statute and is designed to protect **[****67]** not the jurisdiction of the Federal Trade Commission but the jurisdiction of the circuit court of appeals to which the case might finally get." [4]

Both Senate and House Judiciary Committees accepted the view, repeatedly stated by spokesmen for the FTC, **[*638]** that it lacked any authority to enjoin or seek a court order to enjoin mergers prior to an FTC adjudication of their illegality, and that this gap in the Commission's arsenal was crippling its efforts to enforce § 7. Both Committees reported out H. R. 9424, which contained an amendment to § 15 of the Clayton Act authorizing the FTC to seek preliminary relief in the United States District Courts. S. Rep. No. 2817, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 1889, 84th Cong., 2d Sess. (1956). [5] The bill passed the House, but failed of passage in the Senate.

Similar legislative proposals have been introduced in subsequent sessions, but always with less success than in 1956. In all of these legislative **[****69]** proceedings, the position of the FTC has been steadfast: consistently, it has insisted that without new legislation it lacks authority to enjoin mergers pending completion of agency action. In March of 1957, FTC Chairman Gwynne informed the appropriate Committees of the decision in *Federal Trade Comm'n v. International Paper Co., 241 F.2d 372 (C. A. 2d Cir. 1956)*, that the all-writs statute would not support an FTC application for preliminary relief. To the House Committee he forwarded a copy of the opinion, describing it as "even more conclusive" than the earlier unreported decisions of the Courts of Appeals for the First and Third Circuits. [6] **[****70]** In **[***827]** the Senate, Chairman Gwynne characterized his Commission's application in *International Paper* as "something of a forlorn hope." [7] When Senator Kefauver, the Committee Chairman, asked

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[1] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 29 (1956).

[2] The cases referred to were *Federal Trade Comm'n* v. *Farm Journal, Inc*. (C. A. 3d Cir. 1955) (unreported); and *In the Matter of A. G. Spalding & Bros., Inc*. (C. A. 1st Cir. 1955) (unreported). They are discussed in H. R. Rep. No. 486, 85th Cong., 1st Sess., 8-9 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42-45 (testimony of FTC Chairman Gwynne), 156-157 (testimony of Congressman Celler) (1958).

[3] The FTC proposed that § 11 of the Clayton Act be amended to read: "Whenever the Federal Trade Commission has reason to believe --

"(1) That any corporation is acquiring, has acquired or is about to acquire the stock or assets of another corporation in violation of the provisions of section 7 of this Act, and

"(2) That the enjoining thereof pending the issuance of a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

"the Commission . . . may bring suit in a district court of the United States . . . to prevent and restrain violation of section 7 of this Act. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . . ." Hearings, *supra*, note 1, at 29-30.

[4] *Id., at 35*.

[5] H. R. 9424, although worded in greater detail, was in substance like the FTC proposal.

[6] Letter to Chairman Celler, in Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. No. 2, p. 103 (1957).

him whether the FTC had sought **[*639]** review of the decision in this Court, Chairman Gwynne answered: "No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. . . ." The Senator replied, "I think you are right about it." [8]

Nor was Gwynne the only FTC spokesman to represent to Congress that legislation was essential if the Commission, like the Department of Justice and private parties, was to be able to maintain the *status quo* pending determination of a merger's legality. The present chairman, Paul Rand Dixon, who as committee counsel had participated in Senate proceedings on this matter since 1956, informed the Eighty-seventh Congress that "It is clear that the Commission has no such authority," citing *International Paper*. [9] **[****71]** Leading Members of Congress [10] **[**1761]** and key representatives of the Executive Branch [11] expressed the same view.

A third FTC Chairman, Earl Kintner, explained to the bar rather than directly to Congress, that in 1960 the FTC had intervened as *amicus curiae* in a private suit to enjoin a merger, [12] which suit paralleled a pending **[*640]** Commission inquiry. This was done, he said, because the FTC was "lacking any statutory authority to seek a temporary injunction." Kintner, The Federal Trade Commission in 1960 -- Apologia Pro Vita Nostra, 1961 ***Antitrust Law*** Symposium 21, 38. He noted that the FTC was pressing for legislative authorization, and that until the effort succeeded the FTC would be confined to intervention in occasional private suits and to reliance upon the Justice Department "where a temporary **[****72]** restraining order is peculiarly appropriate." *Id., at 41*. [13]

References

Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act (*15 USC 18*), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Right of one corporation to acquire stock in another, as affected by the antitrust acts. 74 L ed 431.

Administrative or practical construction of statute as precedent for judicial construction. 73 L ed 322, 84 L ed 28.

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[7] Hearings, *supra*, note 2, at 45.

[8] *Ibid*.

[9] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 87, 107 (1961). It was in this session that the FTC abandoned its prior advocacy of proposals that it seek relief in the district courts, urging instead that it be given power to issue its own injunctions and restraining orders. *Id., at 88, 91*. Compare testimony of FTC Chairman Gwynne, Hearings, *supra*, note 2, at 49-59.

[10] See, *e. g*., statement of Congressman Celler, Hearings, *supra*, note 2, at 156-160; statement of Congressman Patman, Hearings, *supra*, note 9, at 45; statement of Senator Kefauver, *id*., at 46.

[11] *E. g*., The President's Economic Report, submitted to Congress on January 23, 1957, p. 51; Letter from Attorney General Kennedy, May 2, 1961, in Hearings, *supra*, note 9, at 58.

[12] *Briggs Mfg. Co*. v. *Crane Co., 185 F.Supp. 177* (D. C. E. D. Mich.), aff'd, *280 F.2d 747 (C. A. 6th Cir. 1960)*.

[13] FTC Chairman Dixon utilized the same forum the following year to plead for legislation which would authorize the Commission to issue its own temporary relief. See Dixon, The Federal Trade Commission in 1961, 1962 ***Antitrust Law*** Symposium 16, 19-21.

United States v. Marshall & Ilsley Bank Stock Corp.

United States District Court for the Eastern District of Wisconsin

June 15, 1966

No. 61-C-54

Reporter

255 F. Supp. 273 *; 1966 U.S. Dist. LEXIS 10180 **; 1966 Trade Cas. (CCH) P71,827

United States of America, Plaintiff v. Marshall & Ilsley Bank Stock Corporation, Marshall & Ilsley Bank, Northern Bank and the Bank of Commerce , Defendants.

Core Terms

bank holding company, banking, acquisitions, Clayton Act, concentration, monopoly, stock, provisions, anti trust law, antitrust, commerce, district court, monopolistic, regulation, merger, Pages, Hearings, factors, legislative history, public interest, bank stock, court of appeals, holding company, consolidation, proceedings, facilities, violating, acquire, cases, saving clause

LexisNexis® Headnotes

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > Jurisdiction

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

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Federal Acts > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] **Procedural Matters, Jurisdiction**

The jurisdiction of district courts under *15 U.S.C.S. § 25* to enforce *15 U.S.C.S. § 18* of that act against bank holding company acquisitions on complaint of the United States has been plainly supplanted by the Bank Holding Company Act of 1956, *12 U.S.C.S. §§ 1841, et seq.* This does not mean that *15 U.S.C.S. § 18* is inapplicable to bank holding companies. Rather, it means that the Board of Governors of the Federal Reserve System alone can apply and enforce that section against bank holding company acquisitions which it is asked to approve under the Bank Holding Company Act of 1956, and must do so in ruling on applications under that Act.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

HN3[] **Public Enforcement, US Department of Justice Actions**

The Clayton Act, as originally passed, provided a system of dual enforcement of *15 U.S.C.S. § 18* as to banks, banking associations and trust companies. *15 U.S.C.S. § 21* vested authority to enforce compliance with *15 U.S.C.S. § 18* in the Federal Reserve Board where applicable to banks, banking associations and trust companies, directed the Board to commence proceedings pursuant to that authority if it had reason to believe *§ 18* was violated, and set forth the procedure to be followed. *15 U.S.C.S. § 25* conferred jurisdiction to prevent and restrain violations of *15 U.S.C.S. § 18* on district courts of the United States and imposed a duty on United States district attorneys, under the direction of the Attorney General, to institute proceedings to prevent and restrain such violations.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > Formation

HN4[] **Regulated Industries, Financial Institutions**

See *12 U.S.C.S. § 1842(b)*.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > Formation

HN5[] **Federal Acts, Bank Holding Company Act**

See *12 U.S.C.S. § 1842(c)*.

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN6[] **Types of Banks & Financial Institutions, Bank Holding Companies**

See *12 U.S.C.S. § 1828(c)*.

Administrative Law > Judicial Review > Reviewability > Standing

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN7[] **Reviewability, Standing**

See *12 U.S.C.S. § 1848*.

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN8[] **Types of Banks & Financial Institutions, Bank Holding Companies**

See *12 U.S.C.S. § 1850*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

HN9[] **Financial Institutions, Bank Holding Company Act**

The legislative history of the Bank Holding Company Act reveals without question that in acting in this area Congress was motivated by a concern over concentration in banking and a desire to control bank holding company expansion and prevent monopoly in this field.

Antitrust & Trade Law > Clayton Act > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN10[] Antitrust & Trade Law, Clayton Act

The purpose of *12 U.S.C.S. §§ 1841, et seq.*, is in substantial part identical with that of *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > Formation

HN11[] Regulated Industries, Financial Institutions

It was the intent of Congress in enacting holding company legislation to strengthen, or activate, not repeal *15 U.S.C.S. § 18*. To attain this result, Congress chose to prohibit completely acquisitions by bank holding companies of a certain percentage of the voting shares of any bank unless prior approval was obtained from the Board of Governors of the Federal Reserve System, which Board was charged with the duty of enforcement of *§ 18*. It instructed the Board to consider five factors in determining whether approval should be granted, each factor being a significant consideration in a *§ 18* case, and, in order that all relevant competitive factors not specifically set forth could be considered, directed the Board in general terms to consider whether the effect of the acquisition would be to expand the bank holding company system involved beyond limits consistent with the preservation of competition in the field of banking.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > Formation

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

HN12[] **Procedural Matters, Jurisdiction**

Congress intended that the Federal Reserve Board of Governors, while ruling on acquisition subject to the Bank Holding Company Act, *12 U.S.C.S. §§ 1841, et seq.*, simultaneously perform its duties under the Clayton Act, *15 U.S.C.S. § 18*, and that the Board alone retain Clayton Act jurisdiction with respect to acquisitions subject to the Bank Holding Company Act.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Governments > Legislation > Expiration, Repeal & Suspension

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

HN13[] **Federal Acts, Bank Holding Company Act**

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. No repeal of the substantive provisions of *15 U.S.C.S. § 18* is intended and that the Bank Holding Company Act, *12 U.S.C.S. §§ 1841, et seq.*, effected a change only in the manner in which *15 U.S.C.S. § 18* was to be enforced. A holding that *15 U.S.C.S. § 25* is repealed as to acquisitions subject to the Bank Holding Company Act is compelled by the existence of plain repugnancies between the two provisions.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Mergers > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN14[] **Commercial Banks, Mergers & Consolidations**

15 U.S.C.S. § 21, vests the Federal Reserve Board (FRB), with authority to enforce *15 U.S.C.S. § 18* where applicable to banks. This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted whatever authority the FRB may have acquired under *12 U.S.C.S. § 21* by virtue of the amendment of *15 U.S.C.S. § 18*, to enforce *§ 18* against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under *12 U.S.C.S. § 21*, as it existed before the 1950 amendment of *15 U.S.C.S. § 18* remains unaffected.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Federal Acts > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

HN15[] **Regulated Industries, Financial Institutions**

Congress intended that when performing its function under the Bank Holding Company Act, the Federal reserve Board should simultaneously exercise its authority to enforce *15 U.S.C.S. § 18*, preventing before they occur acquisitions which would violate that section, and that the Board alone should have such enforcement powers.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

HN16[] **Federal Acts, Bank Holding Company Act**

The hearing provisions of *12 U.S.C.S. § 2* are somewhat sparse. No hearing need be held if the Comptroller of Currency or State banking authority does not disapprove the application. However, that such provisions are adequate to enable the Federal Reserve Board to resolve the issues involved and make its determination is demonstrated by the provisions for a full administrative proceeding before the Board in which all interested persons may participate and the views of the interested supervisory authorities may be obtained.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > Formation

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

HN17[] **Federal Acts, Bank Holding Company Act**

Congress intended the statutory proceedings before the Federal Reserve Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested. Admittedly the acquisition of an existing bank is exclusively within the jurisdiction of the Board. It is the exclusive function of the Board to act in such cases and contests must be pursued before it.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Banking Law > Commercial Banks > Bank Expansions > Bank Creations & Reorganizations

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

Governments > Federal Government > US Congress

HN18[] **Regulated Industries, Financial Institutions**

Congress intended that challenges to Federal Reserve Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in *12 U.S.C.S. §§ 1841, et seq.* Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Bank Holding Companies Regulation

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Governments > Federal Government > US Congress

HN19[] **Reviewability, Exhaustion of Remedies**

The Federal Reserve Board's determination regarding a holding company acquisition may not be collaterally attacked in a district court by a suit against the Comptroller of the Currency. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the Courts of Appeals. That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, *12 U.S.C.S. §§ 1841, et seq.*, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

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

HN20[] **Separation of Powers, Primary Jurisdiction**

Although it is true that the savings clause of the Bank Holding Company Act, *12 U.S.C.S. § 21*, states that nothing contained in the Act shall constitute a defense in any suit arising out of any prohibited antitrust or monopolistic act, action or conduct. It also provides, however, that nothing contained in the Act shall be interpreted as approving any act, action or conduct in violation of existing law. The Federal Reserve Board has exclusive jurisdiction to determine the legality of an acquisition.

Judges: **[**1]** Tehan, Chief Judge.

Opinion by: TEHAN

Opinion

[*273] TEHAN, C.J.:

On March 2, 1961, the United States of America filed a complaint in this court against Bank Stock Corporation of Milwaukee, now Marshall & Ilsley Bank Stock Corporation, Marshall & Ilsley Bank, Northern Bank and The Bank of Commerce, all Wisconsin corporations, alleging that the cumulative effect of acquisitions by Bank Stock of more than 80% of the outstanding voting stock of Marshall & Ilsley Bank and Northern in December of 1959 and of 80% or more of the outstanding common stock of Commerce in January of 1961 may be substantially to lessen competition or to tend to create a monopoly in commercial banking in the City and County of Milwaukee in violation of § 7 of the Clayton Act (Title *15 U.S.C. § 18*), and asking that Bank Stock be adjudged to have violated that section, be required to divest itself of the stock unlawfully acquired, and be enjoined from acquiring stock in any other commercial bank in Milwaukee County without court approval. [1] Preceding this action and the acquisitions complained of, the Board of Governors of the Federal Reserve System, acting pursuant to the Bank Holding Company Act of 1956, had **[**2]** approved the applications of Bank Stock to become a bank holding company and to acquire the stock of Marshall & Ilsley Bank, Northern and Commerce.

The defendants' answer to the complaint was filed on May 22, 1961; trial **[*274]** was held in June, July and November, 1963; briefs were filed, the last being briefs requested by the court and filed in May of 1966, oral argument was heard, and the court is prepared to render its decision.

Reflecting as it does disagreement between two executive agencies, both charged with the duty of enforcing § 7, as to the advisability and propriety of acquisitions of bank stock by a bank holding company, this case arises in a maze of legislative and judicial pronouncements relative to jurisdiction. Our examination of those authorities convinces us that this court has **[**3]** no jurisdiction under *§ 15* of the Clayton Act (Title *15 U.S.C. § 25*), the jurisdictional basis relied upon by the plaintiff, to enjoin or undo stock acquisitions by bank holding companies which must be or have been approved by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 and **HN1**[] that the jurisdiction of district courts under *§ 15* of the Clayton Act to enforce § 7 of that act against such bank holding company acquisitions on complaint of the United States has been "plainly supplanted" [2] by the Bank Holding Company Act of 1956. This conclusion is not to be interpreted as a ruling that § 7 is inapplicable to bank holding companies. Rather, it means that the Board of Governors of the Federal Reserve System alone can apply and enforce that section against bank holding company acquisitions which it is asked to approve under the Bank Holding Company Act of 1956, and must do so in ruling on applications under that Act. A discussion of the authorities which compel this conclusion follows.

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[1] This prior approval, if required, would be the second approval since, as will later appear, approval of any substantial acquisition must be obtained from the Board of Governors of the Federal Reserve System.

[2] *United States v. Philadelphia National Bank (1963), 374 U.S. 321 at 344, footnote 22, 10 L. Ed. 2d 915, 83 S. Ct. 1715*.

[4]** The Clayton Act, §§ 7, 11 and 15 of which here concern us, became law in 1914. Paragraph 2 of § 7 thereof provided:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

and remained unchanged until 1950 when it was amended to read as follows:

> ***HN2***[] "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting **[**5]** of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

This amendment, while substantial, is not relevant to the jurisdictional problem here presented.

Unquestionably, banks and bank holding companies fall within the purview of § 7 as originally enacted and as amended. *Transamerica Corp. v. Board of Governors (C.A. 3, 1953) 206 F.2d 163*, *United States v. Philadelphia National Bank, supra.* The authorities do not so clearly reveal, however, the manner in which § 7 must be enforced.

HN3[] The Clayton Act, as originally passed, provided a system of dual enforcement of § 7 as to banks, banking associations and trust companies. § 11 thereof (Title *15 U.S.C. § 21*) vested authority to enforce compliance with § 7 in the Federal Reserve Board where applicable to banks, banking associations and trust companies, directed the Board to commence proceedings pursuant to that authority if it had reason to believe § 7 was violated, **[*275]** and set forth the procedure to be followed. *§ 15* conferred jurisdiction to prevent and restrain violations of § 7 on district courts of the United States and imposed a duty on United States district **[**6]** attorneys, under the direction of the Attorney General, to institute proceedings to prevent and restrain such violations. Both sections were thereafter amended in particulars not here material.

On this thus far fairly uncomplicated legislative scene appeared the Bank Holding Company Act of 1956 (Title *12 U.S.C. § 1841*- *§ 1848*) which became law on May 9, 1956. This Act which at various stages in its legislative history was referred to as a bill "To define bank holding companies, *control their future expansion*, and require divestment of their nonbanking interests" prohibited in relevant part formation of bank holding companies, as defined in the Act, and acquisitions by bank holding companies of a certain percentage of the voting shares of any bank without prior approval of the Board of Governors of the Federal Reserve System. [3] **[**9]** The manner in which approval is to be sought is set forth in Paragraph (b) of § 3 of the Act, (Title *12 U.S.C. § 1842(b)*) as follows:

> ***HN4***[] "(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets **[**7]** of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on

[3] This provision is unlike the Bank Merger Act of 1960 considered by the United States Supreme Court in *Philadelphia Bank* which assigned roles in bank merger applications, depending on the nature of the institution, to either the Board, the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, the latter two of which have no enforcement power whatsoever under the Clayton Act.

such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable **[**8]** opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing." [4]

The factors to be considered by the Board in granting or denying approval are set forth in Paragraph (c) of § 3 as follows: (Title *12 U.S.C. § 1842(c)*)

> ***HN5***[] "(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public **[*276]** interest, and the preservation of competition in the field of banking." [5]

[10]** Section 9 of the Bank Holding Company Act of 1956 as amended, provides for judicial review as follows: (Title *12 U.S.C. § 1848*)

> ***HN7***[] "Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take

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[4] In contrast, the Bank Merger Act of 1960 involved in *Philadelphia Bank* provided for no hearing whatsoever.

[5] These tests are not unlike those set forth in the Bank Merger Act involved in *Philadelphia Bank* which provided: (Title *12 U.S.C. § 1828(c)*):

> " . . . ***HN6***[] In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. . . ."

Although counsel for the plaintiff here has argued that the factors set forth in § 3 differ from the considerations under § 7 of the Clayton Act, the Attorney General himself, in commenting prior to recent amendment of the Bank Merger Act on that Act's similar factors, stated in a letter of September 24, 1965, printed in the 1966 U.S. Code Congressional and Administrative News at Page 340:

> "While there are those in the banking industry and, indeed, in Government who differ with me, I strongly believe that objective analysis will disclose that in actual practice the differences in the standards applied by the banking agencies and by the courts, if any, have been overstated. In fact, the Supreme Court in the leading case has made it clear that all or most of the factors specified in the Bank Merger Act are relevant to a determination under section 7 of the Clayton Act or section 1 of the Sherman Act. . . ." (Page 341)

and in a letter dated January 5, 1966, printed at Page 346:

> " . . . I should like to repeat here my strong belief that the differences, if any, in the standards applied to bank mergers by the courts and the standards applied by the agencies have been overstated. . . ." (Page 347)

> such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." [6]

[11]** **[*277]** § 11 of the Act, the savings clause, provides:

> ***HN8***[] "Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct." [7]

From the foregoing it can be seen that many problems of statutory construction relating to jurisdiction exist in this case that have not been settled by the *Philadelphia Bank* decision, which decision was concerned with the Bank Merger Act and in no way considered the substantially different Bank Holding Company Act. These problems are made more difficult by the fact that § 11 of the Bank Holding Company Act did not appear in the original bills and § 9 of the Bank Holding Company Act, providing for judicial review **[**12]** in the appropriate Court of Appeals with a substantial evidence test applying to findings of the Board, was substantially different from earlier proposals for review pursuant to the Administrative Procedure Act with trial de novo provided. Because this court believed that the legislative history of the Bank Holding Company Act might prove of some aid in the solution of these problems, it recently asked the parties to furnish material and comments relating thereto, more particularly, relating to § 9 and § 11.

HN9[] The legislative history of the Bank Holding Company Act reveals without question that in acting in this area Congress was motivated by a concern over concentration in banking and a desire to control bank holding company expansion and prevent monopoly in this field. For example, in the Report of the Senate Committee on Banking and Currency on this legislation, Senate Report No. 1095, 84th Cong., 1st Session (1955) the following statements appear:

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[6] The Bank Merger Act of 1960 contained no provision whatsoever for judicial review, a fact which, together with its lack of provision for hearing was considered significant by the Supreme Court in *Philadelphia Bank* (See Page 351 of that opinion, *374 U.S. 321*). When that Act was recently amended, provision for review similar to the Bank Holding Company provision was proposed. With respect to that provision, the Attorney General stated in the letter of September 24, 1965, referred to previously: (Page 342, 1966 U.S. Code Congressional and Administrative News):

> "I am opposed to particular procedures set forth in H.R. 11011. The bill provides for review in a court of appeals on the basis of a 'record' upon which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be no little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.
>
> Consequently, while I am sympathetic to efforts to clarify through legislation the application of ***antitrust law*** to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit."

This statement seems to us to clearly infer the Attorney General's belief that such a provision for review such as in the Bank Holding Company Act would abolish the duty of the Attorney General under *§ 15* of the Clayton Act to commence an action in district court concerning approved bank mergers and, consequently, the jurisdiction of the court to entertain such an action.

[7] The Bank Merger Act of 1960 had no savings clause.

"In the opinion of your committee, public welfare requires the enactment of legislation providing Federal regulation of the growth of bank holding companies . . ." (Page 1)

" . . . It is not the committee's contention **[**13]** that bank holding companies are evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities. The dangers accompanying monopoly in this field are particularly undesirable in view of the **[*278]** significant part played by banking in our present national economy. . . ." (Page 1)

* * *

"Testifying before your committee for the Board of Governors of the Federal Reserve System, Chairman William McChesney Martin, Jr., stated:

'Existing provisions of law, originally enacted in the Banking Act of 1933, have proved entirely inadequate to deal with the special problems presented by bank holding companies. It has been, and still is, the Board's view that additional legislation is essential to deal effectively with these problems.'

Chairman Martin noted that the principal problems in the bank holding company field arise from two circumstances:

(1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area **[**14]** under a single control and management; . . . (Page 2)

* * *

"Thus, under the bill, the growth of bank holding companies in the banking field would be regulated but not prohibited." (Page 2)

* * *

"The committee is of the opinion that the bill now favorably reported to the Senate represents adequate and fair legislation to regulate the future expansion of bank holding companies . . ." (Page 4)

* * *

"The factors required to be taken into consideration by the Federal Reserve Board under this bill also require contemplation of the prevention of undue concentration of control in the banking field to the detriment of public interest and the encouragement of competition in banking. It is the lack of any effective requirement of this nature in present Federal laws which has led your committee to the conviction that legislation such as that contained in this bill is needed. Under its provisions, the expansion of bank holding companies in the banking field would not be prohibited, but would be regulated in the public interest." (Page 10)

* * *

"The provisions of this bill, in the opinion of your committee, provide adequate safeguards so that the maintenance or expansion **[**15]** of such bank holding companies can be regulated in the public interest." (Page 10)

The House Committee Report, House of Representatives Report No. 609, 84th Cong., 1st Session (1955) contains the following statements:

"Your committee believes that the destruction of the American unit banking system, resulting in the further concentration of credit facilities, would have revolutionary effects upon our free-enterprise system. Ultimately, monopolistic control of credit could entirely remold our fundamental political and social institutions." (Page 2)

* * *

"Your committee is convinced from the evidence presented during its recent hearings that this bill represents the minimum legislation necessary to deal with the bank holding company problem. The committee wishes to make clear that the legislation which it proposes is not designed to abolish bank holding companies or to prohibit the expansion, within certain limits, of existing bank holding companies. The bill would impose controls which the committee deems desirable over the creation and expansion of bank holding companies . . . ." (Page 11)

> "The bill would control the future expansion of bank holding **[**16]** companies. The problem of how far bank holding company systems should be permitted to expand has long been of serious concern. It is in this area that one of the greatest potential evils of bank holding **[*279]** company operations exists." (Page 14)

Records of Committee and Subcommittee hearings on the legislation also reveal this Congressional concern and purpose. During the House Committee on Banking and Currency Hearings held on February 28, March 1, 2, 3, 4, 7, 8 and 9, 1955, William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System, stated:

> "In the first place, there is nothing in present law which restricts the ability of a bank holding company to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation." (Pages 13-14)

and Representative Multer stated:

> "Now what we are trying to do here now is to see what part, if any, of the antitrust laws, as they apply to banks, need correction or extension or revision. Isn't that the main **[**17]** purpose of this legislation? Isn't it into that field that we are actually delving?" (Page 111)
>
> "The point I was making was this: This legislation we have before us now is part and parcel of the antitrust theory of legislation. If that principle is good, we have got to work it out here, too, and see that it is made to work in this field of our economy as it works in the other fields. That is the thing we have got to keep in mind when we try to put this bill in shape." (Page 117)

and Representative Spence, Chairman of the Committee, stated:

> "So competition is one of the most essential things in the banking business, and I think it should be encouraged, and I think this bill will do that." (Page 128)

During the Senate Subcommittee Hearings of July 5, 6, 7, 11, 12 and 14, 1955, Chairman Martin stated:

> "We believe, as we have said previously, that the principal problems in the bank holding company field arise from two circumstances:
>
> (1) The unrestricted ability of a bank holding company group to add to the number of its banking units, thus making possible the concentration of commercial banking facilities in a particular area under a single **[**18]** control and management; . . ." (Page 44)

and in a written report on views of the Board of Governors of the Federal Reserve System added:

> "(1) In the first place, there is nothing in present law which restricts the ability of a bank holding company to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation. " (Page 75)

Floor debate in the House and Senate, appearing in Volume 101, Part 6 and Volume 102, Part 5 of the Congressional Record similarly disclose the intent of Congress, in enacting legislation dealing with bank holding companies, to prevent undue concentration or monopoly in banking. In Volume 101 at Page 8023, Representative Wolcott stated:

> " Mr. Chairman, I think we should perhaps clear up, as far as we can, a little of the misunderstanding in respect to what the bill seeks to accomplish. In the bill there is the usual declaration of policy. It is the policy, as explained by the esteemed chairman of the committee, the gentleman from Kentucky [Mr. **[**19]** Spence] that the primary purposes of the bill are to control the expansion and creation of so-called bank holding companies and separate banking from the nonbanking activities. They go on to say, however, that it is generally to maintain competition among the banks and to minimize the danger inherent in the concentration of economic power through centralized control of banks."

[*280] Representative Rains stated at Page 8030:

> "But we did not harken to the soothing sirup of those who cautioned delay. We satisfied ourselves, after long and conscientious study of the facts, that the loopholes in our banking laws which permit - rather, which encourage - the alarming growth of monopoly and concentration of control in banking should be closed, and

promptly so. Thus this bill. Thus this recommendation of the Committee on Banking and Currency to restore a greater measure of competition to banking, . . .".

* * *

"Mergers and extension of holding company influence into our banking system across State lines give us a frightening picture of concentration in this most fundamental area of our economy."

Representative O'Hara stated at Page 8034:

"It **[**20]** is the policy of the Congress in the enactment of the proposed legislation to maintain competition among banks. It also is the policy to prevent a concentration of economic power in the giving of credits. I take it that there is no disagreement there."

Representative Marshall stated at Page 8034:

"By proper regulation and control of bank holding companies, the bill is intended to preserve the ideal of independent banking and prevent monopolistic centralization of credit."

Representative Brown stated at Pages 8037-8038:

"Mr. Chairman, unless something is done to control bank holding companies, there probably would result increased monopolistic concentrations of power in the financial world. Such concentrations of power in any field long have been characterized by their strong inclination to bad practices.

We have witnessed in this country monopolistic developments in various fields. Our policy has always been to discourage them because they are diametrically opposed to our cherished system of free competitive private enterprise. This bill is designed to carry out this policy, and if it is necessary to amend the bill for such purpose, I hope **[**21]** no crippling amendments will be adopted. In a democratic way, we are merely urging rules for the game that will preserve our traditional freedoms. Monopoly in banking - the very lifeblood of all commerce - would bring in its wake vast political and financial influence. History has proven that the step from private monopoly to Government monopoly is short."

Representative Johnson stated at Page 8176:

"Mr. Speaker, I wish to say a few words in support of H.R. 6227, the bill to provide for control and regulation of bank holding companies. I believe this legislation is essential to prevent a most dangerous type of monopoly, the banking monopoly. In my opinion, the bank holding company device leads to uncontrolled branch banking, resulting in an undesirable concentration of economic power. Unless restrictions, such as provided by H.R. 6227, are adopted, I think that the present system of independent, community banks will be endangered and ultimately banking will be in the hands of a few, with several superbank holding companies extending across the country.

The old saying, 'An ounce of prevention is worth a pound of cure,' is very applicable to the banking situation. **[**22]** I believe it is in the public interest that we check a banking monopoly before it gains a firm foothold and thus help to preserve our traditional American system of independent competitive banking."

(See also statement of Representative Multer to the Antimonopoly Subcommittee of the House Judiciary Committee reprinted at Pages 8052-8057)

In Volume 102, Senator Robertson introduced a statement at Pages 6750-6751, containing the following:

"S.2577, the bank holding company bill, which will be on the Senate Calendar **[*281]** when Congress convenes in January, represents the culmination of 18 years of effort to control expansion of bank holding companies and to require such companies to divest themselves of nonbanking investments."

* * *

"Our bill recognizes that bank holding companies are legitimate business organizations entitled to fair and equitable treatment, but that they should be subject to proper regulation by the Federal Reserve Board to prevent unfair competition and undue concentration of banking activities."

Senator Capehart stated at Page 6854:

> "I favor 100 percent the purpose of the proposed legislation. I introduced proposed legislation **[**23]** on this subject about 3 years ago. The purpose of it is to prevent bank holding companies from expanding, except under controlled conditions. I think that is the best way to put it."

Senator Douglas stated at Page 6857:

> "For here, as elsewhere, the control over credit is moving into fewer and fewer hands.
>
> At the same time, industry has been moving out of competition into closer and closer concentration - monopoly and quasi-monopoly. This has been helped by the big banks. If we do not wish to travel the path of Canada, Great Britain, and Germany, we should do something effective to check and, if possible, to roll back the concentration of banking and credit. For he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well."

Senator Bricker stated at Page 6861:

> "Under the bill, a bank holding company must obtain prior approval from the Federal Reserve Board before it can acquire a bank. The Federal Reserve Board in considering an application for an acquisition must take into consideration five factors. These factors are, first, the financial history and condition of **[**24]** the company or companies in the banks concerned; second, their prospects; third, character of their management; fourth, convenience, needs, and welfare of the communities in the area concerned; and, fifth, whether or not the effect of such acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.
>
> The last factor I named is the most important and requires the Federal Reserve Board to consider the question of the public interest and the preservation of competition in the field of banking. This provision gives the Federal Reserve Board power to prevent undue concentrations of banking activities and at the same time permits the strengthening and expansion of banking facilities when needed."

The foregoing excerpts, which are a few examples only and not an exhaustion of statements relating to the problem which the Bank Holding Company Act was designed to solve, [8] establish that ***HN10***[] the purpose of that legislation is in substantial part identical with that of § 7 of the Clayton Act. Despite this common purpose, **[**25]** the legislative history affords little enlightenment concerning Congressional intent as to the relationship of the two statutes or the effect of the Bank Holding Company Act upon § 7 of the Clayton Act and its enforcement provisions, § 11 and *§ 15*. [9]

[*282] As some of the statements above quoted reveal, the existence **[**26]** of § 7 of the Clayton Act and its applicability to bank holding company acquisitions was, by some, virtually unrecognized. [10]

Other statements reveal that some believed the Federal Reserve Board alone had jurisdiction to enforce § 7. Thus, in an exhibit at Pages 27 and 28 of the House Committee Hearing, the following appears:

> "That Congress intended to protect the American banking system against overconcentration and monopoly was made manifest when it passed the Clayton Act in 1914. In that act the Federal Reserve System was

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[8] There is no reason in this discussion to cover other problems facing Congress, such as interests by bank holding companies in nonbanking companies, etc.

[9] In considering this question it is well to remember that in 1955 and 1956, when the Bank Holding Company Act was being considered, no action involving bank holding companies had been commenced under *§ 15* by the Department of Justice to enforce § 7, and only one proceeding, the *Transamerica* case, supra, had been commenced under § 11, which proceeding resulted in a determination that a violation of § 7 had not been proved. Also, the recent Supreme Court decisions regarding the scope of § 7 were of course not available.

[10] See also the statement of Governor Robertson at Page 112 of the House Committee Hearings:

> "As was stated this morning, there are really two gaps in existing legislation. One is with respect to expansion. You have no control over it whatsoever. The other relates to combining of different businesses under the same roof. There is no control there. Those gaps should be covered and this legislation purports to do that."

> charged with responsibility for enforcing **[**27]** the prohibitions against stock acquisitions of banks whenever the effect might substantially lessen competition or tend to create a monopoly."

At Page 110, Representative Multer made this statement:

> "Let me make this observation and then either you or Governor Robertson can pick it up from there: As I understand it, when the antitrust laws were written, the Congress took into account that banking was a very specialized part of our economy, and they have deliberately said that the Federal Reserve Board would have jurisdiction over all antitrust violations in the banking field. Isn't that so?"

And at Page 315 of the Senate Subcommittee Hearings, J. Cameron Thomson, President of Northwest Bancorporation, said:

> "No holding company objects to control of acquisitions of bank holding companies if the test is based on sound banking considerations and the antitrust provisions of the Clayton Act, which, so far as banks are concerned, is the responsibility of the Federal Reserve Board."

Still other statements recognize § 7, but express dissatisfaction with the enforcement thereof. For example, at the Senate Subcommittee Hearings, Representative Multer stated: **[**28]**

> "You will remember that there was written into the law provisions giving jurisdiction to the Federal Reserve Board to review those matters and take action with reference to any possible attempts to create a trust or monopoly in the banking field. There has not been a single recommendation all through the years by the Federal Reserve Board to the Attorney General for prosecution in that field. There has not been a single attempt all through the years by the Federal Reserve Board to do anything or, for that matter, by the Comptroller of the Currency to attempt to restrain expansion of banks. Not a single application for permission to merge or consolidate has been disapproved by either of them." (Page 361)
>
> "Yes. I am of the opinion that the Federal Reserve Board entirely overlooked their duties as imposed upon them by the Clayton Act through the years until the clamor arose against bank mergers and bank consolidations as they are happening in the present era. I think they entirely overlooked the fact that they had the right to say 'There shall be no merger or no consolidation because of the provisions of the Clayton Act.' Their entire tendency as indicated by their constant **[**29]** approvals, their failure to stand up and say, 'No, this merger shan't go through, and that consolidation shan't go through,' indicates a sympathy for **[*283]** the colossus, for the stupendous, in the banking industry." (Page 367)
>
> "With reference to that specific matter, I think it is important to emphasize that with the strengthening of the antitrust laws so far as banks, bank stocks and bank acquisitions are concerned, and if our Federal agencies will now be alerted to their duty to step in and make sure that there are no violations of the ***antitrust law*** - and the whole history of it up to date shows that there has been no attempt to look at this situation up to the present moment so far as banks are concerned with any view as to whether or not they will be monopolistic or in violation of the antitrust laws - the minute we strengthen those laws and the minute our enforcement agencies begin to look into this situation of bank-stock acquisition and bank-asset acquisition and begin to bring to bear the full force of the antitrust laws, then bank holding companies must become the device to evade the law unless we enact a bill such as this. They can accomplish the identical thing **[**30]** through the bank holding company that you are seeking to prevent by regulating bank acquisitions and bank-stock acquisitions." (Pages 368-369)

Others indicated that it was believed that § 7 lacked effectiveness in the area of bank holding company acquisitions. Thus during the Senate Subcommittee Hearings, the following colloquy took place at Page 316:

> "SENATOR ROBERTSON. What is the largest bank holding company?
>
> MR. THOMSON. Transamerica is still the largest. Marine Midland second.
>
> SENATOR ROBERTSON. The Federal Reserve Board accused them of violating the antitrust laws.
>
> MR. THOMSON. That is right.
>
> SENATOR ROBERTSON. What was the outcome?
>
> MR. THOMSON. In layman's language, they did not prove their case. But it did prove they did not have the right to bring action under the antitrust laws.

> SENATOR ROBERTSON. Then, Tom McCabe, Chairman of the Federal Reserve, proceeded against the biggest one?
> MR. THOMSON. That is correct.
>
> SENATOR ROBERTSON. On the ground that it was violating the ***antitrust law***? And did not prove the case?
> MR. THOMSON. That is my understanding.
>
> SENATOR ROBERTSON. Then you would assume from **[**31]** that that at the present time there is no bank holding company that could be successfully prosecuted as violating the antitrust laws of the Nation?
> MR. THOMSON. Just as a layman, I would assume that, having started out on that course, if there are others, they would have brought action."

and during the House Committee Hearings, Harry J. Harding, President of the Independent Bankers Association of the 12th Federal Reserve District said at Page 187:

> "Now, on all sides we see the signs of holding-company acquisitions, and a striving for a bigger and bigger share of the country's bank deposits. Does this sound like inertia, or is it the beginning of another mad scramble for banks, the aftermath of the Court's decision in the Transamerica case that the tool the Federal Reserve Board had leaned on, the Clayton Act, was no tool at all with which to combat a tendency toward monopoly?"

and during the House debates at Page 8033 of Volume 101 of the Congressional Record, Representative Rhodes stated:

> "I wonder if the committee has considered that banks are subject to the Sherman Act and they are subject to the Clayton Act. I know there are some loopholes **[**32]** which now exist in the Clayton Act which make it impossible at the present time to treat as fully as they should be treated the monopolistic tendencies, if any there are, in the **[*284]** banking business. But would not the better approach be to amend the Clayton Act and the Sherman Act, so that this tendency toward monopoly, if it exists, could be handled in the ordinary subjective way by the Attorney General of the United States and the United States attorneys, instead of having the Congress say, 'This is a situation which must by its very nature be monopolistic and, therefore, bad. We will make sure it does not happen any more?' I do not think that is the proper way to legislate on a subject such as this."

Another indication of Congressional intent regarding the relationship between the Bank Holding Company Act and the Clayton Act appears in Volume 102, Part 11 of the Congressional Record at Page 14346 when Senator Fulbright, discussing bank merger legislation considered the same year the Bank Holding Company Act was passed, by the same Congress, stated:

> "In this connection, it should be noted that there was an unsuccessful attempt to enforce the stock acquisition **[**33]** provisions of section 7 against a bank holding company. The enactment of the Bank Holding Company Act of 1956 earlier this year provides effective regulation of all acquisitions by bank holding companies, and thus eliminates the necessity of resorting to the Clayton Act in such cases."

and in Senate Report No. 2583, 84th Congress, 2nd Session (1956) on that merger legislation at Page 4, the following appears:

> "As was stated previously, the attempt to enforce the stock acquisition provisions of section 7 against the Transamerica Corp. was unsuccessful. The Bank Holding Company Act by requiring advance approval by the Federal Reserve Board of all acquisitions by bank holding companies eliminates the necessity of resorting to section 7 in such cases. Thus, section 7 of the Clayton Act is actually an insignificant factor in the control of acquisitions by either banks or bank holding companies."

Our conclusions after studying the legislative history are as follows:

1. When it enacted the Bank Holding Company Act of 1956, Congress believed that the Clayton Act could not effectively cope with concentration in banking or with the danger to competition among banks which **[**34]** might result from bank holding company acquisitions.

2. ***HN11***[] It was the intent of Congress in enacting holding company legislation to strengthen, or activate, not repeal, § 7 of the Clayton Act. [11] **[**36]** To attain this result, **[*285]** Congress chose to prohibit completely acquisitions by bank holding companies of a certain percentage of the voting shares of any bank unless prior approval was obtained from the Board of Governors of the Federal Reserve System, which Board was charged with the duty of enforcement of § 7 of the Clayton Act. [12] It instructed the Board to consider five factors in determining

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[11] At Page 325 of the Senate Subcommittee Hearings Mr. Thomson stated:

> "There may be another and more simple method of dealing with this question. Expansion of bank holding companies is primarily a question of competition and monopoly. Acquisitions by bank holding companies are subject to the Sherman Act and, as recently decided in the Transamerica litigation, to the Clayton Act insofar as stock acquisitions are concerned.
>
> There are now pending in Congress S. 2075 introduced by Senator Sparkman and H.R. 5948 introduced by Mr. Celler which would complete the coverage by bringing asset acquisitions within section 7 of the Clayton Act. This problem might and perhaps should be dealt with directly as one of monopoly and competition. The indirect approach adopted by H.R. 6227 has resulted in a bill which will lead to confusion in the field of bank regulation, unnecessary conflict between State and Federal authorities, and *restrictions on normal growth far more severe than those of the antitrust laws*."

and during the House Committee Hearings, R. M. Evans, former Governor of the Federal Reserve System, stated:

> "During all the years that the Board was working with bank holding company legislation, and all the years they were working with bank holding companies, we always had it in our minds that in the Clayton Antitrust Act we had some powers that could compel these people to observe the rules and regulations of the administrative body. It was only after we tried the case and submitted it to the courts, and the courts turned it down, that the question became really urgent, because as of today there is no regulation available, no regulating power available to the Board of Governors to stop the increase in bank holding company acquisitions of independent banks.
>
> Just to give you one little paragraph from the bank holding company hearings on S. 76 and S. 1118, we quote from the court's decision:
>
> 'We agree that this quantitative analysis -'
>
> that is simply a statistical analysis to show the immense concentration of power in this Transamerica Corp. -
>
> 'we agree that this quantitative analysis discloses a tremendous concentration of banking capital and thereby of economic power in the hands of the Transamerica group, which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide. Our only question is whether the theory upon which the Board based its decision meets the legal tests which are required under section 7 of the Clayton Act, to determine whether Transamerica's bank stock acquisitions tend to create a monoply of commercial banking. We are compelled to agree with Transamerica that they do not.'
>
> So the court told the banking industry, and they told the Congress, that the Clayton Antitrust Act, under which these hearings were held, is not an adequate tool to accomplish the result that I have an idea Congress intended it should take care of in the basic legislation." (Page 507)
>
> * * *
>
> "The worst part about the whole hearing was that when this law came up for a test in court it was found to be inadequate to do the job it was supposed to do. That is the great tragedy of the whole Transamerica hearing. " (Page 508)

and the following colloquy took place (Pages 509-510):

> "THE CHAIRMAN. You think the Clayton Antitrust Act is entirely inadequate to meet the situation, don't you?
>
> MR. EVANS. There is no longer the slightest question in my mind, Mr. Chairman. I was the hearing officer. I recommended the divestment of this whole thing. I thought the evidence was overwhelmingly that way and yet the court said that we did not have the authority to make our position stick. So the thing is inadequate and ineffective.
>
> THE CHAIRMAN. And if there is any regulation of holding companies, it ought to be written into the banking law which directly affects these institutions and governs their activity.
>
> MR. EVANS. Absolutely. I think it is basically wrong to permit any group of people to evade the law. "

whether approval should be granted, each factor being a significant consideration in a § 7 case, [13] and, in order that all relevant competitive factors not specifically set forth could be considered, directed the Board in general terms to consider whether the effect of the acquisition would be to expand the bank holding company system involved beyond limits consistent with the preservation of competition in the field of banking.

3. ***HN12***[] Congress intended that the Board, while ruling on acquisition subject to the Bank Holding Company Act, simultaneously perform its duties under the Clayton **[**35]** Act and that the Board alone retain Clayton Act jurisdiction with respect to acquisitions subject to the Bank Holding Company Act.

We realize that this conclusion in effect repeals *§ 15* of the Clayton Act. We also realize, as stated in *Philadelphia Bank, at pages 350-351*, that

> ***HN13***[] "Repeals of the antitrust laws by implication from a regulatory statute are **[*286]** strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

We wish to emphasize, therefore, that no repeal of the substantive provisions of § 7 is here intended and that in our opinion the Bank Holding Company Act effected a change only in the manner in which § 7 was to be enforced. [14] A holding that *§ [**37] 15* is repealed as to acquisitions subject to the Bank Holding Company Act is, in our opinion, compelled by the existence of plain repugnancies between the two provisions.

[38]** In urging that determinations by the Board on the propriety of acquisitions under the Bank Holding Company Act are distinct from or do not involve § 7 determinations, the plaintiff in effect asks us to rule that the Board, after performing its duty under the Bank Holding Company Act, considering the factors therein specified, and finding that an acquisition should be approved, has, in circumstances such as the plaintiff claims exist in the instant case, a duty under § 11 of the Clayton Act to challenge that same acquisition on the grounds that it is violative of § 7. Any construction of the statutes which would place the Board in that self-contradictory role would, in our opinion, be absurd. [15] **[**39]** Rather, we believe that ***HN15***[] Congress intended that when performing its function under the Bank Holding Company Act, the Board should simultaneously exercise its authority to enforce § 7, preventing before they occur acquisitions which would violate that section, and that the Board alone should have such enforcement powers. [16]

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[12] In this way, Congress could insure examination by an enforcement agency of the competitive effect of each acquisition. Until passage of the Bank Holding Company Act, despite the existence of the Clayton Act with its dual enforcement provisions, no such examination inevitably occurred. As stated previously, no action and only one proceeding involving bank holding companies had been commenced charging violation of § 7 of the Clayton Act.

[13] See footnote 5, supra.

[14] As footnote 22 on pages 344 and 345 of the *Philadelphia Bank* case reveals, repeal by implication of enforcement provisions of the antitrust laws is not unique. The Supreme Court there stated:

> ***HN14***[] "Section 11 of the Clayton Act, *15 U.S.C. § 21*, vests the FRB with authority to enforce § 7 'where applicable to banks.' This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under § 11 as it existed before the 1950 amendment of § 7 remains unaffected."

[15] It might be argued, to remove this absurdity, that the Bank Holding Company Act repealed the Board's authority to enforce the Clayton Act by implication rather than repealing *§ 15*. We believe it would be equally absurd to hold that Congress, in directing the Board to examine proposed acquisitions in the light of the factors specified in the Bank Holding Company Act, intended to divest it of the authority and duty to enforce § 7.

[16] In other words Congress abandoned the theretofore ineffective system of dual enforcement as to acquisitions covered by the Bank Holding Company Act in favor of required examination and enforcement by the Board prior to the acquisitions.

The nature of proceedings before the Board with respect to bank holding company acquisitions and of the review of Board orders provided by the Bank Holding Company Act also compels the conclusion that action taken by the Board with respect to a bank holding company acquisition and appellate review thereof was intended by Congress to be a final determination of the legality of that acquisition in all respects.

Admittedly, ***HN16***[] the hearing provisions of § 3 of the Act, quoted previously, are somewhat sparse. No hearing need be held if the Comptroller of Currency or State banking authority does not disapprove the application. [17] However, that such provisions are adequate to enable the **[*287]** Board to resolve the issues involved and make its determination is demonstrated by the following statement by the United States Supreme Court in the Whitney Bank case, **[**40]** at page 417:

> "Provision is made (under the Bank Holding Company Act) for a full administrative proceeding before the Board in which all interested persons may participate and the views of the interested supervisory authorities may be obtained."

See also, as to adequacy of Board proceedings, *Northwest Bancorporation v. Board of Governors, etc., (C.A. 8, 1962) 303 F.2d 832*; *First Wisconsin Bankshares Corp. v. Board of Governors (C.A. 7, 1963) 325 F.2d 946*. And the plaintiff here has never pointed to any position it could not have enlarged and presented adequately before the Board. [18]

[41]** Likewise the plaintiff has never claimed that it did not have the right to seek review of the Board's orders under § 9 of the Bank Holding Company Act and clearly, where plaintiff's contentions are rejected by the Board, it must be considered a "party aggrieved" within the meaning of that section. Had it sought review, which it did not, the plaintiff would have had the burden of convincing the Court of Appeals that the Board's findings were not supported by substantial evidence or that its conclusions therefrom were erroneous. We find it repugnant to hold that Congress contemplated that the plaintiff could ignore this right of review completely, when its § 7 contentions unsuccessfully raised before the Board can be presented to the Court of Appeals, and commence an action in the district court. Particularly is this true since Congress rejected provisions permitting trial *de novo* in the Bank Holding Company Act in favor of the far more limited court review permitted under § 9.

In the Court's opinion, the jurisdictional question here presented has been decided by the Supreme Court in the *Whitney Bank* case. In that case, the Supreme Court held that the district court **[**42]** had no jurisdiction to pass on the merits of a holding company proposal, and that original exclusive jurisdiction with respect thereto rested in the Federal Reserve Board. It stated:

> "We believe ***HN17***[] Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested. *Admittedly the acquisition of an existing bank is exclusively within the jurisdiction of the Board*." (page 419)
> * * *
>
> " . . . it is the exclusive function of the Board to act in such cases and contests must be pursued before it, not before the Comptroller. This position is also supported by legislative history which shows that Congress rejected a proposal for a *de novo* review in the district courts of Board decisions on holding company proposals. Compare *12 U.S.C. § 1848 (1958 ed.)* and S. Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 9 and pt. 2, 84th Cong., 2d Sess., 5, with § 9 of H.R. 6227, 101 Cong.Rec. 8187, and H.R. Rep. No. 609, 84th Cong., 1st

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[17] As a matter of practice, however, it appears that the Board does hold hearings even though no disapproval by the Comptroller or state banking authority is filed. See *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co. (1964) 379 U.S. 411, at page 416, 13 L. Ed. 2d 386, 85 S. Ct. 551*.

[18] In this case the plaintiff deliberately chose not to attack the defendant holding company's acquisition of stock of Marshall & Ilsley Bank and Northern. When the holding company sought approval of acquisition of the stock of Commerce, the Department of Justice filed statements with the Board opposing the acquisition and in a petition for reconsideration urged its position that the acquisition violated § 7 of the Clayton Act. The state banking authorities had recommended that the Board approve the acquisitions.

> Sess., 22, 25-26. Such a procedure would have been similar to that employed here against the Comptroller by respondents. However, **[**43]** the Congress decided otherwise, providing instead for review in the courts of appeals based on the facts found by the Board supported by substantial evidence. We think these congressional actions point clearly to the conclusion that it ***HN18***[] intended that *challenges to Board approval of the organization and* ***[*288]*** *operation of a new bank by a bank holding company be pursued solely as provided in the statute*. This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, e.g., *Callanan Road Improvement Co. v. United States, 345 U.S. 507, 97 L. Ed. 1206, 73 S. Ct. 803 (1953)*; *Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 82 L. Ed. 638, 58 S. Ct. 459 (1938)*; *Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907)*. Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications **[**44]** of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design." (379 U.S., pages 419-420)
> * * *
>
> "Moreover, we reject the notion that ***HN19***[] the Board's determination may be collaterally attacked in the District Court by a suit against the Comptroller. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the *Courts of Appeals. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 2 L. Ed. 2d 1345, 78 S. Ct. 1209 (1958)*; *United States v. Corrick, 298 U.S. 435, 80 L. Ed. 1263, 56 S. Ct. 829 (1936)*. That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies **[**45]** comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.
> A rejection of this doctrine here would result in unnecessary duplication and conflicting litigation. Some opponents might participate before the Board; others might well wait for termination of the Board's activities and then sue in the district courts for an injunction accomplishing the same ultimate end. The different records, applications of different standards and conflicting determinations that would surely result from such duplicative procedures all militate in favor of the conclusion that the statutory steps provided in the Act are exclusive." (379 U.S. pages 421-422)
> * * *
>
> "We have discussed earlier the importance which Congress has attached in the Bank Holding Company Act of 1956 to the principle that the Federal Reserve Board, with its expertise in the banking field, should make the initial determination of the propriety of the plan of organization giving full consideration to the legislative guidelines set out in the Act." (*379 U.S. page 424*)

In a brief filed April 1, 1966, the plaintiff belittles the **[**46]** defendants for their reliance on the *Whitney Bank* case as follows:

> "The repeated citation to the Court by the defense counsel in current and previous correspondence of the statement in *Whitney National Bank v. Bank of New Orleans & Trust Co., et al, 379 U.S. 411, 414, 13 L. Ed. 2d 386, 85 S. Ct. 551*, to the effect that the Federal Reserve Board has 'original exclusive jurisdiction' under the Bank Holding Company Act is **[*289]** peculiarly misplaced, and demonstrates manifest misunderstanding of the doctrine of 'primary jurisdiction.' In the first place, use of the statement in the *Whitney* case must be read in light of the fact that the particular litigation was not an antitrust one and involved no proceeding under any antitrust statutes." (Page 5)

and in a brief filed May 9, 1966, it attempts to distinguish that case and states:

"What the whole *Whitney Bank* dispute was really about, therefore, was the question of alleged illegality of the *de novo* bank under state anti-branch banking laws. It was not concerned with anti-trust in general, Section 11 in particular, or with any question of Section 9 versus Section 11. The various statements **[**47]** in the Supreme Court's decision, whether they be about primary jurisdiction, exhaustion of administrative remedies, appellate review or the like, must be regarded in light of this fundamental fact." (Pages 7-8)

The plaintiff's attempts to distinguish the *Whitney Bank* case are without merit. Contrary to plaintiff's statement, that case did not in our opinion involve any application of the doctrine of primary jurisdiction and defendants have demonstrated no misunderstanding of that doctrine. Rather, it dealt with the exclusive jurisdiction of the Board. We find nothing in the decision indicating that the fact that a new bank rather than an existing bank was being acquired was significant, particularly since the Court stated clearly that acquisition of an existing bank was exclusively within the Board's jurisdiction.

Neither do we consider the fact that the *Whitney Bank* case was not an antitrust action a relevant distinction. ***HN20***[] It is true that the savings clause of the Bank Holding Company Act, § 11, quoted previously, states that nothing contained in the Act shall constitute a defense in any suit arising out of any prohibited antitrust or monopolistic act, action or conduct. **[**48]** It also provides, however, that nothing contained in the Act shall be interpreted as approving any act, action or conduct in violation of existing law. Despite this latter mentioned provision of the savings clause, the Supreme Court held that the Board had exclusive jurisdiction to determine the legality of an acquisition which the Court of Appeals had held to be in violation of the Banking Act of 1933. We see no reason for giving the savings clause a greater effect when an antitrust violation is claimed than when violation of other existing law is alleged.

The savings clause upon which the plaintiff relies did not appear in bank holding company legislation as originally introduced in the House and Senate and there is little in the legislative history regarding its significance. In our view this section does not as the plaintiff claims reserve to it the right to challenge in a separate action acquisitions approved by the Board solely on the ground that the acquisitions violate § 7, and neither the Senate nor House Reports support that view. [19] This provision is entirely consistent **[*290]** with our view that the Federal Reserve Board must consider § 7 in making its determination **[**49]** on applications under the Bank Holding Company Act and that the Board alone, subject to review, can enforce that section with respect to acquisitions subject to that Act.

[50]** The plaintiff had an opportunity to present its § 7 contentions before the Board when the acquisitions here involved were under consideration. It failed to object to the defendant holding company's acquisition of stock of Marshall & Ilsley Bank and Northern. When it chose to oppose the later acquisition of the stock of Commerce its position was considered by the Board and it was permitted to advance for consideration whatever material it desired. While it may be true that § 7 was not extensively discussed by the Board, the plaintiff's grievances in regard to its application should properly have been expressed to the Court of Appeals pursuant to § 9 of the Bank Holding Company Act and, for reasons heretofore stated, cannot be indirectly presented to this court.

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[19] With respect to that section, House Report No. 609 states at Page 34:

"*Section 12*. This section contains a savings clause to make clear that nothing in this act shall be construed as approving any act, action, or conduct in violation of existing law or constituting a defense in antitrust or monopolistic proceedings."

and Senate Report No. 1095 states at Page 19:

"The bill provides that none of its provisions are to be construed as approving any act, action or conduct in violation of existing law. It also provides that nothing in the bill shall constitute a defense to any action, suit, or proceeding pending or later instituted on account of any prohibited antitrust or monopolistic act, action or conduct. In the opinion of your committee, approvals granted and action permitted under the provisions of this bill are not to supersede the provisions of other Federal laws, particularly those designed to control monopoly or break up trusts. For example, the Clayton Act has been judicially determined to apply to banks. Under the provisions of that act, the Federal Reserve Board has an administrative role to play in determining whether banks comply with the requirements of the Clayton Act. Under the provisions of this bill, any action taken by the Federal Reserve Board in accordance with its terms is not to interfere in any manner with the performance by the Board of such functions as may be assigned to it under the Clayton Act."

In their answer the defendants challenged the jurisdiction of the court under *§ 15* of the Clayton Act. No jurisdictional defense was pressed, however, until after the trial had been completed. Since it must hold that it is without jurisdiction, the court believes a discussion of the merits would be improper. This is especially true since the Board having jurisdiction has rendered its decision.

Action dismissed. **[**51]**

Cedar Crest Hats, Inc. v. United Hatters, etc.

United States Court of Appeals for the Fifth Circuit

June 16, 1966

No. 21590

Reporter

362 F.2d 322 *; 1966 U.S. App. LEXIS 5800 **; 62 L.R.R.M. 2441; 53 Lab. Cas. (CCH) P11,309; 1966 Trade Cas. (CCH) P71,808

Cedar Crest Hats, Inc., et al., Appellants v. United Hatters, Cap and Millinery Workers International Union, AFL-CIO, Appellee

Disposition: [1]** Affirmed

Core Terms

labor dispute, district court, manufacturers, leaf-letting, buy, millinery, non-union, retailers, antitrust violation, restraint of trade

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN1[] **Exemptions & Immunities, Labor**

In order for union activity to constitute a violation of antitrust laws, there must be a combination of union and nonunion business groups to create a monopoly, resulting in a restraint of trade or interstate commerce.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN2[] **Exemptions & Immunities, Labor**

Where a union acts solely in its own self-interest and makes no attempt to create a monopoly, there is no antitrust violation.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN3[] **Jury Trials, Jury Instructions**

Judgment notwithstanding the verdict may be entered as if the requested verdict had been directed. *Fed. R. Civ. P. 50(b)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

HN4[] **Labor & Employment Law, Collective Bargaining & Labor Relations**

See *29 U.S.C.S. § 113(c)*.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN5[] **Union Violations, Secondary Activities**

See *29 U.S.C.S. § 158(b)(4)(ii)(B)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN6[] **Collective Bargaining & Labor Relations, Protected Activities**

The lawful purpose of leaf-letting a secondary distributor is to encourage the public to cease purchasing non-union goods and thus discourage the distributor from buying them.

Judges: Jones, Senior Judge, * and Gewin and Bell, Circuit Judges.

Opinion by: GEWIN

Opinion

[*324] GEWIN, C.J.:

This is an appeal from a judgment rendered for the Union defendant in the United States District Court for the Northern District of Texas in a suit seeking an injunction and damages for alleged antitrust violations and illegal labor practices.

Appellee, United Hatters, Cap and Millinery Workers International Union, AFL-CIO (Union), is a labor organization representing ladies' hat and millinery workers throughout the United States. Until the time of the institution of this

* Of the United States Court of Claims, sitting by designation.

lawsuit, it had been unsuccessful in attempts to organize the workers of millinery manufacturers in the Dallas, Texas, area, except in the plant of one Bierner & Son.

In 1962, the Union began a nationwide membership and public education drive. It was the stated goal of the Union to condition the hat-wearing public to buy only those hats bearing union labels so that all manufacturers would be forced to unionize. The Union contacted a number of national retailers of ladies' hats and stated that if they continued to buy **[**2]** and retail non-union goods, it would distribute leaflets in front of their stores urging customers to buy only union-made hats. One such retailer, Joseph Rabinovich, owner of Ogus, Rabinovich & Ogus, Inc. (ORO) and Rhealee Stores, Inc. (Rhealee), acquiesced in Union demands and instructed the personnel in his two companies to stop purchasing from non-union shops when buying in the Dallas market. There was no labor dispute between Rabinovich and the Union, as ORO and Rhealee had already unionized their shipping and handling departments.

Soon thereafter, nine non-union millinery manufacturers [1] in Dallas (appellants) became cognizant of the Union pressure on retailers and filed suit in the district court, seeking an injunction and damages against the Union, ORO and Rhealee. Four counts in the complaint alleged:

> I. A conspiracy between the Union, and ORO and Rhealee to restrain interstate **[*325]** trade or commerce in violation of *Sections 1* and *2* of the Sherman Act, 15 U.S.C.A., SS 1 and 2.
> II. A common law conspiracy between the same parties to damage the business of appellants without justification and with malice.
>
> III. Violation of the secondary boycott provisions **[**3]** of the Labor Management Relations Act, *29 U.S.C.A. § 158(b)(4)(ii)(B)*. [2]
> IV. A common law action for unlawful and malicious interference with the business relationships of the manufacturers and their customers.

The Union denied each of the allegations. Prior to the trial, ORO and Rhealee were dismissed from the case with consent of appellants.

Upon the trial special issues were submitted to a jury, pursuant to *Rule 49(a) F. R. Civ. P.* As to Count III, the District Court denied appellants' request to submit to the jury the question of whether there existed a "labor dispute" between appellants and the Union as defined **[**4]** in *29 U.S.C.A. § 113* (Norris-LaGuardia Act).

The jury found for appellants on Count I and for the Union on Counts II, III and IV. Both parties made motions for judgment notwithstanding the verdict under *Rule 50 F. R. Civ. P.* The District Court granted the Union's motion and entered judgment for it notwithstanding the jury verdict on *Count I, Texas Millinery Co. v. United Hatters, 229 F. Supp. 341*. This appeal followed. [3]

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[1] Texas Millinery Company; Sue Ellen Hat Co., Inc.; Cedar Crest Hats, Inc.; Parke Layne Hats; Jan Leslie Hats, Inc.; Goldstein Hat Manufacturing Company; Pete Brooks Hat Company, Inc.; Bernstein Millinery Company; and Frank M. Benson.

[2] The District Court concluded it had jurisdiction under the provisions of *29 U.S.C.A. § 187(b)*.

[3] By order of this Court five of the appellants were voluntarily dismissed from the appeal: Texas Millinery Co.; Sue Ellen Hat Co., Inc.; Jan Leslie Hats, Inc.; Pete Brooks Hat Co., Inc.; and Bernstein Millinery Co. As to the four appellants remaining, the jury found damages in the following amounts:

Cedar Crest Hats Inc.

$ 501.00

Parke Layne Hats

$ 681.00

Goldstein Hat Mfg. Co.

Appellants here contend the District Court erred as follows: (1) in granting judgment for the Union notwithstanding **[**5]** the verdict of the jury on Count I because there was sufficient evidence to support the verdict; (2) by refusing to submit to the jury under Count III the question of whether there existed a "labor dispute" between appellants and the Union as defined by *29 U.S.C.A. § 113*; and *(3)* the verdict of the jury on Count III was contrary to a preponderance of the evidence and therefore, their motion for judgment notwithstanding the verdict should have been granted.

The answer to appellants' first contention can be found in the Court's charge to the jury on union antitrust violation, the pertinent portion of which is as follows:

> "The ***antitrust law*** seeks to maintain free competition in interstate commerce in order to protect the public interest. The end sought by the ***antitrust law*** is the prevention of unreasonable restraints in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services; the public is to be protected in order to secure to them the advantages which accrue to them from free competition in the market. A concerted refusal to **[**6]** deal, which tends to restrict free and open access to the market is a restraint of trade, since it is one of those situations where the law presumes a public injury. You must decide under the evidence whether any refusal to deal here is a restraint of trade. Not all restraints of trade are unreasonable restraints. All business action affects trade in some way. Therefore, in determining whether a restraint of trade exists, you must decide whether the particular conduct is reasonably calculated to prejudice the public interest, which the ***antitrust law*** is designed to protect; that is, you must decide whether the conduct which you have found tends to restrict or otherwise control free and **[*326]** open competition. In determining whether or not such an unreasonable restraint exists, you need not find a specific public injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest."

We find this charge to be inadequate to describe a *labor union* antitrust violation, because it merely defines an antitrust violation in the broadest possible terms without giving any consideration to the special exemptions which labor unions **[**7]** enjoy under the law. Our reading of the Supreme Court decisions in *Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945)*, and the more recent cases of *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* and *Amalgamated Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*, convinces us that ***HN1***[] in order for union activity to constitute a violation of antitrust laws in the circumstances here presented, there must be a combination of union and nonunion business groups to create a monopoly, resulting in a restraint of trade or interstate commerce. [4] For example, in *Bradley*, the union entered into a "program in which contractors and

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$2,201.00

Frank M. Benson

$ 621.00

[4] In *Bradley* the Court stated:

> "The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations had been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business

manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level." *325 U.S. at 809, 89 L. Ed. at 1949, 65 S. Ct. at 1540*. In *Pennington*, the Court said a violation would **[**8]** arise if the union were to become a party to a collusive arrangement among large coal producers designed to drive smaller competitors from the market, even though the union's part in the scheme was a bona fide undertaking to secure better wages for its members. *381 U.S. at 663-666, 14 L. Ed 2d at 632-634*. In other words, the union must join in a conspiracy *to create a monopoly among fellow-conspiratory business interests*. This interpretation is reinforced by the statement of Mr. Justice Black in Allen Bradley at *325 U.S. at 809, 89 L. Ed. at 1948, 65 S. Ct. 1533* that "Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local 3. *We may assume that such an agreement standing alone would not have violated the Sherman Act*." *We*, in turn, may assume that ***HN2***[] where a union acts solely in its own self-interest and makes no attempt to create a monopoly, there is no antitrust violation.

[9]** The District Court seems to have recognized the error in its charge when it nullified the jury's verdict under Count I for the following reasons stated in its written findings:

> "2. The purpose of the Union in advising Rabinovich of its intention to leaflet being to further legitimate union activity -- that of unionizing employees of plaintiffs and promoting the sale of union-made goods and discouraging the sale of non-union-made goods -- and there being no other purposes, the Union, in inducing O.R.O. and Rhealee to cease doing business with plaintiffs, acted solely in its self interest and with justification."
>
> **[*327]** "3. Rabinovich's agreement with Rose that O.R.O. and Rhealee would cease buying non-union goods does not violate the Sherman Act."

For appellants to have prevailed under Count I it would have been necessary for them to prove facts showing that the Union conspired with certain business interests to create a monopoly for such business interests. We have diligently searched the record and conclude that no such facts were proved.

This case presents a rather unique situation. While there is substantial evidence to sustain the verdict of the **[**10]** jury under the erroneous charge, Count I should not have been submitted to the jury in the first place if the issue had been *properly stated*. Since the Union requested a directed verdict and such clearly would have been proper, the judgment of the District Court as to Count I is affirmed. ***HN3***[] Judgment notwithstanding the verdict may be entered "as if the requested verdict had been directed." *Rule 50 (b) F.R. Civ. P.* It is our conclusion that in these circumstances the incorrect charge was "harmless error." *Rule 61 F. R. Civ. P.*

In Count III of their complaint appellants alleged a violation of the secondary boycott provisions of the Labor Management Relations Act, *29 U.S.C.A. § 158(b)(4)(ii) (B)*. [5] **[**12]** The Union responded by claiming that their leaf-letting activity was protected by the publicity proviso to that Section. [6] Appellants here complain that the District

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> monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act."

[5] *§ 158(b)(4)(ii)(B)*:

> ***HN5***[] "(b) It shall be an unfair labor practice for a labor organization or its agents --
>
> (4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is --
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

Court erred in refusing to submit to the jury the question whether there existed a "labor dispute" between themselves and the Union. **[**11]** *29 U.S.C.A. § 113(c)* defines "labor dispute" as follows:

> ***HN4***[] "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

[13]** It is *quite* clear from the evidence that a "labor dispute" existed between appellants and the Union. Strong undisputed evidence shows that the Union has been attempting to organize millinery **[*328]** workers in the Dallas area almost continuously since 1937. In 1957 the Union won a representation election from one manufacturer, Bierner & Son. As late as 1962 union representatives were obtaining authorization cards from appellants' employees, and only six months prior to the filing of this suit, a full-time organizer was stationed in Dallas who was in constant contact with millinery workers. No citation of authority is actually needed to hold this situation to be a "labor dispute," and the District Court is affirmed. See *Marine Cooks & Stewards v. Panama Steamship, 362 U.S. 365, 4 L. Ed. 2d 797, 80 S. Ct. 779 (1960)*; *East Texas Motor Freight Lines v. International, etc., 163 F.2d 10 (5th Cir. 1947)*. Indeed, we find it unusual to say the least, that in these circumstances appellants would *deny* the existence of a labor dispute.

Appellants concede that it would be lawful for the Union to leaflet the retail stores peacefully in order to advise **[**14]** the public of a labor dispute. However, they contend that a preponderance of the evidence shows that the *motive* of the Union was not to advise the public, but to effect a secondary boycott. Therefore, it is argued that the Union is not protected by the publicity proviso of *Section 158(b)(4)*. We cannot agree to such a limited and unrealistic interpretation of that section. As the Supreme Court pointed out in *NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 12 L. Ed. 2d 129, 84 S. Ct. 1063 (1964)*, ***HN6***[] the lawful purpose of leaf-letting a secondary distributor is to encourage the public to cease purchasing non-union goods and thus discourage the distributor from buying them. The only distinction between the *Fruit & Vegetable Packers* case and the present situation is that ORO and Rhealee acquiesced before the leaf-letting ever began. This was simply an act of foresight. The jury had abundant, undisputed evidence in the form of testimony from retailers themselves to conclude that the only pressure brought against them was the threat of leaf-letting. Therefore, the verdict and **[**15]** judgment thereon shall stand. *NLRB v. Fruit & Vegetable Packers, supra.* See also *NLRB v. Servette, Inc., 377 U.S. 46, 12 L. Ed. 2d 121, 84 S. Ct. 1098 (1964)*.

The judgment is Affirmed.

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[6] "*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

Schulman v. Burlington Industries, Inc.

United States District Court for the Southern District of New York

June 28, 1966

No. 66 Civ. 130

Reporter

255 F. Supp. 847 *; 1966 U.S. Dist. LEXIS 10179 **; 1966 Trade Cas. (CCH) P71,822

Emilie Schulman, Hosiery by Emilie, Inc., and Harem Hosiery, Inc. , Plaintiffs v. Burlington Industries, Inc., et al. , Defendants

Core Terms

hosiery, allegations, conspiracy, customers, interstate, antitrust, counts, induce, retail, commerce

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

In appraising the sufficiency of a complaint a trial court follows the accepted rule that 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. This general principle applies with at least its customary force in suits under the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Patent Law > ... > Damages > Collateral Assessments > General Overview

HN2[] **Regulated Practices, Private Actions**

In complaint based on anti-trust violations, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires, for the cases, whatever their factual and verbal diversities, make clear at a minimum that one qualifies as a private antitrust plaintiff when the violation is directly aimed" at him or he has been "directly harmed" by it.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Unlawful conspiracies commonly consist in part of conduct entirely lawful in itself. Thus, there is no actionable wrong in the mere fact that a competitor sets up shop in close proximity to an existing enterprise. The same may be said of alleged special benefits and advantages extended by a distributor to a retailer to make the latter a more effective competitor. But these steps may serve as part of the sum of the acts which are relied upon to effectuate the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question. This principle applies even without reference to the clearly interstate aspects of a defendant's business and the allegations that this business and its revenues are being employed to effect the wrongs that local plaintiffs charge.

Judges: [1]** Frankel, D.J.

Opinion by: FRANKEL

Opinion

[*849] Memorandum

FRANKEL, D.J.:

Plaintiffs, who own and operate in Chicago stores selling women's hosiery at retail, have filed a four-count complaint against (1) Burlington Industries, Inc., a manufacturer of women's hosiery, among other products, (2) Parklane Hosiery Company, Inc., which is both a wholesale distributor and an operator of retail stores selling women's hosiery, and (3) several officers and employees of these defendant corporations. [1] The second and third counts, which are not of direct concern at this time, allege, respectively, breach of a restrictive agreement by Parklane and wrongful inducement of that breach by Burlington. The first and fourth counts, which do concern us now, seek treble damages under Section 4 of the Clayton Act (*15 U.S.C. § 15*) for various alleged violations of the antitrust laws. The Burlington defendants (except for one individual) have moved under *Rule 12(b)(1)* and *(6)* to dismiss the first and fourth counts for lack of jurisdiction over the subject matter and failure to state claims upon

[1] It will be sufficient for most purposes to refer hereafter to Burlington and Parklane as the defendants.

which relief can be granted. Alternatively, under *Rule 12(f)*, these defendants move to strike, in whole or **[**2]** part, sundry paragraphs of the first and fourth counts as well as one paragraph (59) of the third count. [2]

I.

The first count, involving *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*), *Sections 2(a)*, *(d)*, *(e)*, and *(f)* of the Clayton Act, as amended by the Robinson-Patman Act (*15 U.S.C. § 13(a)*, *(d)*, *(e)*, and *(f)*), and Sections 4, 12 and 15 of the Clayton Act (*15 U.S.C. §§ 15*, *22*, and *26*), after identifying the parties, alleges the following facts to be taken as true for purposes **[**3]** of the motion: Plaintiffs, variously styling their stores as "Albert's," "Albert's Hosiery," or "Albert's Hosiery Stores," purchase substantial quantities of the hosiery they sell from one Albert Hayes, who distributes in interstate commerce to plaintiffs and other retailers throughout the United States. The stores plaintiffs operate, along with those of defendant Parklane and other competitors selling women's hosiery exclusively, "constitute a separate, substantial and distinct area of competition * * *." [3] Burlington and Parklane (in its role as distributor) compete with Albert Hayes.

Before 1954, the first count continues, Albert Hayes bought substantial quantities of hosiery from Burlington, but such purchases became only occasional thereafter. From 1953 to 1957 Albert **[**4]** Hayes sold to Parklane substantially all of the latter's hosiery requirements. In the years covered by the complaint, and until the present time, Burlington has attempted "to coerce and induce said Albert Hayes to purchase all or substantially all of his hosiery requirements from defendant Burlington." As part of this attempt, Burlington induced Parklane to cease buying from Albert Hayes and to buy from Burlington instead. At the same time the several defendants entered into a "combination, conspiracy, contract and plan" the purposes of which included, unless Albert Hayes agreed to purchase all his requirements **[*850]** from Burlington, action "to injure or to destroy the businesses of plaintiffs and other customers of said Albert Hayes so as to coerce and induce them to cease doing business with him and instead to do business with defendant Burlington, * * * [and] to injure and prevent competition in the sale of women's hosiery at retail between customers * * * of said Albert Hayes, including, among others, the * * * plaintiffs herein, * * * and the stores owned, controlled by or affiliated with defendant Parklane * * *." In further implementation of the conspiracy, Burlington **[**5]** agreed to and did extend credit to Parklane on terms more favorable than those given to other Burlington customers, financed the opening of new Parklane stores, gave discriminatorily favorable prices to Parklane, and extended other benefits and assistance to Parklane "which were not available, or not available on proportionately equal terms, to all of defendant Burlington's other hosiery customers." [4] Also in pursuance of the conspiracy, paragraph 31 of the complaint alleges, Parklane agreed to and did open retail stores close to plaintiffs' "for the purpose of injuring them and coercing and inducing them to cease dealing with * * * Albert Hayes and to deal instead with defendant Burlington." Since the opening of these Parklane stores (in 1960), defendants Burlington and Parklane have pressured plaintiffs either to sell their stores to defendants "or to agree to buy * * * all or substantially all of the hosiery requirements for said stores from the defendants Parklane and Burlington." Parklane has, as part of this effort, interfered with plaintiffs' leasing agreements and "engaged in other unfair methods of competition." Moreover, the pattern of tactics described in

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[2] Parklane and its president have made no formal motion, but have filed a brief memorandum offered "as evidencing their joinder" in the Burlington motion. Plaintiffs, pointing out that the motion papers are drafted with focused concern only for the Burlington movants, resist the proposed joinder. Since the motion is being denied, it is not vital to decide how many of the defendants may claim a share in the result.

[3] The complaint (par. 17) adds alleged factual detail to support the quoted conclusion. We accept this conclusion, like others, for now. Cf. *United States v. DuPont & Co., 351 U.S. 377, 395* & n. 22, *76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

[4] Four paragraphs of the first count, detailing discriminatory pricing and other practices by Burlington in favor of Parklane, rest explicitly on the Robinson-Patman Act. The first of these (par. 38) refers to discriminations by Burlington "between plaintiffs, on the one hand, and defendant Parklane and others * * *." Defendants say in their Memorandum that this reference to "plaintiffs" must be an inadvertence because (1) it is the only place in the long complaint where plaintiffs are suggested to be Burlington customers and (2) the paragraph is copied from the complaint in another pending action (S.D.N.Y., 63 Civ. 2043) brought by Albert Hayes and others against the defendants herein. Defendants' observation is highly plausible; it is not mentioned in the thorough memoranda for plaintiffs.

paragraph 31 is **[**6]** said (par. 32) to have been duplicated by defendants in other cities around the country. Other acts of unfair competition - threats, misrepresentations, interference with employees and customers - all in furtherance of the conspiracy, are also alleged.

[7]** The first count ends with allegations of damage to plaintiffs, injuries to purchasers of women's hosiery, and public injury in the form of obstructions and restraints in interstate commerce.

The fourth count, also attacked by defendants' motion, incorporates the first, and adds the second (breach of covenants) and third (inducement of the breach) as being additional "acts * * * in furtherance of the aforesaid conspiracy."

II.

HN1[] "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that 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, 45-6, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. This general principle applies with at least its customary force in suits under the antitrust laws. E.g., *United States v. Employing Plasterers Assn., 347 U.S. 186, 98 L. Ed. 618, 74 S. Ct. 452 (1954)*; cf. *Nagler v. Admiral Corporation, 248 F.2d 319, 322-24 (2d Cir. 1957)*; *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. **[*851]** Its application **[**8]** requires denial of defendants' motion. [5]

1. Defendants argue that plaintiffs are really complaining about alleged injuries to Albert Hayes and fail to "allege some direct injury to themselves caused by defendants' violation of the antitrust laws." It is not necessary in disposing of this contention to conjure with the legal subtleties generated by rules couched in terms of "direct" versus "indirect" consequences. Nor is it necessary to consider **[**9]** whether this notion of "direct" injury has any place at all in this context when ***HN2***[] "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." *Radiant Burners v. Peoples Gas Co., 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*; and see Note, 64 Colum. L. Rev. 570, 581-88 (1964). For the cases, whatever their factual and verbal diversities, make clear at a minimum that one qualifies as a private antitrust plaintiff when "the violation is directly aimed" at him or he has been "directly harmed" by it. *Productive Inventions v. Trico Products Corp., 224 F.2d 678, 679 (2d Cir. 1955)*, cert. denied, *350 U.S. 936, 100 L. Ed. 818, 76 S. Ct. 301 (1956)*; see also Steiner v. 20th *Century-Fox Film Corporation, 232 F.2d 190, 193 (9th Cir. 1956)*; cf. *South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966)*. [6] Plaintiffs allege enough to meet even this debatably stringent test.

[10]** The complaint charges a conspiracy expressly and purposefully aimed at coercing and injuring the plaintiffs as identified targets. It does not matter that defendants, under the allegations, may be conspiring to produce the restraints hurting plaintiffs only as part of an overall scheme to reach still bigger game. A conspiracy, in ***antitrust law*** as elsewhere, may have a variety of objects and victims. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. The complaint alleges injury direct and specific enough when it charges that defendants conspired by a course of predatory tactics to put plaintiffs out of business and thereby destroy the interstate trade between plaintiffs and Albert Hayes.

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[5] The movants assert lack of jurisdiction over the subject matter as well as failure to state claims in counts I and IV. They make no separate points under this branch of the motion, seemingly implying that, since federal jurisdiction is claimed only under the Clayton Act, failure of the claim on the merits inevitably entails failure of jurisdiction. While this assumed premise is dubious, *Bell v. Hood, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946)*, it makes no difference. The conclusion that the motion must be denied on the merits is dispositive in any event.

[6] In *South Carolina Council of Milk Producers,* the Fourth Circuit said that some of the case law unduly "straitens the intent of the Clayton Act" in requiring "directness of injury" as a condition for suing. See *360 F.2d at 417*. The Court formulated the test as one of "proximate cause," leaving for judicial determination in each case whether particular plaintiffs should be barred as being "only distantly or tenuously hurt." *Id at 419-420*.

2. Defendants argue that plaintiffs lack standing to complain of the alleged Robinson-Patman violations because they are neither competitors nor customers of Burlington. In considering this point, we assume with defendants that paragraph 38 states an inadvertent falsehood when it describes plaintiffs as purchasers from Burlington (see note 4, *supra*), although it may be doubted, strictly speaking, whether such an assumption is **[**11]** permitted on a motion to dismiss. We assume further - as plaintiffs also do, at least *arguendo* - that plaintiffs have no right of action for Robinson-Patman violations in the form of discriminations among Burlington customers if they neither buy from nor compete with Burlington. See *Klein v. Lionel Corporation, 237 F.2d 13, 14-15 (3d Cir. 1956)*; *Bolick-Gillman Company v. Continental Baking Company, 206 F. Supp. 151 (D. Nev. 1961)*. These premises do not lead to the dismissal defendants seek.

[*852] ***HN3***[] Unlawful conspiracies commonly consist in part of conduct entirely lawful in itself. Thus, there is no actionable wrong in the mere fact that a competitor (here, Parklane) sets up shop in close proximity to an existing enterprise. The same may be said for present purposes of the alleged special benefits and advantages extended by Burlington to Parklane to make the latter a more effective competitor. But these steps may serve as "part of the sum of the acts which are relied upon to effectuate the conspiracy * * *." *American Tobacco Co. v. United States, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*.

The gist of the case is the alleged agreement or combination to monopolize **[**12]** and restrain trade. If the otherwise lawful actions the complaint describes have been taken under an agreement to injure or destroy plaintiffs' business, and in this way to restrain competition in, and monopolize, the "distinct area of competition" alleged in the complaint, then plaintiffs have a Sherman Act claim. *Schine Chain Theatres v. United States, 334 U.S. 110, 119, 92 L. Ed. 1245, 68 S. Ct. 947 (1948)*; *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. Because they are sufficient in this respect, the counts in question cannot be dismissed if they fail to allege in addition claims warranting independent relief under Robinson-Patman.

3. Defendants are also wrong in their contention that the two antitrust counts must fall because plaintiffs "have totally failed to show any impact on or relationship with interstate commerce * * *." The complaint amply alleges that the commerce affected is the interstate sales and shipments from Albert Hayes to plaintiffs. The fact that plaintiffs' business is retail selling within Chicago does not diminish the sufficiency of the alleged impact upon their purchases in commerce. ***HN4***[] "That **[**13]** wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." *United States v. Employing Plasterers Assn., 347 U.S. 186, 189, 98 L. Ed. 618, 74 S. Ct. 452 (1954)*. See also *Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *United States v. Women's Sportswear Assn., 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949)*. This principle applies even without reference to the clearly interstate aspects of *defendant's* business and the allegations that this business and its revenues are being employed to effect the wrongs plaintiffs charge. Cf. *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119-20, 99 L. Ed. 145, 75 S. Ct. 148 (1954)*.

4. Finally, we reject the alternative prayer that numerous allegations of the complaint be stricken at this stage. One category against which this attack is leveled consists of allegations relating to defendants' war on Albert Hayes and their attempts generally to destroy his custom. It cannot be said with assurance that these averments are wholly immaterial in describing and defining the conspiracy plaintiffs charge. See *Atlantic City Electric Co. v. General **[**14]** Electric Co., 207 F. Supp. 620, 629-30 (S.D.N.Y. 1962)*. Similarly, the Robinson-Patman allegations, already discussed, have at least some "possible bearing on the issues of the trial * * *." *Fleischer v. A.A.P., Inc., 180 F. Supp. 717, 721 (S.D.N.Y. 1959)*. The claim of prejudice because plaintiffs have adopted allegations from the pending complaint of Albert Hayes against these same defendants is not impressive. If the allegations fit, as they seemingly do, they may serve in more than one lawsuit. The task of answering them, already accomplished, is not oppressive. This is, in short, not one of the rare cases in which the early surgery allowed by *Rule 12(f)* seems helpful. See 2 Moore, Federal Practice 2317-19 (2d ed. 1965).

The motion is denied.

It is so ordered.

End of Document

Automated Bldg. Components v. Hydro-Air Eng'g

United States Court of Appeals for the Eighth Circuit

July 7, 1966

Nos. 17985, 18103, 18104, 18004, 18105

Reporter
362 F.2d 989 *; 1966 U.S. App. LEXIS 5580 **; 150 U.S.P.Q. (BNA) 421 ***

AUTOMATED BUILDING COMPONENTS, INC., Appellant, v. HYDRO-AIR ENGINEERING, INC., Appellee. HYDRO-AIR ENGINEERING, INC., Appellant, v. AUTOMATED BUILDING COMPONENTS, INC., Appellee

Disposition: **[**1]** These cases are in all things affirmed

Core Terms

Patent, ordinary skill, subject matter, counterclaim, invention, plates, prior art, pertain, cases, antitrust violation, expert witness, patent misuse, Clayton Act, infringement, allegations, questioning, appeals, damages, invalid, nailing, perfect

Judges: Vogel, Chief Judge, Blackmun, Circuit Judge, and Stephenson, District Judge.

Opinion by: VOGEL

Opinion

[*421]** **[*990]** VOGEL, Chief Judge.

Automated Building Components, Inc. (hereafter Automated), the assignee of the entire interest in United States Letters Patent No. 2,877,520 (hereafter the Jureit Patent), has appealed from the District Court's determination that Claims 1, 3 and 4 of the Jureit Patent are invalid because of being obvious to a person having ordinary skill in the art to which the claims pertain and also because of having been anticipated by the prior art. This determination effectively curtails a patent infringement action brought on the Jureit Patent by Automated against Hydro-Air Engineering, Inc. (hereafter Hydro-Air). Hydro-Air itself appeals from a dismissal of its counterclaim against Automated **[***422]** or treble damages under the Clayton Act, 38 Stat. 731, *15 U.S.C.A. § 15*. [1] Hydro-Air's counterclaim is based on allegations of patent misuse and ***antitrust law*** violations by Automated through the use of illegal tying agreements entered into between Automated and its customers. Without deciding if there **[**2]** were such antitrust violations, Judge Regan determined that Hydro-Air proved no damages so as to be entitled to recover under the Clayton Act. Certain procedural questions are also involved on these appeals.

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[1] As provided in the Clayton Act, 38 Stat. 731, *15 U.S.C.A. § 15*:

"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."

The District Court's opinion, published at *237 F. Supp. 247*, sets out the facts of these cases in sufficient detail so as to make any further statement **[*991]** unnecessary. With a few additional comments, we affirm the District Court on the basis of Judge Regan's opinion. See, also, Automated **[**3]** Bldg. Components, Inc. v. Structomatic, Inc., Civil No. 61 C 262, N.D.Ill., March 25, 1965, an unreported case which also holds Claims 1, 3 and 4 of the Jureit Patent invalid in law.

§ 103 of the Patent Act of 1952 provides as follows, at 66 Stat. 798, *35 U.S.C.A. § 103*:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

The Supreme Court recently rendered its first patent decisions since the enactment of the Patent Act of 1952 in the cases of *United States v. Adams, 1966, 383 U.S. 39, 86 S. Ct. 708, 15 L. Ed. 2d 572*, and *Graham v. John Deere Co., 1966, 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545*. Mr. Justice Clark interpreted *§ 103* in the *Graham* case, at *383 U.S. at 14, 86 S. Ct. at 692, 15 L. Ed. 2d at 554*, as follows:

> "The section is **[**4]** cast in relatively unambiguous terms. Patentability is to depend, in addition to novelty and utility, upon the 'non-obvious' nature of the 'subject matter sought to be patented' to a person having ordinary skill in the pertinent art."

At page 252 of 237 F. Supp. Judge Regan stated, in regard to the Jureit Patent:

> "* * * It was not only obvious to one skilled in the art in 1956 and within the ordinary skill of a worker in the nailing art to modify nail-like fasteners to vary withdrawal resistance but was actually demonstrated in prior art patents, i.e., Kalischer and Berthaud. Without going into what is obvious to this Court but by way of illustration it certainly does not take inventive genius to make joints with plates differing from the French connector plates only in that the Jureit plates have nails struck out from the plate instead of being welded to the plate as shown by Berthaud.
>
> "This Court finds that substantial evidence has been introduced attacking the validity of the Jureit claims and that defendant has overcome the presumption of validity by showing that the subject matter of Jureit's Claims 1, 3, and 4 as a whole was obvious, at the time the alleged **[**5]** invention occurred, to a person having ordinary skill in the art to which the Claims pertain."

From a careful reading of the entire record we agree with Judge Regan's conclusion. His opinion, not being clearly erroneous, is conclusive on appeal. *Steffan v. Weber Heating & Sheet Metal Co., 8 Cir., 1956, 237 F.2d 601, 602*; *Trico Products Corp. v. Delman Corp., 8 Cir., 1950, 180 F.2d 529, 530*. Though drafted before *Graham* and *Adams*, the opinion clearly follows the dictates of *§ 103*, as interpreted by the Supreme Court, in discussing a proper standard of invention.

Automated's allegations questioning the qualification of Hydro-Air's expert witness, Donald A. Fischer, the Dean of the School of Engineering at Washington University, to testify as to the art here involved, clearly must relate to credibility rather than to the admissibility of Fischer's testimony, since the trial court has determined that Fischer qualified as an expert witness. See, generally, 2 Wigmore, Evidence, § 561 (3d Ed. 1940), as supplemented, and the authorities cited therein.

Automated challenges the right of **[***423]** ydro-Air to appeal on the denial of its counterclaim **[**6]** since Hydro-Air did not present a timely appeal thereon after the entry of judgment by the District Court on December 14, 1964. Hydro-Air's appeal was perfected only after Judge Regan vacated the initial judgment and purported to reenter it on June 4, 1965, under *Rule 60(b) of the Fed.Rules of Civ. Proc.*, 28 U.S.C.A., on the grounds that **[*992]** counsel for

Automated violated an oral agreement entered into with counsel for Hydro-Air. Such agreement allegedly provided that Automated would not appeal on its infringement claim if Hydro-Air would not appeal on its counterclaim. Automated filed an appeal at the last possible moment, thus leaving Hydro-Air no time to perfect its own appeal. [2] While we have serious doubts concerning the jurisdiction of the District Court to grant the re-entry of judgment once an appeal had been taken by Automated, [3] we do not deem it necessary to rule on this point since on the basis of the record, as ably interpreted in Judge Regan's opinion, Hydro-Air's counterclaim must fail in any event. A viewing of the record as a whole can yield no logical or reasonable inference that Hydro-Air's damage, if any, was caused by patent misuse or antitrust violations, **[**7]** if any, on the part of Automated.

These cases are in all things affirmed.

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[2] The amended *Rule 73(a) (3) of the Fed. Rules of Civ.Proc.*, effective July 1, 1966, prevents this situation from arising as it gives "any other party" 14 additional days to file an appeal after the first notice of appeal is filed.

[3] See, e.g., *Janousek v. Doyle, 8 Cir., 1963, 313 F.2d 916, 920*. But cf. *Oliver v. City of Shattuck ex rel. Versluis, 10 Cir., 1946, 157 F.2d 150*.

Lewis v. Pennington

United States District Court for the Eastern District of Tennessee, Northern Division

July 15, 1966

Civil Nos. 3431, 3432, 3433, 3446, 3493, 3579, 3591, 4385, 4463, 4988

Reporter

257 F. Supp. 815 *; 1966 U.S. Dist. LEXIS 8297 **; 62 L.R.R.M. 2604; 53 Lab. Cas. (CCH) P11,371; 1966 Trade Cas. (CCH) P71,842

John L. Lewis, et al., Plaintiffs v. James M. Pennington, et al., Defendants. Harry P. Stansberry t/a Stansberry Coal Company, Plaintiffs v. Same. Jesse C. Fesler, et al., t/a Fesler Coal Company, Plaintiffs v. Same. U. R. Arnold, et al., t/a Arnold Strip Mining Company, a partnership, Arnold Coal Company, Inc., Plaintiffs v. Same. Tennco, Inc., Plaintiff v. Same. W. R. Parton t/a W. R. Parton Coal Company, Plaintiff v. Same. E. C. McPherson t/a E. C. McPherson Coal Company, et al., Plaintiffs v. Same. White Oak Coal Company, Inc., Plaintiff v. Same. Dean Coal Company, Plaintiff v. Same. W. R. Parton dba W. R. Parton Coal Company, Plaintiff v. Same

Core Terms

coal, coal company, bid, plant, tons, contracts, negotiations, prices, producers, steam, bargaining, per ton, opening, employees, spot market, conspiracy, bituminous coal, supplied, shipped, sales, wages, signatory, shipment, tonnage, stock, wage agreement, seam, spot, collateral, damages

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

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

Section 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia Act, 47 Stat. 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act, but that neither of these sections expressly deals with arrangements or agreements between unions and employers. Neither section states whether any or all such arrangements or agreements are barred or permitted by 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 lack of wisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

When unions participate with a combination of business men who have complete power to eliminate all competition among themselves and to prevent all competition from others, a situation is created that is not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Wages lie at the heart of a collective bargaining between employers and unions and 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. The union benefit from the wage scale is direct and complete and the effect on the product market results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. A union may conclude a wage agreement with a multi-employer bargaining unit without violating the antitrust laws and it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN4[] **Antitrust & Trade Law, Exemptions & Immunities**

Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages that the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. The policy of ***antitrust law*** is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

HN5[] **Antitrust & Trade Law, Sherman Act**

If there is an industry-wide collective bargaining agreement whereby employers and a union agree on a wage scale that exceeds the financial ability of some operators to pay and that if it is made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union are to be found to have violated the antitrust laws. An industry-wide agreement containing those features is prima facie evidence of a violation. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Mining Industry > Coal Mining > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN6[] **Labor, Statutory Exemptions**

It is necessary to find predatory intent to drive small coal operators out of business in order to hold an employer and a union for a violation of the Sherman Act. The ***antitrust law*** is not designed to protect marginal operators; ill effects alone on the marginal operators are not enough to show intent.

Evidence > Burdens of Proof > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN7[] **Evidence, Burdens of Proof**

Section 6 of the Norris-LaGuardia Act states in effect that no association participating in a labor dispute shall be held liable for the unlawful acts of individual officers, members, etc., except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

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

Contracts Law > Contract Interpretation > General Overview

HN8[] **Jury Trials, Jury Instructions**

If a contract is subject to two reasonable constructions, the one to be given is the one that does not result in a violation of law. Where two reasonable constructions of a written contract can be made, preference is given to that construction of such contract that does not result in a violation of law. A court will not construe a contract to violate the law if it can by reasonable construction construe it to come within the purview of the law.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

HN9[] **Antitrust & Trade Law, Sherman Act**

A conspiracy need not be proved by formal agreement or by direct evidence. It is rare that a conspiracy is proved by direct evidence. Unity of purpose or a common design is sufficient. If the necessary result of a combination or agreement unreasonably restrains trade, it violates the Sherman Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Torts > Intentional Torts > Assault & Battery > General Overview

HN10[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

The states grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN11[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

State law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The federal claim must have sufficient substance to confer jurisdiction on the federal court before it can try the state claim. In addition state and federal claims must derive from a common nucleus of operative fact. And pendent jurisdiction is a matter of sound judicial discretion and not a right of plaintiffs.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Torts > Business Torts > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Torts > ... > Commercial Interference > Contracts > General Overview

HN12[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

It is a violation of Tennessee law to interfere maliciously or intentionally with the business and contractual relations of another, except under certain circumstances and for certain purposes. It is not a violation of state law for a union intentionally to cause harm to an employer in interrupting its business and contractual relations by peaceably inducing its employees to go on strike for the purpose of obtaining better wages and working conditions. It is the acts of violence that result in damages to the plaintiffs' property or business that are the basis of a state law claim.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN13[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

A union has the right under state law to induce employees by fair persuasion to withhold their services from an employer in order to obtain a collective bargaining agreement. By fair persuasion is meant argument, exhortation, or entreaty addressed to a person without threat of physical harm. A union has the right under state and federal law to induce employees to leave their work and to remain away from their work by paying or by giving such employees strike benefits or other moneys or things of value, § 20 Clayton Act, *29 U.S.C.S. § 52*; *§ 4* Norris-LaGuardia Act, *29 U.S.C.S. § 104*.

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN14[] **Establishment, Consent**

Necessarily, any acts performed by a union are done by its individual officers, agents, or members. A defendant union is not liable for any act merely because it has been done by a member of the union, for union membership alone does not constitute the member an agent of the union.

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN15[] **Establishment, Consent**

The mere fact that a member of a defendant union is an officer in a local union affiliated with the defendant union does not, in itself, constitute such local union officer an agent of the defendant union and in the absence of evidence establishing such agency, the defendant union is not responsible for any acts performed by such local union officer.

Business & Corporate Law > ... > Establishment > Estoppel, Necessity, & Ostensible Agency > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

HN16[] **Establishment, Estoppel, Necessity, & Ostensible Agency**

The custom or traditional practice of a union can be the source of actual authorization of an agent to act for and bind a union. If the union is guilty of causing harm to plaintiffs' businesses, under circumstances whereby either the object or the means is illegal, the defendant is liable for the entire resulting damages.

Judges: [1]** Taylor, D.J.

Opinion by: TAYLOR

Opinion

[*817] TAYLOR, D.J.:

These cases are the last chapter in a spate of litigation between coal operators in Scott, Anderson and Campbell Counties, Tennessee, and United Mine Workers of America (hereinafter sometimes referred to as UMW or the Union) resulting from labor disputes that arose in 1955 and continued intermittently through 1959.

Case No. 3431 was tried by a jury and a verdict and judgment rendered in favor of the coal operator. The judgment was affirmed by the Court of Appeals. *Pennington v. UMW, Lewis, et al., Trustees, 325 F.2d 804* (C.A. 6). The Supreme Court granted certiorari and reversed the judgment of the Court of Appeals holding as error the instruction of this Court to the jury that the approach of the Union and operators to the Secretary of Labor and TVA officials for the purpose of having a wage determination by the Secretary of Labor under the Walsh-Healey Act so as to prohibit governmental purchases of coal mined by miners paying wages under the minimum fixed by the Secretary of Labor, was legal unless made pursuant to a conspiracy to put the small coal operators out of business. It also held that the trial court erred **[**2]** in not telling the jury to exclude any damages which the operators may have suffered as a result of the Secretary's Walsh-Healey determination. *United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 671, 14 L. Ed. 2d 626, 85 S. Ct. 1585*.

By agreement, these cases were consolidated for trial and by agreement were tried without a jury. More than 4400 pages of testimony were introduced with 219 exhibits in a trial that lasted approximately four weeks.

In the suits brought by Lewis, Roche and Schmidt, as Trustees of the United Mine Workers of America, Welfare and Retirement Fund, in another phase of Cases No. 3431, 3432, 3433, 3446, 3493, 3579, 3591 and 4385, the Trustees sued for amounts alleged to be due pursuant to the terms of the trust provisions contained in the National Bituminous Coal Wage Agreement of 1950, as amended, for royalties due from each of the defendants in those cases on the respective tonnage of coal mined by each under the Collective Bargaining Agreement. Those suits were defended on the theory that the Bituminous Coal Wage Agreement of 1950, as amended, was an instrument used in a conspiracy which violated the antitrust laws and that the contracts violated **[**3]** the National Labor Relations Act, as amended.

It was held by the Court of Appeals in the case of Lewis v. Pennington, (*6 Cir. Tenn.) 325 F.2d 804*, cert. den. *Pennington et al. v. Lewis et al., Trustees, 381 U.S. 949, 14 L. Ed. 2d 723, 85 S. Ct. 1796*, that regardless of the factual contentions of the defendants under these defenses, the Trustees were entitled to recover the royalties contracted for which were based on the tonnage mined by the defendants during the period of time involved. Judgment for the Trustees has been entered in that case.

The defendants in the other cases insisted that the *Pennington* decision was erroneous. But they argued even if they were wrong in that insistence, still the enforcement of the provision for royalties, which was forced on them pursuant to an illegal agreement or conspiracy caused them damage. And they insist they are entitled to recover, as an item of damage, the royalties paid, in addition to other damages arising from the alleged conspiracy in the cross-claims or actions against UMW.

In Case No. 4385, White Oak Coal Company, Inc. v. United Mine Workers of America, White Oak made additional defenses but this case was disposed of and **[**4]** is no longer before the Court for consideration.

Case No. 3579, W. R. Parton, Individually and t/a W. R. Parton Coal Company v. United Mine Workers of America, has likewise been disposed of.

In Cases No. 3431, 3432, 3433, 3446, 3493, 3579, 3591 and 4385, the defendants filed cross-claims against the Trustees **[*818]** based upon the alleged participation by the Trustees in the alleged conspiracy in violation of the antitrust laws. A voluntary dismissal without prejudice of the suits against the Trustees was entered in each of these cases.

In Cases No. 3431, 3432, 3433, 3446, 3493 and 3591, the defendants filed cross-claims against the UMW. In the case of Lewis et al. v. Parton, No. 3579, by order entered prior to the order consolidating these cases for trial, the cross-claim of the defendant Parton against UMW was assigned a new docket number, namely, No. 4988, and the order recited that the cross-claim was to be considered an original complaint against the Union.

The case of Dean Coal Company v. United Mine Workers of America, No. 4463, constituted an original action against the UMW.

The claims against UMW in all of these cases are based on an alleged conspiracy in which **[**5]** it is charged that UMW participated with major coal operators to drive small coal operators, including each of the parties to this suit (hereinafter sometimes referred to as plaintiffs or operators), out of business, in violation of Sections 1 and 2 of the Sherman Act.

Damages are sought against UMW in each of these cases.

Theories Upon Which Cross-Plaintiffs and Plaintiffs Expect to Recover Against UMW as Set Forth in the Pre-Trial Order

Plaintiffs (and it will be understood this term includes all cross-plaintiffs) contend that UMW engaged in a conspiracy, agreement or understanding with the major coal companies in the United States and their representatives, particularly Bituminous Coal Operators Association (hereinafter called BCOA), Consolidation Coal Company, Peabody Coal Company, West Kentucky Coal Company, Nashville Coal Company, Island Creek Coal Company, Pittston Company and Pittsburgh-Midway Coal Company, and others, to stabilize the prices of coal, to restrain the trade of small coal producers and to monopolize the bituminous coal industry for the major coal producers.

Background of the Alleged Conspiracy

After World War II, the economics of the bituminous **[**6]** coal industry became unstable on account of more coal being produced than the markets required; that before 1950, the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled in the period right after World War II; that on its side the Union was contending that the answer was to cut down on the working time of all producers; that the Union urged a three-day work week and for many months before the 1950 contract was signed, the Union took the initiative on this question and directed the working time of the men in the industry, its officials setting on some weeks, three-day work weeks, and other times a no-day work week; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry because it cut into their profits; that both the Union and major coal companies were concerned with the prospects of a repetition of the depressed conditions in the industry that occurred in the 1920's after the "Jacksonville **[**7]** scale" period, which was precipitated by companies in the South that refused to recognize the Union contract; that in 1949, in the course of the bargaining sessions over the contract that became the National Bituminous Coal Wage Agreement of 1950, major coal producers were discussing among themselves how to accomplish the stabilization of the industry and the establishment of an organization to deal with the UMW so that agreements could be worked out that would be binding upon the entire industry and to accomplish the settlement of national problems in the industry on an authoritative basis that **[*819]** would govern all coal producers, thereby eliminating the chances, or greatly reducing the prospects, of some producers escaping the uniform terms of a national union contract and precipitating conditions comparable to those of the 1920's.

Formation of the Alleged Conspiracy

After the signing of the 1950 National Bituminous Coal Wage Agreement, the major producers who had engaged in the discussions referred to above commencing in 1949, formed the Bituminous Coal Operators Association in 1950 and a marked change was noted in the relations between the Union and the major coal **[**8]** companies as disclosed in the bargaining relations before and after 1950; that the express understanding at the time of the signing of the 1950 Bituminous Coal Wage Agreement was that the major coal companies themselves were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the working time, and of its efforts to give more equitable working opportunities for its members throughout the industry; that the understanding between the Union and the Bituminous Coal Operators Association was that the problem of stabilizing the economics of the industry, the problem recognized by both the Union and the major coal companies, was to be taken care of by establishing national contract amendments that would be applied to all bargaining units throughout the industry and these agreements were to be tailored to the abilities of the major coal companies without regard to the abilities of the smaller companies or the companies working in marginal seam areas, in spite of the fact that there were great divergencies in the geological conditions in the various fields of coal mining and a great disparity in the **[**9]** means and methods of production, leaving great numbers of companies that would be unable to operate under the contract and leaving their share of the markets to the major coal companies who could successfully operate under the contract as it was amended.

Use of the National Bituminous Coal Wage Agreement in the Alleged Conspiracy

The conspiracy as alleged involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; that by successive amendments to the Uniform National Bituminous Coal Wage Agreement's terms, the wage scale and the Welfare Fund payments per ton were raised to exceedingly high levels; that the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; that these amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without **[**10]** affecting their profits; that the Union knew that many weaker companies could not pay the increases, but had no concern as to whether they could pay; that the Union favored the taking over of the industry by the large combines of coal producers and that the Union worked toward this end; that the campaign to impose the wage contracts upon the smaller, independent and non-union mines was intense after 1950 and paralleled the formation of the International Organizing Committee by the Union; that in areas of strong resistance mobs and terrorism were used; that the Trustees of the Welfare Fund stood by and benefited, as pensioners under the Welfare Fund were organized into bands which had as their purpose the imposition of the uniform contract upon the smaller and non-union companies; that benefits under the Fund were held out to the men in the industry as being under Union control so as to regain their fading allegiance to the Union as unemployment spread; that the finances of the Union and the finances of major coal companies have been used **[*820]** to further the drive to bring all production under the contract; that one or more major coal companies have assisted in crushing the opposition **[**11]** of the principal union competitor of United Mine Workers in the bituminous coal labor fields; that the result of this conspiracy and of these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; that when these men are put out of the industry, they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit only for the employees of those companies that survive.

To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement which further restrained their trade; that companies which could not afford to pay the wage scale under the contract were barred from operating on the lands of signatories to the Agreement; this device which was inserted in the National Agreement was effective because the major companies have acquired great tracts of the coal lands of the country and there is little coal land left for the small companies to operate upon under conditions which would make it possible to abide by the Agreement; that in the Protective Wage Clause of 1958, the **[**12]** small companies were prohibited from selling coal to the signatories to the Agreement, including the major companies which supplied coal to the large markets under long-term contracts, when they could not abide by the terms of the Agreement.

Protective Wage Clause in the Amendment of 1958

In 1958 the bituminous coal industry felt a recession and decreasing demand for coal so that the price of coal in the markets was to some degree affected; that this induced United Mine Workers and Bituminous Coal Operators Association and the major companies to seek a strengthening and extension of the understandings which they had between themselves with respect to the duties of the Union and the duties of the major coal companies under the conspiracy; that in December of 1958 the National Agreement was again amended, principally by the insertion of the "Protective Wage Clause" under which the Union bound itself not to enter into, be a party to, or permit any other kind of labor contract in the industry except the National Agreement which it signed with Bituminous Coal Operators Association; the Union further bound itself to enforce fully the terms of the National Agreement with respect to **[**13]** all signatories; on the other hand, the Bituminous Coal Operators Association and the other major coal companies who successfully signed the National Agreement bound themselves to engage in the boycott of " sub-standard coal" or coal not mined under the terms of the National Agreement; that thereby the Union expressly put upon itself a strait jacket which required it to impose upon all operators in negotiations in which it represented bargaining units of employees, the same terms which it negotiated with Bituminous Coal Operators Association; thereafter the enforcement and policing of the National Agreement terms were intensified and the efforts to force the 1958 amendment upon the industry resulted in the destruction of many of the companies and the severe damaging of many of the other companies in the industry, including the coal companies in these cases.

The TVA Market

That the development of the Tennessee Valley Authority as the principal purchaser of coal in the entire country caught the attention of the conspirators to the Southern Appalachian Region when TVA opened up many of its coal-using generating units in 1954, 1955 and 1956; that in 1955 the conspirators manifested **[**14]** their intent and purpose to take over the TVA market by working together to obtain a determination by the Secretary of Labor that the prevailing wage in the bituminous coal industry under the Walsh-Healey Act was the UMW contract scale that had been forced **[*821]** onto the industry, as described above; that while such joint activity with respect to such determination by the Secretary of Labor was not itself a violation of the ***antitrust law***, the purpose and character of other activities of the conspirators to use the UMW's scale as a competitive lever by forcing it upon competitors is manifested by these particular activities and statements made in connection therewith; because contracts for less than $10,000 were exempted from the prevailing wage determination under Walsh-Healey, small companies were able to ship coal on TVA spot orders; that the conspirators further showed their purpose and state of mind by setting about to eliminate or drastically reduce the spot market of TVA; in addition, the conspirators adopted the practice of bidding low prices to drive the TVA coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign **[**15]** the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; the Union had over $25,000,000 of risk capital invested in these companies; that large tonnages were dumped upon the coal market of TVA by these companies at low prices; that the immediate competitors of West Kentucky Coal Company in the West Kentucky field followed the lead of the company in pricing in order to obtain TVA business and prices of the West Kentucky field fell to very low levels with the inevitable result that sales prices in the TVA coal market became depressed; that the TVA provided the principal market of the companies in these cases and the TVA prices were beaten down to such an extent that these companies suffered large losses trying to retain their position in that market and lost contracts by reason of the low pricing; that the conspiracy manifested itself in the field in East Tennessee by a squeeze applied to the local operators from the market side and the labor side; that while a price wall or ceiling was imposed upon them in its principal market, the Union, pursuant to agreement with Bituminous Coal Operators Association and other major producers, raised **[**16]** the labor costs on the local producers by forcing terms and labor contracts that were unreasonable in this field and by interferences with production; that the Union used force and violence, seeking to force the 1958 amendment upon this coal field, a practice which had been followed in previous years, and the Union refused to bargain with local producers with respect to the labor terms.

In the cases of *W. R. Parton*, No. 4988, and *Dean Coal Company*, No. 4463, the aforesaid violence employed by the Union is asserted as an additional basis for claims of violation of the state law and common law. However, it is expected that all damages sustained by these two plaintiffs will, as in the other cases, be shown to have resulted also from the aforementioned violation of the ***antitrust law***; and only in the event of the failure of Parton and Dean Coal Company to recover damages arising from violence under the antitrust claim, will it be necessary for the Court to pass upon their common law or state law claims as such.

Theories of United Mine Workers of America As Set Forth, in Part, in the Pre-Trial Order

UMW says that it has acted to further the best interest of its members through **[**17]** arms-length bargaining with representatives of coal operators within the framework of the Federal Labor Law throughout the pertinent period. Its objectives in negotiating and executing the various wage agreements have been to achieve a uniform living wage, decent and safe working conditions and various fringe benefits. It has made no agreement with any coal operator at any time to impose a wage agreement upon other operators. Its wage agreements have resulted from its own policies and not by agreement with any of the coal operators of one unit to seek the same wages or benefits from other operators.

From its origin as a labor union in 1890, UMW has endeavored to unite in **[*822]** one organization all workers employed in and around coal mines, coal washeries, coal processing plants and coke ovens and has sought to obtain a uniform wage scale for all its members so employed.

UMW Objectives and Policy

UMW strives for national equality of compensation for its members because it believes that miners should receive the same wage for his labor wherever he happens to work, regardless of the particular economic circumstances of an individual operator. Wage differential should **[**18]** not be the basis for affording to one operator a competitive advantage over another. Removal of differences in labor standards as an element of competition is at the core of UMW policy.

UMW does not subsidize marginal operators through substandard labor conditions.

UMW denies that it entered into any contract or joined in any combination or conspiracy in restraint of trade or commerce in violation of the Sherman Act and denies that it has monopolized or attempted to monopolize or that it combined or conspired with any other person or persons or group of persons to monopolize any part of the trade or commerce among the several states.

The 1950 agreement resulted from arms-length collective bargaining over a long period of time during which UMW was restricted in its bargaining efforts by federal court decrees and both UMW and coal operators were mandated to settle their disputes. The 1950 agreement was the only understanding between UMW and operators and was not an instrument of conspiracy.

Under District Court scrutiny, NLRB and Attorney General surveillance, with assistance of members of the Presidential Inquiry Board, and with UMW's bargaining abilities circumscribed by judicial **[**19]** restraints, UMW and operators, bargaining in good faith, achieved the 1950 Agreement, which, obedient to the February 11, 1950 injunction, created a union security clause to comply with Taft-Hartley, made Fund benefits available to signatories' employees regardless of UMW membership, and eliminated the "able and willing" clause and amended the "memorial period" clauses, which had been disputed issues in the bargaining negotiations.

UMW denies that the provisions of the 1950 Agreement and its amendments violated the Sherman Act.

In 1950, as in all proceedings and subsequent negotiations, UMW formulated its wage demands based upon its view of what the industry as an entirety could afford to pay and of what the miner needed to maintain and improve his standards of living, in conformity with UMW's policy of national uniformity of labor standards.

UMW denies that the successive increases in the wage scale and Welfare Fund payments were tailored to meet the abilities of the major coal companies to mechanize and thus not to have their profits affected by the increased labor costs in the amendments to the National Agreement after 1950. UMW has regarded mechanization to be an exclusive **[**20]** management prerogative in which it in no way participates. UMW has never opposed mechanization. Mechanization was a normal procedure long prior to 1950 and was not an issue in the 1940-1950 negotiations.

Prior to 1950 and since, there has been a direct relationship between wages and the expansion of mechanization in the coal industry. As output per miner increases through mechanization, UMW insisted through collective bargaining, that the higher productivity justified a higher wage rate.

Between June 30, 1949 and March 5, 1950, there was no collective bargaining agreement and thus no obligation for UMW members to produce any coal. During this period, UMW directed for some weeks a working period of three days a week in mines east of the Mississippi River, but the directive was not effective west of the River.

UMW neither sought nor wanted a contractual three-day work week and it was not a bargaining issue for inclusion **[*823]** in the 1950 Agreement. The reasons for the directive of the three-day work week were (1) to abate the public concern as to any alleged possible shortage of coal, (2) as a bargaining tactic and (3) to spread available work among normal labor forces **[**21]** to enable each miner to have some income during negotiations.

Mine workers knew that bargaining negotiations would not terminate as long as miners worked full time during the bargaining process.

The 1950 Agreement did not turn over to the UMW responsibility for the administration of the UMW Welfare and Retirement Fund. Administration of this Fund was the joint responsibility of the employer and employee representatives, with tie-breaking authority vesting in a neutral as required by Section 302(c)(5) of the National Management Relations Act of 1947.

The law required and the Agreement provides that all employees of signatory operators are eligible to participate in the Fund as beneficiaries.

Employees in the industry were not led to believe that the Fund was under UMW control. Fund Trustees exercised every reasonable means to inform signatory employees of their rights in the Fund.

Trustees of the Fund did not institute suit for delinquent royalties to eliminate small operators.

Major coal companies have not fostered UMW's domination in the industry. UMW's bargaining history has remained substantially the same since 1890.

As early as 1897, and since, UMW has bargained on a **[**22]** multi-employer basis in a geographic interstate area representing the largest production area in the industry, known as the central competitive field, which has changed from time to time as the volume of production shifted. The Agreement thus achieved by UMW representatives with operators' representatives in the particular central competitive field became the guide for negotiating contracts between UMW and operators in other districts.

In all negotiations, both prior to and after the 1950 Agreement's execution, UMW, in Convention and pursuant to its constitution, has constituted and authorized its Policy Committee to deal with negotiations between the meetings of its quadrennial Conventions, and bargaining agreements can be finalized only when authorized by the UMW Policy Committee.

Since 1947, the Taft-Hartley Act has mandated UMW to bargain collectively with representatives selected by the operators. In all negotiations, both prior to and after 1950, UMW negotiated with the authorized representatives of operators. In negotiations for the 1950 Agreement, UMW met and bargained separately with (1) representatives of the northern operators, (2) representatives of the southern operators, **[**23]** and (3) representatives of captive operators. Since 1950, it has bargained collectively with BCOA as the bargaining representative of the northern group of operators and captive mine owners producing the largest tonnage of coal in the competitive market for bituminous coal. The BCOA was in the process of being formed long prior to the 1950 Agreement's execution and was established as a labor relations agency to give to the largest group of coal operators a single voice in negotiating a collective bargaining agreement with UMW. Any agreement must have operator approval and the UMW Policy Committee's authorization. Southern coal producers have not been members of BCOA. Western operators have been in and out of BCOA. Generally, BCOA has been the first to sign. With the legal authority to demand that UMW bargain with it as Taft-Hartley mandates, southern producers have historically preferred to bargain as a separate unit and to negotiate a labor agreement after UMW has executed with other groups. Consonant with its basic policy of seeking a uniform agreement, the agreement first achieved by UMW has served as a guide for other groups. **[*824]** UMW has not agreed with any operator **[**24]** or group of operators to impose upon other groups the agreement first executed.

Since 1941, UMW has sought to protect the integrity of the labor standards contained in UMW's collective bargaining agreement and thus preserve work opportunities for its employee members covered in the contract unit. A 1943 order of the National War Labor Board directed that each UMW contract include a provision relating to leased mines, that "Operators agree that they will not lease any operating mines subject to this Agreement as a subterfuge" to avoid the Agreement's provisions. This clause by reference was contained in the Ickes-Lewis

Agreement in 1943 and in the National Bituminous Coal Wage Agreement of 1945. The 1952 Agreement provides that operators "agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement." It expresses a covenant which the basic agreement would in any event imply.

The subterfuge provisions proved inadequate. To root out circumvention, a "protective wage clause" (sometimes called PWC) was negotiated in 1958. UMW proposed it and the operators refused to accept it and offered counter-proposals which UMW **[**25]** rejected; and when agreement was reached, operators professed reluctant acceptance to avoid an interruption in the supply of coal. The clause was a continuation of UMW's efforts to prevent operators from vitiating the agreement signed by them by subleasing practices.

The clause's purpose had to do with substandard wages and conditions. In negotiating the 1958 Agreement, UMW complained that signatory operators were subleasing their coal lands to individuals and newly formed corporations and other business organizations controlled by themselves and using other, variant devices and schemes, all geared to obtaining coal produced under substandard labor conditions and thereby depriving their employees of work opportunities and labor standards required under the UMW Agreement. These complaints brought counter-charges from some signatories that UMW field representatives were entering into agreements whereby other signatories were excused from paying wage scale or the royalty payments required by the UMW Agreement. Though UMW denied the counter-charges, operators insisted upon assurances from UMW.

Thus, two promises were made: First, as provided in PWC's paragraph A, UMW assured operators **[**26]** signatory to the Agreement that it would not, during the Agreement's term, enter into or permit any agreement covering labor standards applicable to employees covered by this contract on any basis other than those specified by the Agreement or applicable district agreement and that UMW would perform and enforce the paragraph's term "without discrimination or favor" and that it (UMW) "will use and exercise its continuing best efforts to obtain full compliance therewith by each of the parties signatory hereto," which provision it alleges emphasizes that such assurances did not run to those coal producers not yet signatory. UMW is free to negotiate a labor agreement at variance with the national agreement. Second, operators promised that if they obtained coal from others not mined by themselves, it would be obtained from operators who maintained labor standards "as favorable to the employees as those provided for in this contract," thus assuring UMW that acquisition of coal from others would not be used by a signatory operator as a device to undercut the labor standards to which it has promised to adhere. This second provision is known as the work standards clause. The clause does **[**27]** not prohibit dealings between any persons. Signatories must assure themselves that coal in which they deal has been produced under labor standards at least equal to those set forth in UMW's contract. A non-union producer need only to see that coal is produced under standards equivalent to those in the Agreement if he wishes to sell coal to a signatory, and the clause does not impose either the **[*825]** UMW or its agreement on a non-signatory. It does, however, protect the job opportunities of the unionized worker and safeguards his employment and his wage and benefit scale by removing the economic inducement to signatory producers to purchase coal under substandard conditions. PWC was never enforced. The PWC was executed on December 3, 1958. Its legality was not questioned under the NLRB at the time it was executed. However, on September 14, 1959, effective sixty days later, the National Labor Relations Act was amended by the addition of a section 8(e) which invalidated the so-called "hot cargo" agreement by which an employer, in the statutory language, "ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any **[**28]** of the products of any other employer, or to cease doing business with any other person . . ." The purpose of Section 8(e) is to bar an agreement which sanctions a secondary boycott.

On August 27, 1963, the National Labor Relations Board found that the work standards provision of PWC violated Section 8(e). But on judicial review, the Court of Appeals for the District of Columbia Circuit on August 4, 1965, concluded that the Board applied incorrect legal principles in reaching its decision and remanded the case to the Board for redetermination in accordance with proper standards.

Meanwhile, the Board having invalidated the work standards clause, UMW negotiated a substitute for it, designated to meet the same problem to which the earlier clause had been directed. The substitute clause, known as the Welfare Fund clause, required a signatory operator to pay into the UMW Welfare and Retirement Fund the sum of

80 cents per ton for each ton of coal acquired by it on which the sum of 40 cents per ton had not previously been paid into the Fund.

The Welfare Fund clause requiring signatories to pay 80 cents on coal procured or acquired from non-signatories is devoid of secondary pressures **[**29]** and does not fall within the targets at which 8(e) was aimed.

Though UMW had investments in stock ownership of West Kentucky Coal Company, and loans to other stockholders secured by shares of that company's common stock, it was not a Sherman violation to make such investments; such investments were made subsequent to the alleged conspiracy in 1950 when West Kentucky was not a UMW signatory; West Kentucky became such a signatory only upon evidence that its employees had, in writing, selected UMW as bargaining agent and its execution of the UMW agreement accorded with national labor policy. UMW made no suggestions and proposed no policies with reference to West Kentucky's management, marketing or pricing policies. West Kentucky bids on the TVA market were formulated by West Kentucky personnel without consultation or knowledge of UMW.

There was no collusion among businessmen to drive small operators from the market by predatory price-cutting or like anti-competitive business behavior. No individual coal company has a dominant share of the market. Dependable capacity to furnish the quality and quantity at a reasonable price governs the share of the market that any mine operator obtains. **[**30]** There are no sheltered markets for small or large operators.

The 1950 and successor Agreements, like all preceding agreements, are the product of UMW's independent judgment obtained by the independent efforts acting unilaterally and alone and in its own self-interest, free of any alliance or combination with any employer or employers for a predatory anti-competitive purpose.

UMW denies that it violated the laws of the State of Tennessee with respect either to Parton Coal Company or Dean Coal Company. It denies that any of the companies are entitled to damages.

[*826] *Issues*

The issues as formulated in the pre-trial order are:

(1) Did the UMW engage in a combination or conspiracy, as alleged by the coal companies, so as to unreasonably restrain trade or to monopolize commerce among the several states, outside or beyond the exemption granted by the antitrust statutes to a labor organization?

(2) Did UMW violate any duty under Tennessee law to plaintiffs, Parton Coal Company and Dean Coal Company, and if so, was such violation or violations the proximate cause of the claimed damages sustained by them, or either of them?

(3) If the answer to the foregoing issues, or either **[**31]** of them, is in the affirmative, what damages, if any, resulted to the individual plaintiff coal companies by reason thereof?

Guidelines Fixed by the Supreme Court in the Pennington Case

The guidelines for the decision of the antitrust phase of these cases are set forth by the majority opinion of the Supreme Court in the case of *United Mine Workers of America v. Pennington, et al., supra.*

The Supreme Court held that under the circumstances of the case the Union is not exempt from liability under the antitrust laws and that the action of the District Court in overruling UMW's motion for a directed verdict and for judgment notwithstanding the verdict was proper. *381 U.S. 657 at 661, 85 S. Ct. 1585*.

The Court observed that ***HN1***[] Section 20 of the Clayton Act, 38 Stat. 738, and *Section 4* of the Norris-LaGuardia Act, 47 Stat. 70, permit a union, acting alone, to engage in the conduct therein specified without violating the

Sherman Act, but that neither of these sections expressly deals "with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus *Hutcheson* **[**32]** (*U.S. v. Hutcheson, 312 U.S. 219, 85 L. Ed. 788, 61 S. Ct. 463*) itself stated: '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.'" *Pennington, supra at 662*.

The Court pointed out that the *Allen Bradley Company v. Union, 325 U.S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533*, decision made explicit what had theretofore been merely a qualifying expression in *Hutcheson* and held that ***HN2***[] "when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." It further pointed out that subsequent cases have applied the *Allen Bradley* doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement, and even though the device for effectuating the purpose of **[**33]** the combination was an agreement on wages. *Supra, at 663*.

The Court also pointed out that if the UMW in this case in order to protect its wage scale had presented a set of prices at which the mine operators would be required to sell their coal, the Union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the Government or by some party injured by the arrangement. In such a situation, said the Court, the restraint on the product market is direct and immediate, and is of the type characteristically deemed unreasonable under the Sherman Act and the Union gets from the promise nothing more concrete than a hope for better wages to come.

The Court further observed that if the Union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA market, as **[*827]** charged in the complaint, any claim to exemption from antitrust liability would be frivolous at best.

It was also observed that the major part of Phillips' case was the claim that the Union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon **[**34]** the smaller, non-union operators, irrespective of their ability to pay and regardless of whether or not the Union represented the employees of these companies, all for the further purpose of eliminating them from the industry, limiting production and pre-empting the market for the large unionized operators. *Supra, at 664*.

The Court then observed that ***HN3***[] wages lie at the heart of collective bargaining between employers and unions and 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. *Labor Board v. Truck Drivers Union, 353 U.S. 87, 94-96, 1 L. Ed. 2d 676, 77 S. Ct. 643*; *UMW v. Pennington, supra at 664*; and that the union benefit from the wage scale is direct and complete and the effect on the product market results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. *Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-504, 84 L. Ed. 1311, 60 S. Ct. 982*; *Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46* (C.A. 8); *Pennington, supra at 664*. . **[**35]**

The Court stated that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers. *Supra at 664*.

Negotiations between Union and employers are not automatically exempt from Sherman Act scrutiny simply because the "negotiations involve a compulsory subject of bargaining, regardless of the form and content of the agreement." The Board's demarcation of the bounds of the duty to bargain has relevance to any consideration of the sweep of labor's antitrust immunity, for the Court is concerned with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act or promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Prods. Corp. v. Labor Board, 379 U.S. 203, 211, 85 S. Ct. 398, 13 L. Ed. 2d 233*.

But there are limits to what a union or an employer may offer or extract in the name of wages and just because they must bargain does not mean that **[**36]** the agreement reached may disregard other laws. *Teamsters Union v. Oliver, 358 U.S. 283, 296, 3 L. Ed. 2d 312, 79 S. Ct. 297*; *Brotherhood of Carpenters v. United States, 330 U.S. 395, 399-400, 91 L. Ed. 973, 67 S. Ct. 775*.

The Court further observed that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. Immediately following this statement, Justice White, in footnote 2 of the opinion, stated:

> ***HN4***[] "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. *The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer* ***[*828]*** *conspiracy charge under the Sherman Act*. There must be additional direct or indirect **[**37]** evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency."

The Union, it said, forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. *Supra, at 666*.

The policy of ***antitrust law*** is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is **[**38]** that the union surrenders its freedom of action with respect to its bargaining policy . . ." *Supra, at 668*.

Mr. Justice Douglas interpreted Mr. Justice White's majority opinion by suggesting to the trial court how under the opinion it should charge the jury on the retrial.

First, ***HN5***[] if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

Second, an industry-wide agreement containing those features is prima facie evidence of a violation. Justice Douglas added a footnote to this statement to the effect that acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. In support of the principle contained in the footnote, he cited a number of cases, **[**39]** not one of which involved a union. [1]

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[1] *Eastern States Lumber Assn. v. U.S., 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951*; *Lawlor v. Loewe, 235 U.S. 522, 534, 59 L. Ed. 341, 35 S. Ct. 170*; *American Column Co. v. U.S., 257 U.S. 377, 66 L. Ed. 284, 42 S. Ct. 114*; *U.S. v. American Linseed Oil Co., 262 U.S. 371, 67 L. Ed. 1035, 43 S. Ct. 607*; *Interstate Circuit v. U.S., 306 U.S. 208, 227, 83 L. Ed. 610, 59 S. Ct. 467*.

It is to be observed that Mr. Justice Douglas under paragraph 1 stated that if the agreement contained the two factors mentioned in that paragraph, namely, an industry-wide agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that it was made for the purpose of forcing some employers out of business, both the employer and the union [parties] to the agreement would be guilty of violating the ***antitrust law***. Yet, in the second sentence, he says that such industry-wide agreement containing those features is only prima facie **[**40]** evidence of a violation of the antitrust laws.

We believe that Justice Douglas meant that in order for an employer and a union to be guilty of violating the antitrust laws, the industry-wide agreement must exceed the financial ability of some operators to pay and it must be made for the purpose of putting some employers out of business.

[*829] This presents a question upon which the attorneys are in disagreement. The attorneys for the operators insist that if the effect of the agreement is to force a certain number of operators out of business, regardless of the intent of the parties, the employer and the Union violated the Sherman Act. Attorneys for the Union maintain that the effect of the agreement of forcing some employers out of business is not sufficient to show an antitrust violation; that the other element of predatory intent must be present.

This question has given the Court much concern. The preponderance of the proof shows that the smaller eastern Tennessee operators, including plaintiffs, with the exception of plaintiff Tennco Corporation, could not pay the wages provided in the 1950 Agreement, as amended from time to time until 1964, including the 40 cents royalty **[**41]** on each ton of coal produced.

Upon careful consideration, the Court has reached the conclusion that the *Pennington* case teaches that ***HN6***[] it is necessary to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a violation of the Sherman Act.

Justice White's Footnote No. 2 indicates that the ***antitrust law*** is not designed to protect marginal operators; that ill effects alone on the marginal operators are not enough to show intent.

The standard of proof necessary to show predatory intent is governed by the recent decision of the Supreme Court in United Mine Workers of America v. Paul Gibbs, (C.A. 6, March 28, 1966), *383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218*, 34 Law Week, 4335.

This case involved interpretation of ***HN7***[] Section 6 of the Norris-LaGuardia Act which states in effect that no association participating in a labor dispute shall be held liable for the unlawful acts of individual officers, members, etc., "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

In the ordinary case, proof would be simply by a preponderance **[**42]** of the evidence and in the criminal case guilt would have to be established beyond a reasonable doubt. Under Section 6 of the Norris-LaGuardia Act, as interpreted by the Supreme Court in the *Gibbs* case, a middle ground is reached with respect to the quantum of proof necessary for civil liability.

Justice Brennan suggested that Congress meant "at least to signify meaning like that commonly accorded such similar phrases as 'clear, unequivocal and convincing proof' . . . He is required to persuade by a substantial margin, to come forward with 'more than a bare preponderance of the evidence to prevail.'"

Justice Harlan, who was joined by Justice Clark, concurred in the decision, but felt that the statute was simply directed against a particular type of inferential proof of authorization or ratification unacceptable to those who framed the law. "For me [that is Harlan], the gist of the statute is that in the usual instance a union's carrying on of its normal strike functions and its failure to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrong-doing."

It seems apparent that the Court in the *Gibbs* case, by **[**43]** interpretation of the statute, has placed a heavier burden of proof upon a plaintiff in this type of case.

Position of Coal Companies with Respect to the Proof of Violation of Sherman Act

The main proof relied upon by plaintiffs, if we interpret their position correctly, is the statement by Mr. Moses that one of the reasons for the establishment of BCOA was to avoid the possibilities of a recurrence of the effect of the Jacksonville scale in the 1920's when southern companies got out from under the UMW contract and engaged in price cutting. It is said that this showed a purpose upon the part of the strongest companies and the Union to get together and fix wages in a national contract so **[*830]** as to avoid price competition; that Mr. Love made the statement in effect that BCOA and the Union had worked out a contract to stabilize prices in the industry and that that was a per se violation.

It is said that the Union prior to the formation of the BCOA was urging the operators to adopt some sort of protective plan to stop the dropping prices which was a matter of concern to the Union because of the history of the 1920's; that one of the reasons for the formation of the BCOA **[**44]** was to avoid price war of 1920's; that the meaning of Mr. Moses' statement was that the southern companies were going to be kept in line under the contract so that the 1920's situation would be avoided; that the spokesman for BCOA and the Union felt free to discuss these matters openly as being a reasonable proposition, but that the purposes to stabilize prices encroach upon an area of per se violation; that an effort to force uniform wages throughout the industry to avoid price competition does not eliminate wages as leverage in price competition; that the working conditions in the East Tennessee mines - thin seams of coal - rough terrain, methods of production, differences in working conditions, made a uniform wage for the miners who worked in this area a tremendous disadvantage to the Tennessee operators and a great advantage to the stronger operators; that the alleged boycott provision of the land-lease clause of the 1952 contract and the alleged boycott provision contained in paragraph B of the Protective Wage Clause of the 1958 contract were Sherman violations; that a similar protective wage clause was found in violation of the Sherman Act in *Brotherhood of Carpenters v. United **[**45]** States, 330 U.S. 395, 398-400, 91 L. Ed. 973, 67 S. Ct. 775*.

The attacks of UMW on TVA for buying coal from the producers of the East Tennessee field and the investments of UMW in the West Kentucky Coal Company, the second largest producer selling coal to TVA, and the practices of that company, aided by finances from UMW, and working with other major producers in taking over markets, including 3/4ths of the TVA market, constitute proof, plaintiffs alleged, of purposeful acts to drive the East Tennessee companies out of business.

Oral Argument of Counsel for Plaintiffs

In oral argument, counsel for plaintiffs stated that there are many desperate men in the coal fields of Tennessee; that there has been a great deal of violence; that there is something wrong in the industry; that the names of the dead mines, plaintiffs' being on the list, have been listed in the trial; that the real question is whether this condition should be brought about by a small combination of men in large cities who sit down and make arrangements with respect to the destiny of these people. He contended that the first question for consideration is whether there was an arrangement or a combination or agreement **[**46]** with business men by the Union to fix wages that small operators could not pay. He argued that the evidence showed such an arrangement by the UMW and BCOA and that this combination worked for the establishment of national agreements for the years 1951, 1952, 1955, 1956, 1958 and 1964. Mr. Moses, one of the leading negotiators for BCOA, stated that the purpose of BCOA was to negotiate national agreements and to settle industry problems on an authoritative basis. That is what happened in the East Tennessee coal fields.

Mr. Love, who was the prime mover in setting up BCOA, stated that his purpose was to see that his competitors in the coal business paid the same wage as he paid regardless of the circumstances.

From these facts, it is argued that there was a clear understanding that the contract was to be applied nationally.

Counsel asserted that the effect of the combination or arrangement was to force small coal operators out of business and that the law supplied the specific intent to drive them out of business. In addition, he argued that there is clear proof **[*831]** in the record of a purposeful understanding to eliminate the smaller companies from having any fair chance **[**47]** of survival. In support of this argument, he stated that when the BCOA emerged the Union ceased to be concerned for job opportunities for its members. Concern by the Union for the smaller companies was abandoned with the emergence of BCOA. There was a joint effort of BCOA and UMW to avoid, in the negotiations, large scale negotiations in which the interest of such small companies would be given expression and publicity. On the contrary, negotiations were taken out of the public view and conducted in secret conferences between a handful of negotiators - actually a two-man bargaining team. Harry Moses used the term "two-man bargaining team."

The stated purpose of the BCOA and the Union was to maintain a stabilization of production and prices so that a recurrence of the Jacksonville situation of the 1920's would be avoided. Moses stated that this was one of the reasons for the establishment of BCOA. Another reason for the formation of BCOA was to avoid the price war of the 1920's. The boycott provision and the land-lease provision in the 1952 contract are evidence of the purposes of the BCOA and the Union.

Counsel argued that these matters show a clear violation of the Sherman **[**48]** Act under the opinions of Mr. Justice White and of Mr. Justice Douglas.

Oral Argument of Counsel for Defendant

Counsel for the defendant stated in oral argument that adversary counsel had repeatedly claimed and repeatedly attempted to prove that contemporaneously with the negotiations of the 1950 Bituminous Coal Wage Agreement, a side agreement was made, but that they have failed to prove it.

Counsel stated further that the Supreme Court commented that "a major part of Phillips' case, however, was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, non-union operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators."

That BCOA was the same group of operators that had been bargaining with the Union since 1924, namely, the Pennsylvania, Ohio, West Virginia, northern Virginia group of operators, the old competitive field. After the 1950 Agreement, the BCOA was formed in July, 1950. **[**49]** Fifty per cent or a little bit more than that of the national tonnage was represented by the BCOA. That tonnage was produced in Ohio, Pennsylvania, northern West Virginia, Tennessee, Virginia and Kentucky. Two hundred sixty-two individual companies composed the membership of BCOA, 130, or about half of them, were companies that mined less than 100,000 tons a year. The record indicates that a concern that mines less than 100,000 tons a year is a small operator. After the 1950 negotiations, UMW contracts represented about 77% or 78% of the coal produced.

That the Union operated through a policy committee which designated a subcommittee to negotiate with the BCOA. In June 1949, the southern group of operators terminated their contract pursuant to its terms. The northern operators did not terminate the contract. After the southern group had terminated its contract, the Union terminated the contract with the northern group.

Mr. Lewis, according to defendant, then suggested to the southern and northern groups that they work three days a week in order to provide the country with coal until they could reach a successor agreement. The operators refused. Mr. Lewis then instructed the **[**50]** miners to work the three days a week and that is all they worked. In the meantime, the negotiators had conferences at White Sulphur Springs and at Bluefield, West Virginia, that lasted through December. They couldn't agree. Both the southern and **[*832]** northern coal operators walked out of the meeting. In December, the whole mining industry was down because the miners were not working. They did not have a contract. In 1950, the coal operators filed an unfair labor practice complaint. Public concern was voiced about the shortage of coal and the President appointed a fact-finding board and the Attorney General and the Labor Board obtained injunctions to compel the groups to get back together and bargain in good faith.

The Government, defendant argued, instituted contempt proceedings against the Union and its leaders. Before that the Union had been summoned into the federal court for contempt proceedings because the men were not working. It was under these conditions that the 1950 Agreement was reached. It would seem a bit unusual that the Union and the operators who had been fighting each other for some fifteen years would enter into a conspiracy to violate the antitrust **[**51]** laws.

The Southern Coal Producers and the Southern Tennessee Coal Producers signed the 1950 Agreement. They also signed it in 1951 and 1952. The 1952 Agreement was disapproved by the Wage Stabilization Board and the Southern Coal Producers filed a petition with the Board for approval and the Southern Tennessee Coal Producers signed it. The 1958 Agreement was also signed by that association.

Counsel argued that the first indication of any charge of a conspiracy about the 1950 Agreement was when the plaintiffs were sued for the 1958 delinquent royalties. They filed the counterclaim raising this defense.

The policy committee of the Union designated a subcommittee to bargain with the operators and to negotiate a contract and to report back to the policy committee for its approval or disapproval. Mr. Love, negotiator for the BCOA, had to report back to the representatives of their 262 companies as to his success or lack of success in trying to work out a contract with the Union.

Messrs. Lewis, Kennedy and Owens represented the Union in the negotiations. Counsel argued that there was no evidence of a conspiracy.

Mining Conditions in Tennessee

The production of coal in Tennessee **[**52]** during the World War II years ranged between 7,000,000 and 8,000,000 tons per year. From 1945 to 1948, the production was in the vicinity of 6,000,000 with a drop off in 1949 to slightly more than 4,000,000.

With the growth of the TVA steam plants, and the increasing market offered by those plants, the first half of the 1950's showed increasing production until in 1956, the peak tonnage year, production reached 8,747,000 tons in Tennessee. There was then a rapid decline from 1957 through 1959. The production in 1959 fell to roughly 6,000,000 and that tonnage was maintained roughly in the period of 1960 through 1964.

Since the signing of the National Bituminous Coal Wage Agreement of 1950, there has been a tremendous increase in the number of small mines in classes 5 and 6 and also an increase in the percentage of the production for these classes, with a corresponding drop in the number and the production share of the middle-sized mines, classes 2, 3 and 4. This held true until 1960 and from that point through 1964 the numbers of these smaller mines have diminished without any substantial increase in the number of the middle-sized mines. There was no class 1 mine in Tennessee, **[**53]** that is, one producing as much as 500,000 tons of coal per year, except for one which showed up on the statistical record for the years 1942, 1943, 1956, 1962, 1963 and 1964. In the latter years this mine, the largest mine in the State, was operated by Consolidated Coal Company at Trimore, in Anderson County, Tennessee.

The middle-sized mines of the State employed relatively large numbers of men and as these mines passed out of existence in the late 1940's and early 1950's the men from these mines moved **[*833]** over into the small mines that were being opened, thus giving employment to men who would otherwise be idle.

The Tennessee seams of coal average in thickness far less than the average in any other of the major producing states. In Tennessee only 32% of the coal is over four feet thick; in Pennsylvania, 55%, in West Virginia, 69%, in Ohio, 47%, in Kentucky, 65%, and in the country as a whole 64% of the coal comes from seams thicker than four feet.

The thickness of a coal seam has a great effect on the adaptability of that seam to mechanization and increased productivity, and the thinness of the Tennessee seams has resulted in difficulties and delay in mechanization.

[54]** Tennessee is considerably behind the other major coal producing states in employing the most modern mechanization. In the Tennessee seams of coal it is impossible to mechanize to the degree possible in areas where the thicker seams of coal exist. In Tennessee, manpower rather than heavy machinery must be resorted to, to a far greater degree than in other major coal producing states.

Development of the TVA Steam Plant Market

The increased use of electricity in homes, industry and on farms in the Tennessee Valley and the great expansion of the AEC facilities in the Valley created a great increase in the demand for electricity from TVA. The sale of power by TVA to AEC was a very modest part of the total sales of TVA in 1951, but by 1956 the sales to AEC were greater than the total of all other sales of electricity throughout the area served by TVA power. And by 1956 TVA was delivering to AEC more than twice as much steam-generated electricity as the entire system of TVA-Hydro Plants was able to produce.

The first Widows Creek steam-generating unit was in service on July 1, 1951; the first Kingston Plant unit, on February 8, 1954; and the first John Sevier unit, on July 12, **[**55]** 1955. The last of the original units at Widows Creek was in service on July 7, 1954. The last unit at John Sevier was in service on October 31, 1957. The last unit at Kingston was in service on December 2, 1955.

The construction program for the major steam plants of TVA began about 1948 and has been going on constantly up to the present date. However, the period of 1951-1961 was the period of fastest growth and it is not expected that the future growth will be comparable to this earlier period.

The growth and the generation of power by the steam plants of TVA was from two and one-half billion kilowatt hours in 1951 to forty-eight billion kilowatt hours in 1961.

The steam plant system of TVA (the major plants constructed by TVA) consists of the John Sevier Plant, in Upper East Tennessee; the Kingston Plant, near Kingston, Tennessee; the Widows Creek Plant in Alabama, just south of South Pittsburgh, Tennessee; the Colbert Plant in Alabama, situated in the Tri-cities area; the Johnsonville Plant, near Johnsonville, Tennessee; the Shawnee Plant in Kentucky, near where the Tennessee River empties into the Ohio; the Gallatin Plant on the Cumberland River near Gallatin, Tennessee; **[**56]** and the Paradise Plant in Ohio County, western Kentucky.

TVA steam plants burn coal exclusively. TVA is the largest purchaser of coal in the country. TVA purchases one-tenth of all the coal sold to all of the nation's power systems.

The publication of TVA "Facts about TVA Steam Plants," published April 11, 1956, states that TVA expanded its coal purchases in less than five years "from about 1,000,000 tons a year to about 18,000,000 tons during the current year."

In 1953 TVA received 6,415,000 tons of coal and it burned 5,765,000 tons. In 1954, TVA received 10,196,000 tons of coal and burned 9,301,000. In 1955 TVA received 14,377,000 tons and burned 14,210,000. In 1956 TVA received 20,354,000 tons and burned 18,134,000. In **[*834]** 1957 TVA received 19,481,000 tons and burned 17,672,000. In 1958 TVA received 17,033,000 tons and burned 17,278,000. In 1959 TVA received 17,808,000 tons and burned 18,815,000 tons. In 1960 TVA received 18,886,000 tons and burned 19,035,000 tons.

With the development of the Steam Plant system, TVA made strenuous efforts to encourage coal operators to enlarge old mining facilities and to develop new mining facilities, and encouraged the operators **[**57]** in other areas to move into the TVA area to increase production. Many operators took advantage of the situation and developed and expanded mining facilities in the area.

In 1953, TVA received 2,262,000 tons from Tennessee, approximately 40% of the state's production; in 1954 TVA received 4,291,000 tons from Tennessee, 66.7% of the state's production; in 1955 TVA received 4,531,000 tons from Tennessee, 64.2% of the state's production. (It is to be seen that 1956 was the year the market fully developed.) In 1957 TVA received 5,664,000 tons from Tennessee, 71.2% of the state's production. In 1958, TVA received 4,763,000 tons from Tennessee, 70.2% of the state's production. In 1959 TVA received 4,311,000 tons from Tennessee, 72.9% of the state's production. In 1962, TVA received 4,814,000 tons from Tennessee, 64.3% of the state's production.

Only rarely does TVA buy coal on a negotiated basis and that is only where there is an emergency situation in circumstances under which competitive bidding had not produced ample and timely supply. An emergency apparently occurred only once in major proportions and that was in the period 1955-56, when emergency purchases were made for the Kingston **[**58]** Plant in tonnages aggregating 500,000 tons, at the time when the Kingston Plant first became fully operative.

Outside of emergencies, TVA is required by statute to obtain its coal by advertising and sealed bids opened in public.

TVA analyzes the bids received and determines the bid with the lowest cost with respect to the amount of heat to be generated from the coal. The amount of heat is determined by the btu content of the coal. Also included in the computation of cost is the transportation cost. The quality of the coal is guaranteed by bidders. Thus, quality, the cost of transportation, together with the price of the coal, are the three elements the TVA uses in analyzing cost and this cost is analyzed on the basis of cost per million btu's at the plant.

TVA buys coal on spot contracts and on term contracts. The greatest share of the coal is bought on term contracts. The amount of coal the TVA buys on the term market was originally established at 75% by TVA policy but by 1962 this amount had risen to 88%. Generally, the invitations for bids for the term market specify that TVA will receive on a contract not less than 500 tons per week and not more than 10,000 tons per week **[**59]** for a period of not less than six months. The length of the term varies. Generally, TVA buys on term contracts of one to three years. However, TVA does issue from time to time invitations to bid in which the term is limited, not for three years, but four, five or ten years, or longer.

The balance of the TVA coal is purchased on spot bidding. The invitations for this bidding call for much smaller quantities and for delivery within a few weeks after the contract is executed. The invitations for the spot bids generally go out at the end of each month reflecting the amount of spot coal that the TVA expects to buy the succeeding month. The purchases are then made under the resulting bidding on a week to week basis.

The spot buying program is designed primarily to gear the receipt of coal more closely to actual needs. The coal burned at the various plants is not uniform throughout the year. It varies, depending upon the load that is supplied by each plant, and the load is determined by many factors, including the weather. The term contracting program is used to fill the primary supply; and then, in order to reduce the peaks and valleys of **[*835]** burn and receipts of coal, **[**60]** the spot program is used to fill the gaps in the supply of term coal.

Whether or not a bid is submitted for delivery to a particular plant of TVA generally depends upon the method of transportation. In the case of rail deliveries the bidders generally offer the coal f.o.b. rail cars at origin and then TVA computes the applicable transportation cost to any plants where the coal might be competitive in determining the cost under the bid. In the case of truck deliveries, the bidder specifies a particular plant to which the coal is offered and the transportation cost is included in the bid price. In the case of large deliveries the bids include a price sometimes f.o.b. the origin and sometimes f.o.b. barge at the plant.

The TVA steam plant system was designed to draw, and is capable of drawing, coal from ample deposits in several coal fields. Some of these fields lie in southern Illinois, Indiana and western Kentucky, this being part of the midwestern basin deposit. Another field is in Southern Appalachia, including the eastern part of Kentucky, southwest Virginia and upper east Tennessee, extending over into the Monterey area. Another field is in southeastern Tennessee and northern **[**61]** Alabama.

No field is situated so as to supply all of the TVA plants because of transportation distances involved under normal competitive situations. Generally, each plant can draw competitively from two or more areas. It was the intent and expectation of TVA to obtain coal from the fields nearest to the particular plant. The John Sevier Plant is normally supplied from southwestern Virginia; and from Middlesboro, Kentucky-Jellico, Tennessee, origins on the Southern railroad. The Kingston Plant is generally serviced from the Jellico-Middlesboro-Pineville field in east Kentucky and from the upper east Tennessee field. Since 1959 large shipments have been from the Hazard field in east Kentucky; also coal moves to Kingston from the southeastern Tennessee field to a limited extent and some coal has moved to the Kingston Plant from the west Kentucky field, generally in emergencies. One other field supplying Kingston is the Monterey field in Middle Tennessee. The Widows Creek plant is generally supplied from the southeastern field in Marion, Grundy and Sequatchie Counties, Tennessee, with some coal moving there from the Alabama Sand Mountain Plateau field; also coal moves to the Widows **[**62]** Creek plant from the western Kentucky mines by train and coal can move into Widows Creek by barge from the middle-western fields. The western Kentucky field supplies the coal to the Gallatin Plant. The Paradise Plant receives coal from mines adjacent to the plant in western Kentucky. The Shawnee and Johnsonville Plants are supplied from the middle-western fields in Illinois, Indiana and western Kentucky. Plants capable of receiving coal by barge are Widows Creek, Colbert, Johnsonville, Shawnee and Kingston.

There is one other plant in the TVA system recently constructed which came into service only toward the end of this trial - the Bull Run Plant in east Tennessee, near Clinton. This plant has been designated as the destination for coal from the Hazard field in east Kentucky, under a fifteen year contract for 30,000 tons per week.

The TVA steam plants generally maintain a storage of coal in quantities sufficient to supply the requirements of the plant for 60 to 90 days.

As stated above, the bids specifying shipment by rail to the TVA steam plants do not generally specify a particular plant but are filed with the price fixed at the point of origin and the rail shipments make **[**63]** up the greatest bulk of the shipments to the TVA steam plant system. The TVA steam plants are connected with transmission lines and the entire system makes a large network supplying power to the whole TVA area. The TVA maintains in Chattanooga an IBM 704 electronic data processing machine or computer, which, on the basis of cost factors at the various plants, determines **[*836]** the loading of the TVA power plants and comes up with the lowest total cost of generating power at any particular time. This machine determines at which plant the load should be increased and at which plant the load should be decreased.

Factors that go into the cost computation and the determination of the allocation of load between the plants include: The location of the demand and the loss by transmission, the economies or efficiency of the various steam plant generating units; the amount of water in the reservoirs of TVA lakes and the season of the year; and the cost of the coal used in the various plants. The cost of coal represents approximately one-half of the generating cost.

The TVA steam plant system was so designed as to be able to draw coal from several coal fields, as stated above, and be **[**64]** able to shift over the years the relative volume of coal obtained from the various fields.

The TVA officials made it clear in discussions with the coal suppliers in Tennessee, that the TVA steam plant system was part of an inter-connected power system in which the use of the various plants was determined by the relative economics of the plants and that if a plant became less economical to operate than others because of its relative coal costs, then this plant naturally would be operated less heavily than other plants that might be operated more cheaply because of cheaper sources of coal. The TVA officials explained to the operators in Tennessee that these determinations were made by feeding data into the electronic computer.

UMW Investments in West Kentucky Coal Company, which was Strategically Located With Respect to the TVA Market

By July 1, 1958, United Mine Workers had made the following investments in West Kentucky Coal Company and Nashville Coal Company: (Nashville Coal Company was purchased by West Kentucky Coal Company in 1955.)

In Nashville Coal Company	
25,000 shares (Chertsey loan collateral)	$ 2,625,000.00

In Nashville Coal Company		
10,000 shares (Sagamore loan collateral)		1,050,000.00
10,000 shares (Tower loan collateral)		1,050,000.00
	Total	$ 4,725,000.00
In West Kentucky Coal Company		
875,000 common shares owned		$ 2,354,522.04
50,000 preferred shares owned		2,500,000.00
Pledge of assets on bank loan		5,200,000.00
90,600 shares (Cyrus Eaton Loan collateral)		2,513,895.18
84,560 shares (Chertsey loan collateral)		2,153,279.50
84,912 shares (Sagamore loan collateral)		2,287,809.32
25,300 shares (Tower Loan collateral)		443,223.90
5,200 shares (Tower Loan collateral)		77,938.32
1,300 shares (Tower Loan collateral)		18,847.04
8,128 shares (Tower Loan collateral)		176,461.07
20,000 shares (Tower Loan collateral)		491,430.00
50,000 shares (Colton Loan collateral)		1,506,875.00
25,000 shares (Combs Loan collateral)		1,006,875.00
	Total	$20,731,156.37
Total investment in both companies		$25,456,156.37

[65]** **[*837]** Loans to Cyrus Eaton, secured by West Kentucky stock tabulated above, commenced October 9, 1951. The Sagamore-Summit Corporation loans, secured by West Kentucky stock, started the same date as also did the Tower Industries, Inc. loans, secured by West Kentucky stock. The Colton loans, secured by West Kentucky stock, started October 28, 1955. The Chertsey Corporation loans, secured by West Kentucky stock, started October 4, 1954. The Chertsey Corporation loans secured by Nashville stock, started September 5, 1955. The Sagamore-Summit Corporation loans, secured by Nashville stock, started September 6, 1955, as also did the loans to Tower Industries, Inc., secured by Nashville stock. The September 5 and 6, 1955 loans were made in connection with the acquisition of Nashville Coal Company by West Kentucky Coal Company.

The foregoing loans were evidenced by promissory notes, all of which were demand notes.

Chertsey Corporation, Sagamore-Summit Corporation and Tower Industries, Inc. were corporations affiliated with Mr. Cyrus Eaton. Mr. Cyrus S. Eaton, Jr. owned all of the outstanding stock of Sagamore-Summit Corporation. Tower Industries, Inc. stock was all owned by **[**66]** Mr. Eaton's children, their spouses or business associates. All of the stock of Chertsey Corporation was owned by Mr. Eaton and his children. Mr. Eaton handled the various transactions involved in these loans and the loans were spread between these various corporations for the convenience of these companies.

Each of the notes evidencing the above loans provided that the borrower might surrender the collateral to the holders of the note and relieve himself, or itself, from any further personal liability. However, according to Mr. Eaton it was not the understanding that United Mine Workers would suffer all the loss or that he or his companies would take all the gain under these transactions.

These demand notes were renewed annually and there was no understanding as to how long the process of replacing notes annually would continue. It was the understanding that UMW would retain the collateral until payment or surrender.

Some of the notes provided that interest would be one-half of the dividends paid under the collateral. In other notes interest was provided for but if no dividends were paid under the collateral, interest was not paid and it was the understanding that no interest **[**67]** would be paid if there were no dividends.

The Combs' loan was foreclosed by UMW. The form of the obligation under the Colton notes was identical with that under the Eaton and affiliated corporation notes. Mr. Colton was the President of the National Bank of Washington in which UMW at one time held the majority stock and UMW, in addition, loaned many millions of dollars to Mr. Colton in connection with the acquisition of the bank shares. Under the Colton notes the holder of the note was to receive any dividends under the collateral and no other provision was made for interest.

One of the most frequently stated reasons given by witnesses in interrogatory answers for the investments of UMW in West Kentucky Coal Company was that of giving employment to members of the Union. However, the President of West Kentucky Coal Company, Mr. Eastin, testified that in 1950, West Kentucky had 3,000 miners. He testified that there was a gradual reduction of the men as the mechanization program of the company had gone forward. He testified that in 1960 West Kentucky had 2,000 to 2,200 men. When Mr. Lewis was asked about the investments on cross-examination he testified that the company had been **[**68]** paying substandard wages and had substandard working conditions.

The reason, frequently mentioned, that the working conditions and terms were substandard and far below the UMW **[*838]** contract terms, was given by both Mr. Lewis and Mr. Owens. Mr. Eastin, however, testified that the West Kentucky Coal Company maintained a Welfare Fund into which the company paid the same amount as was paid under the UMW contract, even before the company signed a UMW contract. Mr. Eastin also testified that the wage scale of West Kentucky Coal Company was equal to or better than that in the UMW Agreement. Mr. Owens, on cross-examination, maintained that Mr. Eastin's testimony in this regard was not factually true. However, UMW counsel later produced as their own witness Mr. McMahon, who was Vice-President and Controller of West Kentucky Coal Company, and he substantiated the testimony of Mr. Eastin on cross-examination. Mr. McMahon further testified on cross-examination that Nashville Coal Company also paid a wage equal to the UMW scale, except for the omission of travel time.

A reason given to the membership for the investments by the International officers of the Union at the International **[**69]** Convention of 1960 was that "The West Kentucky Coal Company was breaking the price of coal down in every market that it could penetrate. The Indiana and Illinois production was constantly being attacked by the low wage scales paid in those mines and the sales marketing policy of this non-union coal company." Asked about this speech by him at the Convention, Mr. Owens testified: "What I was trying to convey in my humble way was that the wages paid to those men down there made it possible for this corporation to market coal under the wage structure that was affecting the employees that we represented in those markets where they were marketing their coal and as an institution we had a right to use the money to do it." Thus there is no conflict in the evidence that a reason for the acquisition of the West Kentucky investments was the previous policy of the company in dumping coal at low prices into the market, particularly the Illinois and Indiana market.

Another reason given for the investments upon which there is no dispute in the record, is that the Union had excess funds that it wanted to invest in order to make a profit. It is to be noted that if the profit-making motive was the **[**70]** sole motive, the form of the investment took a peculiar turn. A number of the notes show that the interest on the loans was to be only one-half of the dividends paid on the collateral and profits would have been greater, demonstrably, if the stock had been directly acquired rather than going through Mr. Eaton.

Mr. Lewis testified in 1961: "The Trustees of the United Mine Workers are satisfied with the investment in West Kentucky Coal Company and are quite content in the belief that, in the end, it will prove to be immensely profitable to the United Mine Workers of America in a financial sense; a wise investment of the funds."

Mr. Lewis' final testimony on this point was: Mr. Eaton was a man of acknowledged industrial success and one of the leaders in the financial and industrial world of the country whom I had known for a long time, and we invited him to make a joint venture with us in the West Kentucky purchase of stock, and we loaned him some money to buy stock - any profits occurring from the joint enterprise in the investment were to be split mutually, 50% to each. We could not ask Mr. Eaton to do so and lose his own money, so we divided the profit like joint partners in any **[**71]** enterprise.

West Kentucky Coal Company had 857,264 common shares of stock outstanding. The voting stock consists of the common stock and 50,000 shares of preferred stock.

The listing of the investments in West Kentucky Coal Company above shows that UMW owned the 50,000 preferred shares and owned or held as collateral 480,400 shares of the 857,264 outstanding common shares. Mr. Eaton and his associates assumed control of the Board of **[*839]** Directors of West Kentucky Coal Company. Mr. Eaton was made a Director December 12, 1952. Mr. Cyrus Eaton, Jr. came on the Board March 9, 1953; Mr. Daley and Mr. LeFevre came on May 12, 1953; and Mr. Kaiser came on the Board May 15, 1958. Mr. Eaton became Chairman of the Board of Directors May 12, 1953.

That there was control here capable of being wielded in the direction of union policy is shown by Mr. Lewis' statement at the 1956 Convention: "When Mr. Eaton's interests bought the West Kentucky Coal Company, which was operating non-union for more than fifty years, his first official act was to have that corporation sign the industry agreement with United Mine Workers of America."

Counsel for UMW in oral argument stated that he was **[**72]** of the opinion that the loans and investments in West Kentucky and Nashville were for organizational purposes. With this opinion, the Court concurs.

Justice Goldberg stated in his dissenting opinion in the Pennington case, and found in his dissent in *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 734, 14 L. Ed. 2d 640, 85 S. Ct. 1596*, that the UMW had a right to make substantial investments in West Kentucky Coal Company and neither that nor its financing others in their acquisition of stock in West Kentucky Coal Company was a violation of the Sherman Act. He further stated that ownership of a controlling or substantial interest in a company which conspires with others in a violation of the antitrust laws does not in itself impose liability on the owner. The owner must be shown to have participated knowingly and actively in the alleged illegal activity. See *United States v. Wise, 370 U.S. 405, 8 L. Ed. 2d 590, 82 S. Ct. 1354*.

On the bid opening of April 15, 1954, TVA awarded term contracts to a large number of eastern Kentucky and eastern Tennessee small producers. Under these contracts the average cost at the plant was approximately $4.50 per ton. This price is to be compared **[**73]** with the prices of West Kentucky Coal Company hereinafter listed on TVA contracts. In the Edition of the United Mine Workers Journal for July 15, 1954, there appeared an article which tabulated the awards by TVA of contracts to these east Tennessee and east Kentucky producers at the aforesaid bid opening. This article stated: "Evidence that TVA is still pursuing its short-sighted and dog-eat-dog policy of buying coal, is offered by the latest contract figures of coal bids awarded in early June for delivery to the Kingston, Tennessee Plant. Analysis of the coal awards above, most of which went to non-union companies and brokers who buy from small dog-hole mines that do not observe union wages, hours, welfare or conditions, and also disregard state and federal safety codes and the Walsh-Healey Act, shows how the TVA coal purchase policy operates. Note the low prices of coal at the mines which even after transportation costs are still below the prices quoted by established operators and generally recognized as standard prices for the industry, . . ."

After the award of a TVA coal contract to Whitwell Coal Corporation one of the small mines in southeastern Tennessee after bid opening **[**74]** of December 16, 1954, there appeared an article in United Mine Workers' Journal, Edition of April 15, 1955, attacking TVA for this contract awarded to Tennessee small mines.

Mr. Kampmeier, a consulting engineer in private practice in Chattanooga, formerly worked for TVA as Assistant Manager of Power. He stated that TVA tried to build large steam plants near two or more coal fields; that it considered coal the more attractive fuel because of price. The steam plants were designed to burn a large variety of coal. Much of the coal was bought on long term. TVA encouraged the national competition in suppliers. Some of the bids were for spot orders. They were made so as to invite as many bidders as possible. TVA worked out transportation arrangements **[*840]** with railroads and large barge lines. These things enabled TVA to purchase at lower prices than other utilities. It purchased coal at 15 cents or 20 cents per ton less at the mine than did other utilities. He saw no evidence that UMW or any coal operators were trying to hold down prices. The suppliers tried to get as high a price as they could. The availability of the spot and term markets was beneficial to suppliers. **[**75]** The market made the expansion in the use of coal possible.

Consolidation Coal Company played a small part in the TVA market. TVA tried to get it interested in the market. From 1952 to 1962, Consolidation never showed much interest in the market and supplied less than 10% of the coal even with its Pocahontas Mine. West Kentucky supplied about 5% and Nashville supplied less than West Kentucky. West Kentucky was less aggressive and not eager to go after the business. West Kentucky and Nashville combined supplied between 8% and 9%. Peabody was interested in the TVA market and expanded in the market. Its whole business was built on the steam market. Generally, Peabody expanded from 0 per cent to about 10 per cent as a result of the Paradise market. Island Creek was never important. It supplied less than 10% until it bought West Kentucky's coal properties. Pittston supplied about 5%. It had a mine in Monterey, Tennessee. Pittston's business with TVA diminished. The eight companies that are charged with being conspirators with the UMW to lower the price of the TVA coal to squeeze the small operators out of business furnished less than 25% of coal to TVA during the period of **[**76]** 1952 to 1962. The coal from the west Kentucky fields does not compete with east Tennessee coal at the Kingston and John Sevier plants because of transportation costs. Prices at Kingston dropped faster and further than the prices dropped in the west Kentucky area because the price was very high in 1956 in the Kingston area. The Kingston plant operated at a higher capacity than the other TVA steam plants. That was because it was near Oak Ridge. Kingston Steam Plant built up an adequate stock pile by 1957 and this caused a cut back on purchases of coal by TVA. The transportation costs of coal purchased by TVA averaged less than one-half that of other utilities. The transportation costs of other utilities averaged more than $1.00 per ton.

Mr. Kampmeier testified that the quality of coal is a material element in its price. There is a big difference in the price of steam coal and metallurgical coal, the latter being about 50% higher.

TVA's attitude toward term contracts has changed. It at first thought that its original view of long term contracts was a mistake. This caused it to turn to a three-year contract. Later it began to make longer term contracts because it had learned **[**77]** more about the coal business.

TVA located its Paradise Steam Plant adjacent to the coal properties of Peabody Coal Company. Peabody is to furnish 65,000,000 tons over a period of over fifteen years at a price of $2.90.

[*841] Below is a tabulation of the contracts awarded to West Kentucky Coal Company (and Nashville Coal Company after its acquisition by West Kentucky) by TVA on the term market after competitive bidding in the period of 1954 through May of 1959.

TVA Requisition 21-825509,

West Kentucky Coal Company, 7,000 tons to 27,500 tons at $2.90, Sept. 15, 1954;

TVA Requisition 21-825509, West Kentucky Coal Company, 7,000 tons to 27,500 tons, at $2.67, Sept. 15, 1954;

TVA Requisition 16-831970P, West Kentucky Coal Company, 3,000 tons per week for 21 months, at $2.32, May 19, 1955;

TVA Requisition 364, West Kentucky Coal Company, 2,000 tons per week for 18 months, at $2.68, Sept. 23, 1955;

TVA Requisition 364, Nashville Coal Company, 1500 tons per week for 30 months, at $2.31, Sept. 23, 1955;

TVA Requisition 364, Nashville Coal Company, 2,000 tons per week for 12 months at $2.72, Sept. 23, 1955;

TVA Requisition 364, Nashville Coal Company, **[**78]** 1,500 tons per week for 18 months at $2.49, Sept. 23, 1955;

TVA Requisition 11180, West Kentucky Coal Company, 3,000 tons per week for 36 months, at $2.80 July 12, 1956;

TVA Requisition 11180, Nashville Coal Company, 1500 tons per week for 12 months, at $3.21, Nov. 16, 1956;

TVA Requisition 23923, Nashville Coal Company, 4,000 tons per week for 36 months at $2.58, Oct. 24, 1957;

TVA Requisition 23923, Nashville Coal Company, 1,000 tons per week for 36 months, at $2.54, Oct. 24, 1957;

TVA Requisition 23923, Nashville Coal Company, 2,000 tons per week for 15 months, at $2.75, Oct. 24, 1957;

TVA Requisition 99095, Nashville Coal Company, 6,000 tons per week for 24 months, at a barge delivered price at Johnsonville of $3.95, May 20, 1958;

TVA Requisition 25, West Kentucky Coal Company, 5,000 tons per week for 18 months, at $2.66, May 5, 1959.

West Kentucky became the second largest shipper of coal to the TVA system. Several of the immediate competitors of that company in the west Kentucky field followed the lead of West Kentucky Coal Company with low bids, but generally less frequently and for smaller tonnage.

While this was going on UMW pledged $5,200,000.00 **[**79]** of its assets for a loan by the National Bank of Washington to West Kentucky Coal Company, September 21, 1956, for capital to expand the company's operations.

According to Mr. Kampmeier the price of steam coal in the West Kentucky field has been lower than in any other of the TVA supplying coal fields. Using statistics from the Federal Power Commission, Mr. Kampmeier pointed out that the average price for steam coal in western Kentucky District 9 was 12.56 cents per million BTU. In the eastern Kentucky, northern Tennessee, southwest Virginia **[*842]** and southern West Virginia District 8, it was 14.34 cents per million. In Illinois District 10, it was 15.03 cents per million. In Ohio District 4, it was 15.20 cents per million. In Indiana District 11, it was 15.56 cents per million and in southeastern Tennessee-Alabama District 13 it was 15.82 cents per million. (The foregoing cost evaluations were f.o.b. the mines.) The average f.o.b. mine price for steam coal in western Kentucky according to Mr. Kampmeier was $2.95. Although TVA was an integrated system, with respect to the purchasing of coal for delivery to various plants of the system, TVA officials made it clear to the **[**80]** operators in Tennessee that if the Tennessee price was not competitive with the price at other plants the Tennessee market would be curtailed.

The history of Kingston pricing is:

Bid Opening	Average cost per million BTU (in cents)	Typical Price per ton FOB mine	Company receiving this price	National Average price of Coal
4/15/54	$18.65	$3.48	Royal Fuel	1954-$4.52
11/26/54	18.27	3.55	Capitol	
4/28/55	18.10	3.45	Ramco	1955-$4.50
8/30/55	19.04	3.41	G & R	
12/21/55	22.16	3.88	Dean	
2/21/56	23.49	4.15	Straight Fork	1956-$4.82
8/26/56	21.71	3.70	Pemberton	
11/16/56	21.69	3.72	Kay	
2/26/57	21.41	3.80	Straight Fork	1957-$5.08
5/8/57	20.93	3.90	Clinchfield	
6/6/57	20.04	3.84	Holmes Darst	
8/14/57	No Awards			
10/24/57	19.80	3.23	Dean	

Bid Opening	Average cost per million BTU (in cents)	Typical Price per ton FOB mine	Company receiving this price	National Average price of Coal
5/20/58	20.18	3.55	Whitley Strip	1958-$4.86
10/7/58	20.24	3.45	Southern C & C	
12/9/58	20.49	3.49	Straight Fork	
2/5/59	20.80	3.43	Dean	1959-$4.77

The problem with the Tennessee field in its competition with the west Kentucky field was in the difference in productivity. Mr. Kampmeier stated: "A southern Tennessee miner may produce 10 **[**81]** tons per day and a western Kentucky miner 20 tons. On this basis, the labor cost in a ton of Tennessee coal is about twice as high, perhaps as much as $2.50 a ton versus $1.25, plus 40 cents in each case for the UMW Welfare Fund. Such a difference is, indeed, a serious matter to the southern Tennessee producer, especially as wages increase. The April 1 increase of 80 cents a day is equivalent to about 8 cents per ton in southern Tennessee versus 4 cents per ton in western Kentucky."

With costs of production being raised year after year under the UMW contract, the Tennessee producers could not recover these increasing costs from the market, even though they had some of the largest steam plants in the country at their door steps.

Relationship of West Kentucky Coal Company and Peabody Coal Company in the Marketing of Coal

The West Kentucky Coal Company produces its coal from underground mines. **[*843]** West Kentucky Coal Company has been engaged in the mining of coal since 1904, operating in Hopkins and Muhlenberg Counties, and also having operated at some times in Union County, with additional property in Webster County, Kentucky. Nashville Coal Company, acquired by **[**82]** West Kentucky Coal Company on September 13, 1955, likewise operated in Muhlenberg, Hopkins and Union Counties in West Kentucky. West Kentucky Coal Company sells to middle western utilities, chemical, cement and other industrial users, to an important Canadian clientele and to a strong group of retail and wholesale distributors to the commercial and domestic markets in the Great Lakes area, as well as in the south. Its primary market has been in the northwest, in the Chicago area and Iowa and Wisconsin. Other principal areas are western Tennessee and western Kentucky, in addition to Canadian customers to whom the coal is shipped through a terminal in Chicago.

Peabody Coal Company produces most of its coal by strip mining in the states of Oklahoma, Missouri, Illinois, Indiana, western Kentucky and Ohio. It has one large underground mine at Springfield, Illinois. It formerly sold its coal through its sales subsidiary, Southern Coal Company, but in recent years has abandoned that agency and sells itself, through its own sales department. Peabody serves most of the important electric utilities in the middle western area, including the Commonwealth and Edison System. The company has **[**83]** approximately 30 mines.

There are close operating and selling relationships between Peabody Coal Company and West Kentucky Coal Company. West Kentucky Coal Company, with enormous reserves of coal in the western part of Kentucky, leases land to Peabody, as well as to other companies, and retains an option to sell the coal produced on that land. West Kentucky Coal Company and Peabody Coal Company buy and sell substantial quantities of coal to and from each other.

The exchange of coal between the two companies for application on particular contracts is exemplified in the Tampa and Memphis utility markets. When West Kentucky Coal Company acquired Nashville Coal Company, it also acquired the Nashville contract with Tampa Electric Company, which called for the shipment of coal by

Nashville to Tampa Electric Company on a long term contract for the requirements of the generating plant at Tampa. After the acquisition of Nashville Coal Company, West Kentucky spent many months of intensive work getting the facilities ready to handle the coal by the water shipment to Tampa. When time came to ship on the contract West Kentucky reneged on this contract and Tampa Electric Company brought a **[**84]** suit against the Company. West Kentucky took the position that the contract was invalid under the ***antitrust law*** because it had a monopoly on requirements of the electric company. There were factors in the contract that were not satisfactory to West Kentucky Coal Company. It developed that the company was disappointed in the prospects for back haul of phosphate by water on the barges that brought in the coal. Also, West Kentucky desired to substitute an escalation clause that would tie increases of coal price to the rapid UMW contract cost increases. When West Kentucky renounced the contract, it was ready to ship the coal after spending many months in getting prepared. Other shippers would have to go through the same period of preparation. In this situation, the coal from the Uniontown mine of West Kentucky, which was supposed to supply the contract, was largely diverted to the TVA spot market. After this development an arrangement was made by Tampa to obtain coal from the eastern Tennessee and east Kentucky area by rail, with a greatly reduced rail rate having been worked out. Under this arrangement Phillips Brothers Coal Company started shipping coal to Tampa. Then Peabody **[**85]** Coal Company came into the picture and obtained a term contract for supplying Tampa Electric Company. **[*844]** It resulted that West Kentucky leased its water coal handling facilities in Louisiana to Peabody and West Kentucky was to share in the contract to the extent of one-half of the tonnage. After the Peabody contract Phillips Brothers Coal Company lost out in the Tampa market.

When the bid invitations came out from the Memphis Power plant contract for coal, according to the sales representative of Peabody Coal Company, there possibly were discussions about the invitations between Peabody, West Kentucky Coal Company, Pittsburgh-Midway Coal Company and Kirkpatrick Coal Company: "We might possibly have because there was a lot of negotiations down there selling it to them. If they could have, they would have bought the coal without submitting it to bids. They were just in that mood, and they made it clear - but at any rate, I don't recall discussing it or not. We might have. It would be a little natural down there we run together down there and have a drink or two together and we get pretty talkative. We might have talked to any of them. The City Manager was going to buy **[**86]** some coal, and we hoped we could get it and you discuss what you do and what they do - the competition was so hot that they split it. We had so many friends behind us all that they split it up." Both Peabody and West Kentucky obtained contracts at Memphis and Peabody is applying coal from West Kentucky Coal Company on its Memphis contract.

It is mentioned above that substantial quantities of Uniontown coal were diverted by West Kentucky Coal Company from the Tampa contract to the spot market of TVA. As stated above, the spot market of TVA was designed for small amounts of coal to fill in on requirements of plants where term contracts did not meet the requirements. In the years 1956, 1957 and 1958, including the period that the Uniontown mine coal was going into the spot market, West Kentucky and Peabody were bidding large quantities of coal on the TVA spot market and West Kentucky Coal Company, particularly, was doing this. An analysis was made of the spot award sheets of TVA and a tabulation was made of the extraordinarily large spot bids filed by West Kentucky and Nashville Coal Companies, Pittsburgh-Midway and Peabody Coal Company and Debardeleben and Truax-Traer Coal Companies. **[**87]** (The bids of the last two companies did not show dropping prices.) These were the only operating companies that repeatedly bid over 10,000 tons on the spot market with the exception of Old Ben Coal Company which bid a few times in 1958. West Kentucky and Nashville Coal Companies were bidding extraordinarily large quantities on the TVA spot market in comparison with all other companies. Their bids show a downward trend in the pricing and a number of contracts were awarded them on the basis of their bids for these extraordinarily large tonnages.

It was inevitable that this kind of bidding would have a depressing effect on the spot market of TVA. The kind of bidding the West Kentucky and Nashville companies were engaging in on the spot market is shown by the size of their actual sales on the spot market. As examples: In September, 1957, TVA purchased from Nashville and West Kentucky Coal Companies 38,000 tons of coal on the spot market. TVA purchased 38,000 tons from these companies in October, 1957. TVA purchased 60,000 tons from these companies in December, 1957, on the spot market. TVA purchased 66,000 tons of coal from these companies on the spot market in January, 1958. In **[**88]**

May of 1958 TVA purchased 36,500 tons from these companies. In June, 1958, TVA purchased 28,000 tons of coal on the spot market from these companies.

A comparison of the average cost of coal at the Kingston Plant for the term and spot contracts shows that the spot market was depressed considerably below the term market. Bearing in mind that **[*845]** a difference in cost per million BTU of one full cent is roughly equivalent to a difference of 25 cents per ton in price, this comparison is as follows:

Term Bid Opening Date	Term Average Cost per Million BTU (in cents)	Spot Average Cost per million BTU this month (in cents)
2/21/56	23.49	22.08 23.43 (April)
8/26/56	21.71	20.06
11/16/56	21.69	19.54
2/26/57	21.41	19.61
5/9/57	20.93	18.98
6/6/57	20.04	19.17
8/14/57	No awards	18.50
10/24/57	19.80	17.92
1/30/58	19.88	18.71
5/20/58	20.18	19.02
10/7/58	20.24	18.45
12/9/58	20.49	18.31
2/5/59	20.80	18.78

TVA took into consideration the advantages of this kind of a market (the spot market) to small coal producers in establishing the spot bidding program. However, the UMW attacked the spot bid program of TVA. Mr. Lewis, **[**89]** in the 1956 Convention, charged that the spot market program was an effort to avoid the minimum wage under the Walsh-Healey Act (which permitted an exemption of contracts for less than $10,000.00 in amount) and an effort to buy coal at a price less than what the "organized mines" were charging. Mr. Lewis said that this kind of program was "anti-social, un-American and double-dealing" on the part of TVA.

Drive Staged by West Kentucky Coal Company and Peabody Coal Company in 1959 and Later Years for the TVA Market

On February 19, 1959, the Pleasant View mine of West Kentucky Coal Company worked out of its No. 11 seam and drove down into the underlying No. 9 seam, opening this lower seam for operations on October 14, 1959. On July 27, 1959, West Kentucky Coal Company submitted a bid under TVA requisition 27, proposing to sell 16,347 tons per week for fifteen years from the Pleasant View mine, at a price of $2.90. TVA awarded a contract on this bid evaluating the bid for shipment to Shawnee Steam Plant. This was the West Kentucky Coal Company T-3 contract. As stated, the price of this coal was $2.90, which was substantially higher than the earlier contracts of West Kentucky **[**90]** with the TVA, as tabulated above.

After the award of the above contract, Mr. Hoffman, Vice-President for sales of West Kentucky Coal Company, approached TVA with respect to the selling of additional coal from the Pleasant View Mine. At the bid opening of February 9, 1960, under requisition 32, West Kentucky Coal Company filed a bid for the sale of coal from the Pleasant View Mine in the amount of 34,616 tons per week for a period up to 15 years, at the same price of $2.90. This time the other producers in the middle western field bid under West Kentucky's price of $2.90 and West

Kentucky obtained no contract on this bid. At the same time West Kentucky bid at the same price for the same mine, in much smaller quantities and a much shorter term, without success. **[*846]** West Kentucky Coal Company allowed TVA to keep this bid alive for a full year to be accepted at the option of TVA.

There ensued discussions concerning a much lower rail rate to the eastern TVA plants from the western Kentucky field to be negotiated by the rail carrier, L&N Railroad, with TVA under Section 22 of the Interstate Commerce Act. Discussions centering on the Widows Creek Plant were going on about this **[**91]** proposed rate for six months to a year before it was finally made official on August 29, 1960, effective October 1, 1960. The new rate for shipments was established at a flexible scale of $1.45 per ton, to $1.60 per ton, depending upon the tonnage carried on the L&N to the Widows Creek Plant. The amount of tonnage to determine which rate applied would include the coal shipped on the L&N from the southern Tennessee field to the Widows Creek Plant. Before this rate, the lowest transportation cost from the West Kentucky fields to Widows Creek was $2.07 by using combined rail and barge movement through Grand Rivers, Kentucky.

Officials of West Kentucky Coal Company had discussed with the L&N Railroad this change in the rates to Widows Creek and also new rates to Kingston and the sales department of West Kentucky Coal Company had been very active in bringing about the Widows Creek Section 22 rate. West Kentucky Coal Company wanted to take credit for this reduced rate with TVA. In later testimony, Mr. Eastin, President of West Kentucky Coal Company, repeated that West Kentucky Coal Company considered that getting rate reductions was normal and that they wanted to get credit for this **[**92]** rate with TVA and that is what they did with respect to this Section 22 rate. At the time of the taking of Mr. Eastin's prior deposition the West Kentucky Coal Company had bids in with the TVA and this coal might be awarded at Widows Creek if the rate were established. About that time or on October 6, 1960, TVA had made awards based upon the bids filed and opened on September 1, 1960, and West Kentucky Coal Company was not successful on that bidding, it having bid 19,250 tons per week for five years, with an option for an additional 19,250 tons a week from the Pleasant View Mine but this time the bid went up to $3.00 on its price from the previous $2.90 figure.

At the February 14, 1961 bid opening West Kentucky Coal Company again filed a $2.90 bid for the Pleasant View Mine for 19,250 tons per week, for ten years, with an option to TVA to elect to take an additional 19,250 tons per week for nine years by notice given prior to January 1, 1962. TVA elected to take the coal in the amount of 19,250 tons per week for ten years at the Gallatin Steam Plant. At the time TVA did not need the extra 19,250 tons per week and left the option dangling. Mr. Kampmeier pointed out that TVA had **[**93]** the right to move the coal under the West Kentucky Coal Company contracts to any other plant besides the plant at which the contracts were awarded. On December 29, 1961, TVA elected to take the extra 19,250 tons under the West Kentucky bid option.

At the bid openings of September 19, 1962, West Kentucky Coal Company obtained another contract for 9,700 tons per week for ten years at the $2.90 price from the Pleasant View Mine and the East Diamond Mine. The East Diamond Mine had worked out the No. 11 seam on December 23, 1960 and it opened the underlying No. 9 seam on July 25, 1962.

At the bid opening of October 15, 1963, West Kentucky Coal Company obtained another contract for 10,000 tons per week for ten years at the price of $2.90.

By 1964, under the foregoing contracts West Kentucky Coal Company was shipping to the TVA System 3,900,000 tons per year at the $2.90 price. Mr. Hicks points out that with the addition of the Memphis Steam Plant to the TVA System the total annual shipments to TVA from West Kentucky Coal Company aggregated 4,240,000 tons.

In the meantime, Peabody Coal Company had been greatly increasing its participation in the TVA market. For the July 27, 1959 bid **[**94]** opening, TVA issued an invitation in routine fashion stating **[*847]** its intention to buy up to approximately 3,000,000 tons of coal a year and that it would consider bids for terms up to twenty years. In a lower paragraph there was language to the effect that in addition to the foregoing, TVA would consider other bids if operators wished to offer tonnage for a starting date later than that specified. Peabody Coal Company was the only company that responded to the language in the lower paragraph and filed a bid for $2.95 under this language. As a result of this invitation and bid, and as noted previously, a contract was entered into calling for the shipment of

65,000,000 tons of coal by Peabody Coal Company to TVA for a new steam plant, one of the largest ones in the system, to be established by TVA adjacent to Peabody's property from which the coal was to be mined. The tonnage of 65,000,000 was to be shipped at a rate of 80,000 tons per week until the contract was completed. This would mean an annual shipment to TVA of 4,000,000 tons for this one contract.

At the same bid opening of July 27, 1959, Peabody Coal Company received another contract awarded September 30, 1959 **[**95]** for a five year term for 20,000 tons per week. This meant an additional 1,000,000 tons per year from Peabody Coal Company to the TVA system until October of 1964.

In addition, on the bid opening of July 17, 1961, Peabody Coal Company received a contract dated August 10, 1961, for a three-year term of 3,000 tons per week, making an additional 150,000 tons a year to expire in August of 1964. Also, at the bid opening of December 7, 1961, for a three-year term for 1,500 tons per week, making 75,000 tons annual shipments to expire in December, 1964. Then at the bid opening of October 15, 1963, Peabody Coal Company received a contract dated December 12, 1963 for a ten-year term for 15,000 tons per week, making an annual shipment of 750,000 tons. Thus the total shipments that Peabody Coal Company had to the TVA System through most of the year 1964 was at the rate of 5,975,000 tons per year.

Adding the annual shipments of West Kentucky Coal Company in 1964, of 4,240,000 tons to the Peabody Coal Company annual shipment of 5,975,000 tons, would make an annual shipment of 10,215,000 tons per year for these two companies alone. In 1963, the total amount of coal received by all of the TVA **[**96]** plants was 20,717,000 tons. Accordingly, Peabody Coal Company and West Kentucky Coal Company together had built up a tonnage to TVA of approximately 50% of the total receipts.

In addition, Pittsburgh-Midway Coal Company secured a contract under the bid opening of June 19, 1963, for 12,500 tons a week for fifteen years; the contract under the bid opening of October 15, 1963 for 12,500 tons for fifteen years; a contract under the bid opening of October 20, 1960 for 5,000 tons per week for ten years. These contracts aggregated 1,500,000 tons per year for Pittsburgh-Midway Coal Company in the TVA market for many years into the future.

And, also, Kentucky Oak Mining Company now provides 2,000,000 tons per year to the TVA market by reason of contracts one of which was awarded on the bid opening of July 27, 1959, for 8,500 tons per week for ten years and on bid opening of February 20, 1962, another contract for 30,000 tons per week for 15 years. This is the company that acquired leases in the Hazard field of East Kentucky from North Fork Coal Company after North Fork received a loan of $1,500,000.00 from the National Bank of Washington, secured by pledge of equivalent assets of United **[**97]** Mine Workers for the purpose of accumulating the leaseholds in the Hazard field.

Thus, between 1959 and 1964 the four companies, West Kentucky Coal Company and Nashville, Peabody, Pittsburgh-Midway, and Kentucky Oak, took approximately 13,700,000 tons of TVA's annual requirements of approximately 21,000,000 tons, leaving the balance to be scrambled for by the many smaller companies for whom TVA was the principal market. The effect on prices at Kingston **[*848]** in this period is shown by the average term contract costs at that plant as follows:

Bid Opening Date	**Average Cost per Million BTU (in cents)**
5/5/59	21.57
7/27/59	21.62
9/17/59	20.96
2/9/60	20.08
9/1/60	No awards
2/14/61	18.97

Bid Opening Date	Average Cost per Million BTU (in cents)
7/17/61	18.55
12/7/61	No awards
2/20/62	18.85
9/18/62	18.65
1/15/63	18.72
6/19/63	19.61
10/15/63	No awards
3/3/64	19.36
10/20/64	18.82

Before UMW started making its investments in West Kentucky Coal Company, that Company had a profitable business. It made a profit of $4,645,000.00 in 1950 and a profit of $4,223,000.00 in 1951. Thereafter its profit declined sharply and in 1958 and 1959 it had very substantial operating losses.

Obviously, the **[**98]** West Kentucky Coal Company has concentrated on the TVA market. In 1964, West Kentucky was shipping 4,240,000 of TVA out of a total production of 8,000,000 tons of the company. This was true although the prices the company was getting for coal in the other markets were higher. The annual report of the company for 1958 reported an impressive and diversified roster of customers in the middle western and Canadian markets. This was a true description of the clientele of the company. The Western Kentucky coals are prominent in the mid-western utility market and that market has held up well price-wise. But, West Kentucky Coal Company was concentrating on the TVA market, which was a depressed market considerably below the middle western utility market.

The record contains an exhibit which includes the contracts for the sale of coal by West Kentucky Coal Company six months prior to, and six months after, the making of the February 14, 1961 contract with TVA. It contains the sales of coal in excess of 10,000 tons (excluding retail or domestic coal) to other customers besides TVA for that period of time. There was only one sale of coal in that entire period at a price as low as the 4,000,000 **[**99]** tons that West Kentucky sold to TVA at $2.90. The prices in the exhibit range from $2.90 to $7.15. The exhibit contains 300 sales.

UMW sought to bring out that different coals bring different prices according to size and treatment. But, the last mentioned exhibit includes all kinds of sales, including all of the sales to utilities by West Kentucky Coal Company in the period involved. It includes the sales of carbon coal which is the lowest form of coal and these sales were made at prices ranging from $2.90 to $3.85. But the contracts of West Kentucky Coal Company with TVA did not call for carbon coal. They required run-of-mine coal and carbon coal was not allowed to be shipped on these contracts.

The $2.90 price that West Kentucky charged TVA in the 1959-1963 period was considerably higher than many contracts West Kentucky bid for and secured from TVA in the earlier period when it established itself as the largest shipper to TVA.

The market quotations give no price nearly as low for western Kentucky coal as the $2.90 price, even for screenings. Mr. Eastin testified that the Company was making no analysis of profit on TVA contracts. Mr. Bowden, Vice-President in charge of **[**100]** sales, testified that he knew the prices were low.

Through all of this, UMW held securities representing the control of the company. Through the downward spiral of the West Kentucky profits, the sales department of West Kentucky was given an absolutely free hand to conduct the enormous low-priced sales to TVA.

[*849] When West Kentucky Coal Company acquired Nashville Coal Company it inherited from the latter a contract with Louisville Gas and Electric Company under which Louisville bought coal from West Kentucky Coal Company at a price originally at $3.21 but which raised by escalation to $3.55. Louisville owned the Cherry Hill mine and under the contract the West Kentucky Coal Company was obligated to sell as sales agent 200,000 tons of the Cherry Hill coal at a price 15 cents higher than the price charged Louisville for the coal shipped by West Kentucky to Louisville. In August and September of 1960, substantial quantities of the Cherry Hill coal were applied on the TVA contracts of West Kentucky and the price that West Kentucky received under the TVA contracts for this coal was approximately $39,000.00 less than the price that West Kentucky paid to Louisville for this **[**101]** coal. In August through December of 1962 considerable quantities of the Cherry Hill coal were applied by West Kentucky on the TVA contracts and the loss suffered on this coal amounted to approximately $111,000.00.

The West Kentucky witnesses maintained that the Cherry Hill coal was difficult to sell, even at the $2.90 price. However, the Cherry Hill tonnage was shipped to Louisville Gas and Electric Company and also was sold to the general market, industries, retail dealers, etc. The larger sizes of the Cherry Hill coal were screened off and sold at higher prices and the evidence contained at least one sale of the residual unwashed carbon coal from Cherry Hill, sold in the Louisville market for $2.95. Moreover, it is to be observed that West Kentucky was willing to raise the quantity of the Cherry Hill coal for which it was obligated from 200,000 tons to 400,000 tons in 1958.

The principal mine of West Kentucky shipping on the TVA contracts made in 1959 and later years was the Pleasant View mine. This mine opened up the No. 9 seam October 14, 1959, after the July 19, 1959 TVA contract. In the remaining three months of 1959, the monthly cost per ton of the Pleasant View coal, **[**102]** including production and administrative costs, ranged from $2.90 to $3.03. The TVA price was $2.90. This is the cost experience that West Kentucky had to rely on when it made its February, 1960 bid to TVA at the same $2.90 price, for 34,616 tons per week for fifteen years. The September 1, 1960 unsuccessful bid of West Kentucky to TVA for 34,650 tons per week was filed at a price of $3.00 and the term was shortened from three to five years. The average cost per ton at the Pleasant View mine for the entire year of 1960 was $2.925. And this was the cost experience that West Kentucky had when it filed its February, 1961 bid at the $2.90 price for 19,250 tons per week for ten years and option tonnage for an additional 19,250 tons per week for nine years and this was a bid that was successful. In 1961 the average cost at the Pleasant View mine was $2.697 and in 1962 it was $2.72. After that the cost of the coal went up at the Pleasant View mine to $3.21. In the year 1963 the cost went up to $3.40 per ton at Pleasant View. On May 29, 1965 the Pleasant View mine was closed.

The West Kentucky Company witnesses maintained that the Pleasant View mine ran into difficult conditions.

[103]** After the 1959 and 1961 TVA contracts West Kentucky Coal Company began to fall behind in its Welfare Fund obligations. The Company went to United Mine Workers and obtained a series of loans aggregating $900,000.00 to maintain the currency of its Welfare Fund obligations.

On September 23, 1963, UMW took a loss of $8,000,000.00 in the West Kentucky venture. UMW took the collateral held under the Eaton loans and cancelled the loans because Mr. Eaton could not pay the amounts due and the stock became the property of UMW which was sold to Island Creek Coal Company.

West Kentucky Coal Company, although it had a large number of diversified customers in other areas, continually **[*850]** concentrated on placing the bulk of its tonnage on the TVA term and spot markets at low prices.

Plaintiffs insist that the foregoing facts establish a conspiracy among TVA and some of the large coal operators, including West Kentucky Coal Company, to take over the TVA market and that one of the methods used was to make bids on spot market awards at prices that were very low and sometimes below cost of production for the purpose of squeezing the small operators, including plaintiffs, out of the market **[**104]** and that they were largely successful in their purpose; that UMW financed the West Kentucky Coal Company while it was engaged in its nefarious methods to capture the TVA market.

The defendant says that the following facts show that West Kentucky and its alleged co-conspirators followed accepted business practices in submitting bids and they did not bid the low prices or prices below cost; and did not submit bids to depress coal prices for the predatory purpose of eliminating any of their competitors from the market.

1952-1962 Period Consolidation Coal Company

During most of the period material to this case Consolidation Coal Company was the largest coal company in the United States. It was never, however, very important in the TVA market. Though TVA officials met with high officials of Consolidation Coal Company to encourage that Company to engage in experimental work, the Company failed to show much interest in the TVA as a market for its coal. Consolidation Coal Company acquired Pocahontas Coal Company during this period and prior to that Pocahontas had acquired the Moore mining properties in Anderson County, Tennessee. Coal has been sold from these mines to TVA, though **[**105]** not on an extensive basis. Consolidation and Pocahontas together supplied TVA with less than 1% of TVA's coal during the period 1952-1962.

Island Creek Coal Company

This company played no part in the TVA market until its acquisition of West Kentucky Coal Company in 1963.

Peabody Coal Company

Peabody Coal Company was not a significant supplier of coal to TVA during the early 1950's. Upon its merger with Sinclair Coal Company, following which the Kelce Brothers became the managers of the company, Peabody became an important supplier of TVA coal. The company evidenced interest in responding to the new markets created by power systems, including TVA, and it has since expanded rapidly in terms of production, sales and earnings. The amount of coal supplied by this company grew from less than 5% of TVA's supply to 10% or more by 1962. Also, during this period TVA negotiated a very large contract with Peabody Coal Company for the supply of coal to the Paradise Steam Plant. Deliveries began on this contract after 1962.

The Pittston Company (Clinchfield Coal Company)

This company has been of moderate importance to the TVA's program. This company has operated a mine near **[**106]** Monterey during much of this period and also it developed a major mine, the Moss No. 3 Mine, in western Virginia during this period. One of the reasons the John Sevier Steam Plant was located in upper east Tennessee was because it made Virginia mines available to TVA. Clinchfield supplied TVA substantial quantities of coal from its Moss No. 3 mine during a portion of this period. It was understood, however, that Clinchfield had developed its Moss Mine largely to supply a power plant built by the Appalachian Power Company on the upper Clinch River in Virginia and accordingly TVA did not obtain long term contracts for coal from Clinchfield. Upon development of the Appalachian Power Company's market Clinchfield's western Virginia mine has diminished greatly in importance to TVA. Clinchfield supplied approximately 5% of TVA's requirements during the 1952-1962 period.

[*851] *West Kentucky Coal Company and Nashville Coal Company*

During the early part of the period, Nashville Coal Company was owned by Mr. Justin Potter. Potter was "philosophically opposed" to TVA and sponsored newspaper advertisements criticizing TVA. His company nevertheless supplied approximately 5% of TVA's **[**107]** requirements prior to the sale of Nashville Coal Company to West Kentucky in the fall of 1955.

Mr. Kampmeier described West Kentucky Coal Company as being quite different from Nashville in that it was a more conventional type operation. West Kentucky Coal Company, at the time TVA's coal market began to grow rapidly, had "about as large, and not fully loaded, coal mining capacity as any potential supplier we had" and it was important in TVA's coal supply picture.

Mr. Kampmeier termed the bidding practices of West Kentucky as somewhat less imaginative than those of Nashville and he stated that West Kentucky "did not seem to me to be as interested in the new type market that the power systems were creating as compared to the older type of markets as some of the other companies."

After its acquisition of Nashville Coal Company, West Kentucky Coal Company and Nashville combined supplied between 5% and 10% of TVA's coal requirements. Its percentage has recently grown to approximately 17% because of long term contracts awarded to West Kentucky. West Kentucky is the second largest supplier of TVA at the present time. Peabody's Paradise contract, together with its other contracts, makes **[**108]** Peabody the largest supplier of coal to TVA.

Pittsburgh-Midway Coal Company

This company supplied approximately 2% of TVA's coal requirements during the 1952-62 period. In this regard, Pittsburgh-Midway compared with several companies, including General Coal Company (which actually supplied more than 2%), Tennessee Products and Chemical Corporation, Old Ben Coal Company, Freemon Coal Mining Company, Lafayette Coal Company, Coiltown Mining Company, Bell and Zoller Coal Company, United Electric Coal Company and Tennessee Consolidated Coal Company.

Kampmeier observed no efforts on the part of any of the alleged conspirators to hold down the price of coal to TVA. To the contrary, it was observed that these suppliers tried to get the best price they could. He believed it was "quite obvious" that this was the case.

West Kentucky Coal Company's Shipments to TVA

The following table shows the annual shipments made by West Kentucky to TVA and also the percentage of TVA coal supplied by West Kentucky during the period material to this case.

Year	**TVA Total Receipts**	**Tonnage Shipped by West Kentucky & Nashville Coal Inc.**	**Percent of Company Shipments to Total**
1954	10,196,290	978,824	9.6
1955	14,377,000	1,298,923	9.0
1956	20,354,000	1,511,987	7.4
1957	19,581,879	963,384	4.9
1958	17,033,466	1,094,396	6.4
1959	17,808,900	1,336,870	7.5
1960	18,886,000	1,575,000	8.3
1961	18,674,000	1,681,000	9.0
1962	19,172,000	2,000,000	10.4
1963	22,141,000	3,394,000	15.3
1964	22,847,000	3,700,000	16.2

[109]** **[*852]** The Nashville acquisition occurred effective October 1, 1955, and hence the sales of that company are included beginning as of that date. It is significant that West Kentucky's participation was at its lowest point in 1957 and 1958 - years in which plaintiffs claim it was depressing the market. In 1957 West Kentucky's deliveries to TVA dropped by one-third, or 550,000 tons. This drop accounted for roughly three-fourths of TVA's decline in shipments for the year 1957.

The plaintiff coal companies have pointed to the mine prices of bids offered by West Kentucky Coal Company during the period 1954-1959 as evidence of plaintiffs' contention that West Kentucky bids were intended to depress. These prices are compared with prices of coal of a much higher quality coal sold in a market where it enjoyed a substantial transportation advantage.

The bids submitted by West Kentucky during the material period were within the limits of existing competition.

Coal offered the TVA from the western Kentucky field was at lower mine prices than that offered from east Tennessee and southern Tennessee. The western Kentucky coal, however, is inferior in quality to Tennessee coals, averaging **[**110]** 11,800 BTUs as opposed to over 13,000 BTUs, or a difference in quality of more than 60 cents per ton on the TVA market.

None of the western Kentucky mines competed at the steam plants at which the plaintiff coal companies sold their coal. The western Kentucky companies were not competitive at those plants (Kingston and John Sevier) because of transportation costs.

Though TVA is an integrated system, the price of coal offered by West Kentucky and other mines in that field did not directly or materially affect the quantity of coal purchased by TVA for use at Kingston. The competition among east Tennessee mines, and not prices charged in fields not serving the eastern steam plants had the immediate and direct bearing on the price at those plants. The price of coal offered by West Kentucky was not fixed for any purpose other than legitimate business purposes.

West Kentucky and Nashville Bids on the TVA Spot Market, 1956-1958

Plaintiffs state that in 1956 the prices on the TVA spot market were at substantially the same level as term market prices and that this fact is evidence of a conspiracy. The 1956 prices on the spot market at Kingston were at an exceptionally high level **[**111]** because of a critical but temporary shortage at that plant and once the shortage was overcome, the curtailment in purchases by TVA resulted in the decline in prices.

The decline in the spot market began in 1956. No West Kentucky coal was sold on the spot market in that year.

Normally the fluctuations of coal the TVA purchases on the spot market is not a significant factor in the operation of the TVA plants.

Bids made on the spot market by West Kentucky in 1957 and 1958 were evaluated at the Colbert and Shawnee plants and never at the Kingston or John Sevier plants.

The bids on the spot market made by West Kentucky from the Uniontown mine in 1957 and 1958 were made for lawful purposes and do not evidence a conspiracy. There were 26 such bids over the period February 1957 through March 1958. Of these, six were successful. On the declining spot market West Kentucky did not lead but followed the market and on the few occasions it was a successful bidder, it was the highest, or nearly so, of the successful bidders.

A review of the Uniontown bids shows that the first eight of these bids submitted from Uniontown ranged well above the market price per million BTUs. (1 cent per million **[**112]** BTUs is about $0.25 per ton.) Its last bid of these eight unsuccessful bids was at $3.70 per ton and was evaluated at Shawnee at 16.68 cents. Its ninth bid was at the same price ($3.70) and was successful, West Kentucky quoting the highest price of the successful **[*853]** bidders. Its tenth, eleventh and twelfth bids, also at $3.70 per ton, were unsuccessful. Its thirteenth bid was at $3.70 but with an improved guarantee, resulting in an evaluation of 16.49 cents, and was successful. West Kentucky's bid was again the highest successful bid. Its fourteenth and fifteenth bids continued at $3.70 and were unsuccessful. Its sixteenth and seventeenth bids were also at $3.70 and at the same evaluation, but were successful. In the former it was the highest successful bidder; in the latter there were several lower bids to Shawnee and TVA made awards on these lower bids but placed the coal to other plants. These bids were followed by two unsuccessful bids at the same price ($3.70) and evaluation. The highest successful bidder on the latter was evaluated at 16.16 cents, and on its next bid (of December 12, 1957) West Kentucky reduced its price to $3.62 with an evaluation of 16.16 cents. **[**113]** Its bid was successful, being the second highest of all offered. There were no unsuccessful bidders at Shawnee on this occasion. Its next bid, made at the same price, was unsuccessful. Its next bid at $3.58 per ton, or 15.99 cents, was successful and on this occasion 73,900 tons were bid unsuccessfully as low as 16.01 cents. Its remaining bids, respectively at $3.58, $3.58, $3.55, $4.00, $4.00 and $4.55 were unsuccessful.

The bids reviewed above were motivated by a need for sales. West Kentucky's Hoffman testified that the spot bids from Uniontown were made "to relieve the situation at our Uniontown Mine . . . until such time as I could obtain a term contract." He denied that they were made to harm any producer.

West Kentucky acquired the Uniontown mine in October 1955 as a part of the Nashville Coal Company acquisition. Uniontown, designed to produce 1,700,000 to 1,800,000 tons annually, was a barge mine without rail connections - the only mine of that type owned by West Kentucky. West Kentucky owned its own barge equipment and bid TVA a delivered price from Uniontown to enable it to use that equipment.

As a part of its 1955 Nashville transaction, West Kentucky acquired **[**114]** two contracts which contemplated shipment from Uniontown. Both contracts, because of their termination, are of significance in this case. One was a three-year TVA term contract for 350,000 tons a year. This contract expired in June, 1957. The other was a twenty-year total requirements contract with Tampa Electric Company providing for shipment of at least 450,000 tons per year. In April, 1957, West Kentucky advised Tampa it would not perform the contract because, in West Kentucky's view, it was void under the antitrust laws. During the spring and summer of 1957, while negotiating for settlement of the contract controversy, West Kentucky shipped 118,000 tons from Uniontown to Tampa on spot orders. Settlement negotiations failed and Tampa refused to order further coal from West Kentucky. The loss of sales for the tonnage which had gone to TVA and Tampa and also some barge coal to Chicago through Mount Vernon, Indiana, resulted in West Kentucky's bids on TVA's spot market from Uniontown.

West Kentucky's position in the TVA term market indicates why it was necessary to bid on the spot market:

Year	TVA Coal Receipts	West Kentucky (and Nashville) Shipments	Type Sales	Percent of TVA Market
1954	10,196,290	978,824		9.6
1955	14,377,000	1,298,923		9.0
1956	20,354,000	1,511,987	All Term	7.4
			Includes	
1957	19,581,879	963,384	313,000 spot	4.9
1958	17,033,466	1,094,396	198,000 spot	6.4

[115]** **[*854]** These figures show no spot sales by West Kentucky in 1956. They also show a drastic fall in West Kentucky's total sales to TVA in 1957 and 1958. During these years West Kentucky sold less than 900,000 and 600,000 tons, respectively, on TVA's term market as compared with 1956, the year it acquired Nashville.

West Kentucky Profits During the Period 1950-1964

Plaintiffs claim that West Kentucky's profits of over $5,000,000.00 in 1950 before taxes and the decline in profits thereafter show that West Kentucky was losing money on its TVA contracts by reason of its low bids which were made for the predatory purpose of squeezing them out of the market. The evidence indicates that the variations in West Kentucky profits resulted from factors unrelated to predatory pricing.

The following table shows the situation not only in profit, but also in terms of production in tons and sales in tons. It also shows another significant fact in the industry - the decline in national production.

Year	Tons Produc-tion	Tons Sales	Net Income Before Income Taxes	Tons National Production
1950	6,456,136	6,473,135	$5,645,919	516,301,000
1951	5,513,890	5,466,189	4,223,814	533,600,000
1952	5,738,617	5,790,072	3,864,129	466,800,000
1953	5,080,565	5,182,814	2,721,133	457,290,000
1954	4,849,854	4,734,806	1,385,096	392,000,000
1955	9,736,007	12,296,048	1,441,367	470,000,000
1956	9,374,205	12,705,646	2,150,971	500,000,000
1957	7,724,999	8,789,215	1,376,377	490,000,000
1958	6,984,695	7,554,539	(376,516)	405,000,000
1959	7,451,924	7,450,831	435,841	410,000,000
1960	8,438,331	7,717,910	725,705	413,000,000
1961	6,873,850	7,362,058	203,597	403,000,000
1962	6,570,131	7,457,257	327,724	424,000,000
1963	7,226,176	8,135,799	322,449	456,000,000
1964	7,924,807	8,042,357	2,147,311	485,000,000

[116]** The explanation for the decline in the early 1950's is found in the testimony of J. W. McMahon, retired vice-president and controller of West Kentucky, and C. M. Hicks, West Kentucky's vice-president and sales manager. Hicks explained that in the late 1940's and early 1950's fifty per cent of West Kentucky's business was highly profitable retail dealer business and 25% was rail coal. Today 7% is retail dealer trade and less than 1% is for rail. This business was at a "fairly high price." West Kentucky also had a decline in sales. Sales, as shown in the annual reports, declined from $26,000,000 in 1950 to $22,000,000 in 1951; to $21,000,000 in 1952; to $18,000,000 in 1953; to $15,000,000 in 1954 and to $17,000,000 in 1955. The downward trend in sales is closely followed by the downward trend in profits, and clearly refutes the assertion of predatory pricing.

The acquisition of Nashville occurred in 1955 but the earnings records of the two companies were kept separately until 1957. Nashville sustained a loss of $604,057 in 1956. The combined income of Nashville and West Kentucky for 1956 was $1,591,000 before taxes.

Several factors explain West Kentucky profits from 1957 to **[**117]** date. The cost of interest in financing the acquisition of **[*855]** Nashville accounts for much of the difference in earnings before and after the acquisition, as shown in the following table:

Year	Stated Income (Combined)	Interest	Income Before Interest
1956	$1,591,000	$ 492,354	$2,083,354

Year	Stated Income (Combined)	Interest	Income Before Interest
1957	1,376,377	596,346	1,972,723
1958	(367,516)	1,027,532	660,016
1959	435,841	875,083	1,310,924
1960	725,705	739,203	1,463,908
1961	203,597	585,698	789,295
1962	327,724	554,117	881,841
1963	332,449	693,372	1,025,821
1964	* 2,147,000	104,605	2,251,605

Another factor with regard to Nashville was the high cost of operating its mines. One of the five mines acquired, Stoney Point, had to be closed in 1957. Another, the Kirk mine, for which Nashville was sales agent, had to be closed for lack of markets. Still another factor is found in the increased labor costs at **[**118]** Nashville. Prior to its acquisition Nashville paid the Union scale, but obtained nine hours work rather than eight, as would have been the case under the UMW agreement. Extension of the UMW agreement to the Nashville employees resulted in an increase in production costs of over 19 cents per ton.

Plaintiffs have referred to contracts West Kentucky obtained for delivery to plants in the western end of the TVA system as evidence of an intention on its part to willfully depress the TVA market. These contracts called for a mine price of $2.90 a ton. As related below, the availability of this coal to West Kentucky without substantial development costs prompted the bid. The price of $2.90 was competitive, and in fact was frequently rejected by TVA during this period as being too high. The coal was offered by West Kentucky at that price to its other utility customers but by and large it could not be sold at that price elsewhere because of its quality. The price was established by West Kentucky at a figure from which it could make a profit and it has realized a profit thereon.

There are four $2.90 contracts to be considered. These contracts are the T3, T24, T18, and T6 contracts. **[**119]** The T3 contract was obtained under Requisition 27 on bids opened in July of 1959 for delivery of 16,347 tons per week for fifteen years to the Shawnee plant. The first award under the T24 contract was obtained under Requisition 27 on bids opened in February of 1961 for one million tons per year. An award of a second million tons per year was made in January of 1963 under this contract. The T24 contract was made for delivery of coal to Gallatin. The T18 contract, which was for 9,700 tons per week for ten years, was made in April of 1963 for delivery to Shawnee. The T6 contract was made for delivery to Gallatin under TVA Requisition 44 in October of 1963.

The coal offered on these contracts was No. 9 seam mine run coal and the West Kentucky mines known as Pleasant View and East Diamond have been the chief source of supply. As far as West Kentucky is concerned $2.90 is a standard price for that coal and it has been offered to a number of other utilities at the same price.

At the time West Kentucky first offered this coal to TVA in 1959, it was in **[*856]** the process of working out its No. 11 seam at the Pleasant View mine. It could continue the operation of that mine quite **[**120]** easily and cheaply by driving down 90 feet to the No. 9 seam. To be able to sell the No. 9 coal in this way meant that the company could continue to utilize its tracks, its preparation plant, its loading plant and much of the other items originally constructed in connection with the mine. If the company was unable to sell the coal, these items would be abandoned. The No. 9 coal unprepared does not have a market other than the utility market and even with preparation it does not enjoy a volume market. West Kentucky had tried to sell it as washed coal and had found a preference for No. 11 coal because it was lowest in ash content. West Kentucky arrived at the price of $2.90 after discussions among the operating, sales, accounting, and management people, and it was believed that coal could be mined profitably at that price. There was no intent to depress the market in offering the coal at $2.90.

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* Includes gain on sale of capital asset of approximately $1,900,000.

After it was awarded its T3 contract in 1959, West Kentucky sought to place more of this coal inasmuch as the Pleasant View mine was capable of producing more coal than its 1959 contract required. West Kentucky wanted to get Pleasant View to maximum production. West Kentucky worked out **[**121]** the No. 11 coal in East Diamond, in December, 1960, and it closed that mine because it did not have a market for its No. 9 coal. East Diamond was reopened in July, 1962, after the contract was finally obtained for the sale of the No. 9 coal from that mine.

The price of $2.90 was fixed by the operating and sales personnel of West Kentucky. During 1959, while the No. 9 seam at Pleasant View was in the development stage and production was at a low level in terms of the potential of the mine, production costs were at $2.729 per ton. Substantially the same production costs were experienced under similar circumstances in 1960. These costs were before a fixed administrative cost of 20 cents per ton, but this cost would have been borne by the company regardless of whether it had had the contract. Operating costs, excluding the 20 cent administrative cost, was $2.497 in 1961 and $2.52 in 1962. In 1963 a bad mine fire at Pleasant View caused operating expenses to increase and this finally required the closure of the mine. Meanwhile the No. 9 seam at East Diamond was opened in 1963. (This mine had been closed in 1960 when it worked out the No. 11 seam, even though the No. 9 coal was **[**122]** available, because it could not then market the coal to TVA or elsewhere at the $2.90 price.) In 1963 the operating cost at East Diamond was $2.13, and in 1964 it was $2.523. Because of the premium provisions of the contracts West Kentucky realized about $3.04 per ton rather than the basic $2.90 per ton on these contracts. Its operating profit on the contracts ranged from a low of 33 cents (except for the period following the fire at Pleasant View before that mine was closed) to a high of 91 cents, before allocation of the fixed administrative costs of 20 cents.

The price offered by West Kentucky on the $2.90 contracts appears to have been a matter of sound business judgment and is not evidence of predatory pricing.

From a competitive standpoint, the $2.90 bids were not, according to TVA's Kampmeier, "Particularly attractive to TVA." This is borne out by a review of the other bids evaluated by TVA at the same time. Most of West Kentucky bids were evaluated at the Shawnee, Johnsonville, Gallatin and Colbert steam plants. After a reduction in the rail rate from western Kentucky to Widows Creek in 1960 the bids were also evaluated at that plant. Hence, West Kentucky's bids were **[**123]** in competition with the bids of other companies evaluated at each of those plants.

Several bids were submitted by West Kentucky of its No. 9 coal. It appears that the No. 9 coal was offered to TVA eight times and the competition was such that the bids resulted in awards on only four occasions. On the occasion of **[*857]** the first contract (July 27, 1959), West Kentucky was fourth from low of the bidders evaluated at Shawnee. The coal was next offered by West Kentucky on February 9, 1960 at $2.90, but it did not receive an award. At this bidding, West Kentucky's bid was next to last out of twenty bids and sixteen of the twenty bids were at mine prices below $2.90. On the next bid opening (September 1, 1960), West Kentucky again failed to sell its No. 9 coal. Each of the 24 bids showing a mine price was below the mine price offered by West Kentucky with prices ranging from $2.00 to $2.85 per ton. On the next bid opening (February 14, 1961), West Kentucky obtained a contract for delivery to Gallatin where its bid ranked third out of six considered. The two lower bidders offered mine prices of $2.63 and $2.73. Under this contract, TVA obtained 19,250 tons per week with the **[**124]** right to take an additional 19,250 tons per week for the last nine years of the ten year contract. TVA exercised this option in December 1961. Plaintiffs say this option placed a ceiling on the market in the western end of the system. In this regard TVA's Kampmeier observed that "it was very obvious" that West Kentucky "was trying to find somebody to buy the coal at $2.90" and that "any other bidder would know that there wasn't much point in offering coal to TVA at still higher prices as TVA wasn't taking (the West Kentucky) coal." At the next bid opening (September 18, 1962), West Kentucky obtained a contract. It was the highest bidder of the six bidders who received a contract. Its bid, as evaluated, was the equivalent of 12 cents per ton above the next highest. The awards included mine price bids of $2.58, $2.61, $2.67 and $2.73. At the next two bid openings (January 15, 1963 and June 19, 1963), West Kentucky's bid of $2.90 was not successful. On the latter occasion its bid was next to high at every plant at which it was evaluated. At the October 15, 1963 bid opening, the $2.90 bid was successful at Gallatin, by virtue of a reduced freight rate obtained by TVA.

From the **[**125]** foregoing discussion, the Court finds that West Kentucky's $2.90 bids were in line with existing competitive conditions. No inference of predatory pricing may be drawn therefrom.

The Section 22 Rail Rate from the Western Kentucky Field to Widows Creek was Obtained in 1960 by TVA in Direct Negotiations. TVA Sought the Rate to Justify Expansion of the Widows Creek Plant

The so-called Section 22 rate was obtained by TVA from the L&N in August of 1960 from the western Kentucky coal fields to Widows Creek. This rate was an "absolutely essential" factor to a determination to make the second enlargement at Widows Creek.

The Section 22 rate was made on August 29, 1960. The quotation established a rate from western Kentucky of from $1.60 to $1.40 per ton, the exact rate to be determined on a scale based upon total tonnage to Widows Creek from both southern Tennessee and western Kentucky. The sliding scale was negotiated by TVA to include southern Tennessee coal to avoid the possibility of TVA's having to use all western Kentucky coal to obtain thereby a lower transportation rate. The southern Tennessee producers in 1960, in addition to a substantial quality advantage, had rates **[**126]** of 60 and 65 cents, as they had for several years before 1960 and as they have now. Prior to the Section 22 quotation, the L&N rate from western Kentucky to Widows Creek was $2.40, though a $2.07 combined rail and barge rate was available. The $2.07 rate had been used by TVA for evaluation purposes.

It is clear from the record that officials of TVA and L&N negotiated the rate and that West Kentucky and Peabody played no material part in it. Neither did any UMW representative.

Tennessee Products and Tennessee Consolidated joined in a protest of the rate before the Interstate Commerce Commission. TVA and L&N alone defended the rate before the ICC and the rate was upheld.

[*858] The significance of the Section 22 rate is pointed out in a letter written by TVA's Chairman Vogel to Senator Kefauver.

> "Adoption of the suggestion that bids of western Kentucky coal producers be evaluated on the basis of the published rates would not, as Mr. Callis suggests, assure that the government would obtain the benefit of the Section 22 quotation. It would simply price western Kentucky out of the market and leave TVA dependent solely on the southern Tennessee field for supplying a unit **[**127]** which was put at Widows Creek only because western Kentucky coal would be available as a source of supply."

West Kentucky's Contract with the Louisville Gas and Electric Company and its Operation of the Cherry Hill mine

Plaintiffs offered in evidence a contract between Nashville Coal, Inc. and Louisville Gas and Electric Company under which Nashville acquired a quantity of coal from the Cherry Hill mine at approximately $3.55 per ton in 1960 and 1962 for shipment on one of its TVA contracts at $2.85 per ton. Plaintiffs contend that this is evidence of selling below cost and thus evidence which supports their theory of predatory pricing.

The Louisville Gas contract was made by Nashville Coal Company, prior to the 1955 acquisition of West Kentucky, and the contract term extended to March 1, 1963. The agreement contemplated the sale to Louisville Gas of a portion of its requirements of coal, which amounted to a sale of approximately 1,000,000 tons of coal a year. The contract provided for an escalating price which, by the end of the contract term, was $3.55 per ton. The contract had a tie-in provision under which Nashville was responsible for the sale of coal mined **[**128]** at the Cherry Hill mine, a mine owned by Louisville Gas. Nashville was required to pay Louisville Gas $3.70 per ton for the first 200,000 tons and $3.60 per ton thereafter, regardless of where it was sold. This price was paid to Louisville Gas even on Cherry Hill coal shipped from Cherry Hill to Louisville Gas. Most of the Cherry Hill coal was shipped to Louisville Gas and on this coal Nashville received the stipulated price under its contract, and thus realized a "loss" of 10 to 15 cents on each ton. The Cherry Hill coal shipped to Louisville Gas was a part of the approximately 1,000,000 tons a year shipped by Nashville to Louisville Gas. Hence it was necessary for Nashville to absorb that loss out of the profit realized on coal it shipped to Louisville Gas from its own mines.

Some of the Cherry Hill coal for which Nashville paid $3.70 or $3.60 per ton was shipped to purchasers other than Louisville Gas. The record shows that some of this coal was placed at $2.95 to a purchaser other than TVA. In

1960 and 1962 West Kentucky arranged with TVA to place some of the Cherry Hill coal on one of West Kentucky's $2.90 TVA contracts at a price of $2.95 per ton. West Kentucky did not **[**129]** realize a loss on the TVA transaction in that the Cherry Hill coal which went to TVA rather than Louisville Gas was replaced at Louisville Gas by West Kentucky coal at $3.55 per ton which otherwise would have gone to TVA at $2.90. The placement of Cherry Hill coal at a destination other than Louisville Gas permitted West Kentucky to ship more of its coal to Louisville Gas and thereby offset the loss. West Kentucky's Hicks explained, "the dollars and cents were the same thing."

West Kentucky (i.e. Nashville) shipped the Cherry Hill coal to destinations other than Louisville Gas, because Louisville Gas wanted it to. The coal had a limited market and West Kentucky was unable to ship it to TVA in 1961 because TVA didn't want the coal.

Upon the expiration of the Louisville Gas contract in 1963, West Kentucky sought to negotiate a successor contract in either of two ways. West Kentucky offered coal at $3.40 under an agreement which would continue the Cherry Hill arrangement; and it offered coal at $2.90 (the same type coal it was then shipping TVA) without responsibility for the Cherry Hill mine. West Kentucky was **[*859]** underbid by Peabody Coal Company and lost the account.

[130]** *The TVA Contract Awarded to Peabody Coal Company at The Paradise Steam Plant - Other Peabody TVA Contracts*

Peabody Coal Company is said by plaintiffs to have made a "drive" on the TVA beginning in 1959. Peabody is the largest supplier of coal to TVA. Its position as such results largely from its contract with TVA for delivery of some 4,000,000 tons of coal per year to the Paradise Steam Plant.

The Paradise contract was awarded under Requisition 27 with respect to bids opened July 27, 1959. At that time the Paradise plant was not in existence and the description of plant on the award sheets is shown simply as "new steam plant." The award sheets indicate that deliveries were to begin at the rate of 40,000 tons per week in August 1962 and, after April 6, 1963, in an increasing amount to 80,000 tons a week for a total of 65,000,000 tons. The plant price at which the award was made was $2.95.

The invitation which prompted Peabody's bid resulted from a decision on the part of TVA to build one of its steam plants at the coal supply to eliminate transportation costs or to keep them as low as possible. TVA had made studies and had become satisfied that there were plant sites in Western **[**131]** Kentucky where available reserves would make the plan feasible. Thus, in connection with its invitation of July 1957, TVA invited bids in large quantities in the hope that out of this would come an opportunity to build such a plant. The only bid that resulted, which TVA thought was big enough to justify the kind of plant it contemplated, was the Peabody bid, and since it was the low bidder, TVA was in a position to negotiate on modifications to see if a mutually agreeable contract could be arrived at. As a result of these negotiations a price of $2.95 per ton was agreed upon.

The circumstances under which the Paradise contract with TVA was negotiated by Peabody preclude any inference of conspiracy in regard thereto.

Negotiations between BCOA and UMW Resulting in 1950 Agreement

The 1950 negotiations were carried on under the surveillance of the National Labor Relations Board and the Court, two injunctions having been issued, one at the instance of the NLRB and the other at the instance of the Department of Justice. The injunction directed the Union and the operators to bargain in good faith.

Protective Wage Agreement

Plaintiffs rely strongly on Section A of the Protective **[**132]** Wage Agreement [2] to support **[*860]** their contention that the Agreement prescribes labor standards outside the bargaining unit to which it applies.

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[2] A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by it and the Operators shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other employees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal

[133]** Counsel for plaintiffs stated that Section A was not presented to the District Court or to the Supreme Court in the **[*861]** *Pennington* case either in the Appendix of the briefs or in oral argument.

During the trial one of the attorneys referred to portions of the record in which the trial court called to the attention of the jury portions of Section A.

Plaintiffs argue that UMW agreed in Paragraph A with the signatories to the contract to impose a certain wage scale on other bargaining units and that under the following language in the *Pennington* opinion it thereby forfeited its exemption from the antitrust laws:

> "But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."

The Supreme Court then observed that there is nothing in labor policy indicating that the Union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. The obligation of the Union to its members would seem best served **[**134]** if the Union retains the ability to respond to each bargaining situation as circumstances might warrant, "without being strait-jacketed by some prior agreement with the favored employees."

[*862] Counsel for plaintiffs in their pre-trial brief stated that "predatory intent is almost an inevitable element of proof in developing a case of conspiracy based on circumstantial evidence." But counsel asserted that direct

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place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose operations are under contract with the Union. No operator may be found to be in violation of this Protective Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the Joint Industry Contract Committee that such operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to the subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.

evidence of such an agreement was a violation of the antitrust act per se, and that when Paragraph A was inserted in the Protective Wage Clause in December, 1928, the agreements and understandings between UMW and BCOA constituted per se violations of the Sherman Act throughout the critical period of the case.

We do not agree.

Paragraph B of the Protective Wage Clause manifests an intention to protect the continuity of work of the employees against the practice of the employers procuring from others by land-lease, subcontract or otherwise coal that was produced under terms and conditions less favorable than those provided in the contract with the Union.

Paragraph A obligates the UMW not to enter into or be a party to any agreement covering wages and working conditions **[**135]** applicable to employers covered by the contract on any basis other than those specified in the contract. "The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain *full compliance therewith by each and all parties signatory thereto*."

It is to be observed that the UMW only obligates itself for full compliance of the terms of the contract by the "parties signatory thereto." Paragraph A does not appear to obligate UMW to embody the same terms and conditions in contracts to be made with other parties not signatory to the 1950 contract and the amendments thereto. The language in Paragraph A may not be as clear as it might be. But it does not appear to bind the Union to the same standards and conditions in dealing with other bargaining units.

Mr. Welly K. Hopkins, Senior Counsel for UMW and at one time a member of the Criminal Division of the Department of Justice, who participated in the bargaining negotiations from 1943 through 1964 and presumably assisted in the drafting of the 1958 amendment, **[**136]** stated that the operators demanded Paragraph A and the Union demanded Paragraph B and that neither paragraphs affected anyone except those signatory to the contract. This testimony would only be competent if the contract is ambiguous. We understand that it is the position of both parties that the contract is not ambiguous.

The land lease provision of the Protective Wage Clause sprang from the 1941 amendment and first appeared in the 1943 agreement. Mr. Hopkins stated it had no connection with what is referred to as a "favorite nation" clause. It grew out of the practice by signatory operators of avoiding obligations under their contracts by leasing their coal lands to other operators who were non-signatories as a subterfuge to avoid the terms of the contract. This clause was eliminated in the 1964 contract on account of the "hot cargo" provision provided for in the Landrum-Griffin Act.

HN8[] If a contract is subject to two reasonable constructions, the one should be given that does not result in a violation of law. *Great Northern Ry. Co. v. Delmar Co., 283 U.S. 686, 691, 75 L. Ed. 1349, 51 S. Ct. 579*; *Perry Coal Company v. NLRB, 284 F.2d 910, 914* (C.A. 7).

The trial court charged **[**137]** the jury in the first *Pennington* trial that "Where two reasonable constructions of a written contract can be made, preference is given to that construction of such contract that does not result in a violation of law. The Court will not construe a contract to violate the law if it can by reasonable construction construe it to come within the purview of the law." Printed Record, Vol. III, p. 1587a; Williston on Contracts, 3rd Ed. (Jaeger), Vol. 4, pp. 747-748; *Restatement on Contracts, Sec. 236*.

[*863] *Allegations of Predatory Pricing Were Denied by All Parties Who Testified and Who Participated in the 1950 Basic Agreement and the Various Amendments to Such Agreement*

Ten witnesses, each of whom was in a position to know, testified positively that there was no predatory price fixing. Included in this list were UMW officials who likewise denied any participation in any alleged price fixing.

HN9[] A conspiracy need not be proved by formal agreement or by direct evidence. It is rare that a conspiracy is proved by direct evidence. *American Tobacco Company v. United States, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125*; *Interstate Circuit, Inc. v. United States, 306 U.S.* ***[**138]*** *208, 221, 83 L. Ed. 610, 59 S. Ct. 467*.

Unity of purpose or a common design is sufficient. *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, 340 U.S. 211, 213-214, 95 L. Ed. 219, 71 S. Ct. 259*.

If the necessary result of a combination or agreement unreasonably restrains trade, it violates the *Sherman Act. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244, 44 L. Ed. 136, 20 S. Ct. 96*; *United States v. Reading Co., 226 U.S. 324, 57 L. Ed. 243, 33 S. Ct. 90*; *United States v. Live Poultry Dealers' Protective Association, Inc., 4 F.2d 840, 843* (C.C.A. 2); *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 423* (C.A. 10).

However, the proof is insufficient to establish plaintiffs' claim that West Kentucky Coal Company or any other coal operator bid on TVA coal for the purpose of depressing the price of coal on the TVA coal market and thereby drive small coal operators, including plaintiffs, out of business; or that West Kentucky Coal Company or any other operator through arrangement, combination or otherwise fixed the price or attempted to fix the price of coal on the TVA market.

The proof is insufficient to show that UMW, by arrangement, combination or otherwise, influenced **[**139]** or attempted to influence West Kentucky Coal Company or any other coal operator in bidding for coal on the TVA market.

The Court finds that the contracts obtained from TVA by various coal companies charged with the conspiracy were obtained as a result of lawful efforts and that they did not submit low bids to the TVA for the predatory purpose of putting small coal operators, including plaintiffs, out of business but were made in a competitive market. If the price of coal purchased by TVA f.o.b. mines was lower than the national average, it was due to the policy of TVA to keep the price down, which in part, it seems to the Court, was effected by long term contracts for enormous tonnages of coal.

Plaintiffs claim that Messrs. Lewis and Love stated in speeches and press conferences, some of which were carried in the UMW Journal, that one of the objectives of the 1950 Agreement was to stabilize the coal industry.

Mr. Love, in his testimony, stated that his use of the word "stabilization" meant stabilization of working conditions. Mr. Lewis stated that the question of price was a prerogative of management with which the UMW was not concerned. Plaintiffs argue that the respective positions **[**140]** of UMW and the coal operators materially changed in 1950 from their positions of the past when the UMW had sought a three-day work week in order to equitably apportion the work among the miners. Mr. Lewis and the other witnesses in the negotiations explained that the three-day work week was not an issue in the 1950 negotiations but was simply used as a bargaining tactic; that the miners were out of work in late 1949 and early 1950 and the public was being made to believe that coal supplies would soon become exhausted. UMW caused the workers to work three days a week to disabuse the minds of the public of this thought and at the same time enable the miners to earn enough money for their families to live on.

Plaintiffs say that the wages, including the royalty provided for in the 1950 Agreement and the amendments thereto **[*864]** were geared to the operations of the large mechanized coal operators for the purpose of putting the small coal operators out of business because the BCOA and UMW knew that the small marginal operators could not pay the wages provided in the Agreement.

This charge is also denied by all of those who participated in the negotiations and who testified in **[**141]** the case.

The Court is of the opinion and finds that plaintiffs have failed to prove, either by a preponderance of the evidence or by the standards of evidence established by the Supreme Court in UMW v. Paul Gibbs, supra, that the defendant engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged in the complaint. In this connection, the Court observes that the extensive evidence introduced by plaintiffs of violence in the coal fields is consistent with the Union's determination to unionize the units of the entire area, and, in the light of the Court's conclusion just noted, is insufficient to show a Sherman Act antitrust violation.

Common Law Claims of Parton Coal Company and Dean Coal Company

This brings us to the alternative claims of Parton Coal Company and Dean Coal Company which are based upon alleged violations by the Union of Tennessee law. This part of the claim is based on evidence of violence and intimidation by the Union.

The principle that permits damages based on state law was reaffirmed in the recent case of United Mine Workers of America v. Gibbs, supra, 383 U.S. 715, 721, 86 **[**142]** S. Ct. 1130, 16 L. Ed. 2d 218, 34 Law Week p. 4336, as follows:

> "'We have allowed ***HN10***[] the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell, 356 U.S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030*; *United Construction Workers v. Laburnum Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025*. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.' *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 3 L. Ed. 2d 775, 79 S. Ct. 773*.

> " . . . The Court held in *Hurn v. Oursler, 289 U.S. 238, 77 L. Ed. 1148, 53 S. Ct. 586*, that ***HN11***[] state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law."

The federal claim must have had sufficient substance to confer jurisdiction on the Federal Court before it can try the state claim. In addition **[**143]** state and federal claims must derive "from a common nucleus of operative fact." And pendent jurisdiction is a matter of sound judicial discretion and not a right of plaintiffs. *United Mine Workers of America v. Paul Gibbs, supra.*

The interest of the attorneys in the antitrust phase of the lawsuit overshadowed the alternative claims based on Tennessee law. This is shown in both the oral and written arguments of counsel.

In the opinion of the Court, plaintiffs in the present cases stated, in good faith, substantial claims based on federal law. Although the Court has held that the federal claims were not established, this does not deprive the court of jurisdiction to determine the non-federal ground. The trend under the Federal Rules is to require plaintiffs to try their causes of action at the same time. This principle was stated by the Supreme Court long before the Federal Rules came into existence. *Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319, 71 L. Ed. 1069, 47 S. Ct. 600*.

Dean Coal Company and W. R. Parton charge that in pursuance of unlawful **[*865]** activities and with the intent and purpose to unlawfully and illegally interrupt, impede, terminate and destroy the **[**144]** business of the plaintiffs, that the defendant through its duly constituted and authorized officers, agents, representatives and members caused huge motorcades to be assembled and formed to roam and block the highways and roads in and around the area of plaintiffs' operations; that they threatened abuse and intimidated employees of the plaintiffs with the result that plaintiffs' employees and others were alarmed, frightened and intimidated to such an extent that the mining operations of plaintiffs were completely halted for a time and drastically curtailed for a longer period and plaintiff Dean Coal Company was compelled to spend large sums of money to safeguard its equipment and to move its operations to a safer location; that defendant's agents and members, at the direction of its duly authorized officers and representatives, placed dynamite upon the coal mining machinery of the plaintiffs in an effort to destroy it and although the explosion did not occur, plaintiffs' employees and others were further intimidated and frightened thereby to the damage of plaintiffs' businesses; that the interruption of the Dean Coal Company's business began on or about March 16, 1959 and it was not **[**145]** until 1961 that it was able to resume normal and profitable operations of its business and that the wrongful and unlawful activities of the defendant were prompted and carried out with a wanton, deliberate and malicious intent and purpose to destroy the business and property of plaintiffs in consequence of which the plaintiffs are entitled to recover punitive damages.

W. R. Parton

The common law or state law claim of W. R. Parton, d/b/a Parton Coal Company, arises out of the termination in 1959 of his strip coal mining operations near Beech Fork in the New River Section of southwestern Campbell County, Tennessee. Parton had been engaged in strip mining since 1953 on various leaseholds in Morgan and Campbell Counties. In 1959 he moved his operations from the Beech Fork location to a higher seam of coal and had completed the building of his haul roads. He had for a number of years sold most of his coal to the TVA for delivery to the Kingston Steam Plant, and in January, 1959 his sales agent obtained a term contract to be filled by him and another producer which called for 1,200 to 1,300 tons per week for twelve months. The coal was shipped by rail from a loading facility on **[**146]** the Tennessee Railroad located a short distance along a public road from the entrance to Parton's leasehold which was several miles from his mine. The coal was hauled by truck from the mine to the railroad siding mainly by trucks owned by a trucking contractor, Allen, who furnished the trucks and drivers and who was paid by the ton.

There is much evidence in the record about the refusal of strip mining operators in eastern Tennessee to sign the National Bituminous Coal Wage Agreement, as amended in 1958, the cancellation of most of the existing contracts by UMW and the intensive efforts of the Union to see that no coal was hauled or produced by such operators. Parton was not served with a termination notice because according to Field Representative Ross, it was believed that Parton had discontinued operations. The Trustees of the Welfare Fund had filed their action against him for unpaid royalties on June 13, 1958. The circumstances under which Parton originally signed the Wage Agreement will be hereinafter noticed.

On or about March 30, UMW field representatives, Ross and perhaps Jones, participated in a motorcade or caravan of cars occupied by UMW members through the New River **[**147]** area. For about a week thereafter a similar group gathered at a point on the Petros Mountain highway. Their purpose is disputed, but it is obvious that it had something to do with preventing the hauling of coal from the mining operation to Kingston.

On April 15, 1959, Parton undertook to have his coal trucked from his strip pit to the railroad but Allen's trucks **[*866]** were stopped near the intersection of the haul road and the public road by a large group of UMW members. A few were armed. Parton was warned that he should not be loading coal if he had not signed the UMW contract. And after some discussion the coal in the trucks was dumped by the side of the public road. Parton did not try to load any more coal until the following August. He and his employees and the truckers were afraid to.

The threats made against Parton and the dumping of the coal without a shot being fired or a blow being struck might as one isolated incident be considered non-violent, but taking place in the atmosphere of threats and violence shown by the proof in this case and in others, particularly *Allen v. UMW, 319 F.2d 594* (6 Cir. Tenn. 1963), it is not to be characterized as UMW contends, as **[**148]** peaceful picketing. It was the type of activity enjoined by orders of the United States District Court for the Eastern District of Kentucky entered April 30 and May 4, 1959 on petition of the Regional Director of the National Labor Relations Board including "assaulting, stoning, clubbing, overturning or threatening to overturn equipment, threatening physical violence or other injury."

The group of so-called pickets that had stopped the hauling of Parton's coal came mainly from the membership of two nearby UMW local unions, three of whose members testified that it was their purpose to stop Parton's operation. One of them testified for the Union that they just happened along at the time for no particular purpose. Some of them had obtained gasoline paid for by UMW Field Representative Ross under an arrangement whereby it was to be used by the members for "picket line" work. Such activity, as the stopping of Parton's operation, was in accordance with and a part of UMW's purpose of stopping the production of non-union coal.

In May 1959 there were several instances of shooting into coal hauling trucks and into the cars of employees of at least one non-union operation. Strip mining **[**149]** equipment belonging to this same operator, Double Camp Mining Company, was destroyed by dynamite late in May on a Sunday, the day before dynamite was found on the mining equipment of Dean Coal Company operated by the brother of the principal in Double Camp Mining Company.

Parton undertook to resume his operations after an election conducted by the NLRB in which UMW was defeated, but he was not able to make up for the time lost during the spring and summer. He could not get a crew to work at night or enough truckers to haul the coal.

Parton could not keep the payments up on his equipment or produce enough coal to keep his markets with the result that he lost his business entirely. There was no market for the equipment in 1959 because of the inactivity among the coal strippers and because the insurance necessary to a purchase money loan was not to be had. The insurance carried by the operators in the area was cancelled after the destruction of the Gilchrist tipples at Jellico and the Double Camp Mining equipment in the New River area during the month of May.

Parton, at the time his coal stripping business stopped, owed various sums of money for the purchase price of most of the **[**150]** items of his equipment, a stripping shovel, a loading shovel, a bulldozer, a grader, the loading ramp or crusher, and other small pieces. In his item by item calculations he claimed a market value for the equipment in excess of the debt against it of $73,800.00. Parton's business was relatively small and his accounting records were meager. According to his income tax returns his record of profits (or loss) was as follows:

1954	$19,865.90	
1955	12,088.14	
1956	25,409.03	
1957	1,633.41	
1958	9,414.22	Loss

His loss in 1958 was explained by him as due to the cost of building new haul roads and of doing other road work in that year. The suit brought against him **[*867]** by the Trustees of the UMW of America Welfare Fund would also tend to cause the postponing of production of coal as distinguished from preparation work.

Parton's testimony is that he was persuaded in 1954 to sign the printed form modifying and supplementing the National Bituminous Coal Wage Agreement of 1950 by UMW Field Representative Les Jones, after several visits by Jones to his mine and home and under a threat by Jones that if he did not sign the "Jones boys" would "come around" **[**151]** and after advising Jones that he was signing it because he "did not want to get anybody hurt and get my equipment tore up." He was never given a copy of the basic contract containing the wage scale and other information. He paid his employees whatever was agreeable and later the Walsh-Healey prevailing wage scale. None of Parton's employees were at any time members of the UMW; no employee was given a so-called hospital card or received benefits from the UMW of America Welfare and Retirement Fund. Parton testified he had no contract with any UMW representative except with Jones who at irregular intervals requested Parton to make a token payment to the Welfare Fund. Parton sent in no tonnage reports to the Fund. He testified that Jones told him he could pay what royalty he could, "that's the way most of them do."

This testimony is not contradicted by any witness in position to know any of the facts. It is corroborated by the testimony of other plaintiffs in this case that they were persuaded by threats to sign the papers and were advised by one or the other of the UMW field representatives that they pay what they could to the Welfare Fund.

Dean Coal Company

Dean Coal Company **[**152]** was organized in 1954 as a coal stripping and augering business in the vicinity of Straight Fork in Scott and Campbell Counties, Tennessee. Ralph Ross and Paul Ross were the owners and were jointly in charge of the operations of the company until the formation of a second operating division in May, 1956. From that time until the end of 1958, Ralph Ross operated the division known as Dean or Dean No. 2, which operated in the vicinity of Straight Fork. Paul Ross operated the division known as Fork Mountain, or Dean No. 3, in the vicinity of Fork Mountain, Tennessee. At the end of 1956 the Dean operation, or Dean No. 2 continued as the operating unit of the corporation and the Fork Mountain, or Dean No. 3 division was separately incorporated as Double Camp Mining Company. From that time, Ralph Ross has been in charge of the operations of the Dean Coal Company and acquired the stock interest in Dean Coal Company previously held by Paul Ross.

The Company evaded the efforts of UMW organizers to obtain an authorized execution by Dean Coal Company of the National Bituminous Coal Wage Agreement. However, Paul Ross signed one of the supplements in 1954 as "lessee" covering the operation **[**153]** listed on the contract as Dean Coal Company at Dean, Tennessee, and he signed another one of the supplements in 1956 as "partner" covering the Dean Coal Company at Fork Mountain, Tennessee. In the meantime, and up until 1959, Ralph Ross was visited several times by UMW Field Representatives Daniel and Maddux, who tried but failed to persuade him to sign the Agreement on behalf of Dean Coal Company and pay only what he could to the Welfare Fund. The corporation did not recognize this Agreement and did not check off dues or make payments to the Welfare Fund. It was threatened with litigation over the Welfare Fund royalties, after which it maintained a reserve on its account in anticipation of potential liability. However, the Trustees never sued Dean Coal Company.

Most of the coal of Dean Coal Company was sold to TVA on term and spot contracts. The financial records of the two operating divisions were separately maintained during the period of concurrent operations so that the profit-making ability of the division operated by Ralph Ross can be separately calculated. It is now **[*868]** the only operation of Dean Coal Company and has been since 1959. The annual profits and losses **[**154]** of Dean Coal Company (or division) as reported for federal income taxation was as follows:

1955	$32,407.22	
1956	31,710.20	
1957	17,226.84	
1958	2,469.32	Loss
1959	37,531.47	Loss
1960	13,249.94	Loss
1961	1,233.39	
1962	13,441.38	

The 1958 loss is explained by Ross as having been caused in part by a heart attack which disabled him in early October, low sales prices and unusually high equipment repair costs.

On March 16, 1959, a UMW motorcade of approximately 100 cars, led by Field Representatives Prater and Daniel, came to the hollow where the Dean tipple and loading facilities were located and told the foreman and a truck driver that they were shutting the mine down and not to bring any more coal down from the strip pit. Prater and Daniel told them that they had shut down the mine of U. R. Arnold, which they had visited that morning with the same motorcade, and the operations of Gilchrist, Randolph and Snyder and that "they were going to stop the rest of them." The foreman sent for the stripping crew as ordered by the UMW representatives, and Prater and Daniel made speeches to the assembled employees. Some of them joined the Union the next day **[**155]** and started drawing weekly grocery allowances from the Union.

The operations of the company were discontinued until April 30, 1959 when Ross sent word to the men that he would undertake to resume work the following week. This was the date that the restraining order was issued by the United States District Court for the Eastern District of Kentucky, mentioned above in connection with the Parton claim. On Monday, June 1, 1959, when the mining crew went to work they found twenty-six sticks of dynamite on the auger "that had not gone off." Later that month the railroad trestle leading to the Dean tipple was burned and the following evening the automobile occupied by some of the employees leaving work was struck by rifle fire. Only about one-half of the former Dean employees came back to work during the 1959 working season. Although a rival union prevailed in an election held later in 1959, it was not until 1961 that the company was able to recover from the interruptions, disorganization and other trouble and to assemble a full crew of employees.

About two years later, in 1961, two of the Dean employees who had joined the Union in 1959 confessed that they had placed the dynamite on **[**156]** the auger at the direction of Field Representative Prater and UMW Local President, George Cross, on Sunday, May 31, the same afternoon that the equipment of Double Camp Mining Company, owned by Paul Ross, was destroyed by dynamite explosions some fifteen or twenty miles away.

Damages

UMW is liable for damages to the plaintiffs, Dean Coal Company and Parton Coal Company, resulting directly and proximately from its wrongful acts hereinbefore set out. These plaintiffs were entitled to operate their businesses without tortious interferences by the defendant. Hutton v. Waters, 4 Higgins 582, 583, 589 (1914 Tenn. Ct. of Civil Appeals); *Lann v. Third National Bank in Nashville, 198 Tenn. 70, 277 S.W.2d 439*; *Love and Amos v. UMW, 53 Tenn. App. 37, 378 S.W.2d 430, 437 (1963)*; *UMW v. Meadow Creek Coal Co., 263 F.2d 52, 63* (C.A. 6). Twenty-three witnesses, persons in a position to know, testified of the violence and extreme fear created by such violence that was caused by the organizational activities of UMW. Defendant breached a duty owed to them under the Tennessee common law when it wrongfully and unlawfully, through violence and fear, interfered with their operations. **[*869]** **[**157]** See *White Oak Coal Company v. UMW, 318 F.2d 591, 600-601* (C.A. 6).

HN12[] It is a violation of Tennessee law to interfere maliciously or intentionally with the business and contractual relations of another, except under certain circumstances and for certain purposes. It is not a violation of state law for a union intentionally to cause harm to an employer in interrupting its business and contractual relations by peaceably inducing its employees to go on strike for the purpose of obtaining better wages and working conditions.

It is the acts of violence that result in damages to the plaintiffs' property or business which are the basis of a state law claim. *International Union v. Wisconsin Board, 336 U.S. 245, 253, 93 L. Ed. 651, 69 S. Ct. 516*.

HN13[] A union has the right under state law to induce employees by fair persuasion to withhold their services from an employer in order to obtain a collective bargaining agreement. Restatement of Torts, Vol. 4, Sec. 798.

By fair persuasion is meant argument, exhortation or entreaty addressed to a person without threat of physical harm. Restatement of Torts, Vol. 4, Sec. 779.

A union has the right under state and federal law to induce employees to leave **[**158]** their work and to remain away from their work by paying or by giving such employees strike benefits or other moneys or things of value. *Restatement of Torts, Sec. 798, Comment a*, Sec. 20 Clayton Act, *29 U.S.C. § 52*, *Sec. 4* Norris-LaGuardia Act, *29 U.S.C. § 104*.

These suits are against a Union which is an association of individuals and is not against any individual person. ***HN14***[] Necessarily, any acts performed by the Union were done by its individual officers, agents or members. The defendant Union would not be liable for any act merely because it was done by a member of the Union, for union membership alone does not constitute the member an agent of the Union. *United Brotherhood v. United States, 330 U.S. 395, 406-7, 91 L. Ed. 973, 67 S. Ct. 775*.

HN15[] The mere fact that a member of the defendant Union is an officer in a Local Union affiliated with the defendant Union does not, in itself, constitute such Local Union officer an agent of the defendant Union and in the absence of evidence establishing such agency, the defendant Union is not responsible for any acts performed by such Local Union officer. *Garmeada Coal Co. v. UMW, 230 F.2d 945* (C.A. 6).

It is admitted by the defendant that **[**159]** William Prater, Ed Daniel and Ed Ross were, during the period involved in these cases, employed as Field Representatives of District 19 of the defendant Union and as such were agents of the defendant Union. Under these circumstances the Court is of the opinion that defendant Union is responsible for acts performed and instigated by these agents in the course of their employment.

HN16[] The custom or traditional practice of the Union can be the source of actual authorization of an agent to act for and bind the Union. *United Brotherhood v. United States, supra, at 410*.

If the Union was guilty of causing harm to plaintiffs' businesses, under circumstances whereby either the object or the means was illegal, the defendant would be liable for the entire resulting damages. See *Carpenters Local 131*

v. Cisco Const. Co., 266 F.2d 365 (9 Cir. Wash. 1959); United Mine Workers of America v. Osborne Mining Co., 279 F.2d 716 (6 Cir. Tenn. 1960).

The interruption and other losses sustained by Dean Coal Company and Parton Coal Company were caused by violent conduct carried on by UMW members and instigated by officials Prater, Daniel and to a lesser extent, Ross. Among the state laws violated were Code **[**160]** Section 39-2805 prohibiting the willful **[*870]** traveling, riding or walking through the country or towns, to the disturbance of the peace or to the alarm of the citizens for the purposes of, among other things, terrorizing any citizen or causing through threats or intimidation or other improper means any citizen not to do any lawful thing and Section 39-2303 prohibiting persons from obstructing a public or private road.

It is established by the evidence that Dean Coal Company, as operated over a period of more than ten years by Ralph Ross in substantially the same location and conditions, was and is capable of making during normal years substantial profits.

Parton Coal Company, of which W. R. Parton is the owner, suffered damages due to the unlawful and wrongful acts of the defendant. Damages from loss of his equipment amounted to $65,000.00. The business was making a profit, or capable of making a profit of at least $15,000.00 a year over a period of several years. He sustained losses of profits for the years 1959, 1960 and 1961 on the basis of $15,000.00 a year, or a total of $45,000.00 in lost profits.

The Court, therefore, fixes the compensatory damages at $45,000.00, **[**161]** plus $65,000.00, or a total of $110,000.00.

Parton is entitled to punitive damages on account of the oppressive, wanton and unlawful acts of the defendant, in the amount of $50,000.00. The Court fixes the total amount of damages of the Parton Coal Company at $160,000.00.

Dean Coal Company suffered an operating loss in 1959 on account of the wrongful and unlawful acts of the defendant of $37,537.47 and an operating loss in 1960 of $13,249.94, or a total operating loss of $50,787.41. Dean made a profit in the year 1955 of $32,000.00, in 1956 of $31,000.00 and in 1957 of at least $17,000.00. There is proof supporting a total loss of profits for 1958-60 of $17,000.00 a year, or a total of $51,000.00. Dean, therefore, suffered compensatory damages in the amount of $101,787.41.

In addition, Dean Coal Company is entitled to punitive damages on account of the oppressive, wrongful and unlawful acts of the defendant in the amount of $50,000.00, making a grand total of $151,787.41.

The costs of the consolidated cases are taxed against the defendant.

State v. Milwaukee Braves, Inc.

Supreme Court of Wisconsin

June 9, 1966, Argued ; July 27, 1966, Decided

No Number in Original

Reporter

31 Wis. 2d 699 *; 144 N.W.2d 1 **; 1966 Wisc. LEXIS 1021 ***; 1966 Trade Cas. (CCH) P71,843

State, Respondent, v. Milwaukee Braves, Inc., and others, Appellants

Prior History: [*1]** Appeal from a judgment of the Circuit Court for Milwaukee County: Elmer W. Roller, Circuit Judge.

Disposition: *By the Court*. -- Judgment reversed, cause remanded with directions to dismiss the complaint.

Core Terms

baseball, league, regulation, team, interstate commerce, commerce, anti trust law, major league baseball, decisions, appears, antitrust, silence, restraint of trade, national interest, exemption, second sentence, monopoly power, franchises, membership, matters, state action, preemption, commodity, monopoly, sports, cases, congressional action, majority opinion, trial court, defendants'

LexisNexis® Headnotes

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

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Wis. Stat. § 133.01(1)*.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Governments > Legislation > Effect & Operation > Prospective Operation

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Governments > Legislation > Effect & Operation > General Overview

HN2[] **Sports, Baseball**

Congress did not intend to include the business of baseball within the federal antitrust laws.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN3[] **Sports, Baseball**

Antitrust exemption does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of league structure, but the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN4[] **Congressional Duties & Powers, Commerce Clause**

While various tests may be used for guidance as to the regulatory power left to the states where congress is silent, the ultimate question is whether the state action conflicts with national policy.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN5[] **Interstate Commerce, State Powers**

Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN6[] **Regulated Industries, Higher Education & Professional Associations**

The regulations of baseball league membership imposed by any state necessarily affect activities of members in other states.

Syllabus

Action by the state of Wisconsin against the corporate owners of the 10 baseball teams in the National League of Professional Baseball Clubs, and against the National League, to enforce *sec. 133.01*, Stats., an antitrust statute.

In 1953 the Boston Braves of the National League moved from Boston to Milwaukee, with the permission of the National League. The team had been purchased in 1945 by assuming an indebtedness of $ 311,000. In the last year in Boston the attendance was 240,000.

Milwaukee had not previously had a major league baseball team, but a new stadium had recently been erected by the county and it was leased to the Braves. Attendance in 1953 reached 1,826,397, and in that year the Braves finished in second place in the League. In each of the next four years, attendance was over 2,000,000, and the Braves finished in third, second, second, and first place, in those years. In 1958, attendance was 1,971,101, and the Braves again won the pennant. Attendance dropped **[***2]** each year thereafter, reaching 1,101,441 in 1961 and 766,921 in 1962. The Braves' final standings were second in 1959, second in 1960, fourth in 1961, and fifth in 1962. Profits before taxes in this entire period exceeded $ 7,500,000.

Late in 1962 a new corporation, controlled and largely owned by a new group, acquired the team and franchise for $ 6,218,480. In 1963 the attendance increased to 773,018 and the team finished in sixth place. In 1964 the attendance increased to 910,911 and the team finished in fifth place.

On October 21, 1964, the board of directors voted to transfer to Atlanta, Georgia. On November 7th the League approved the transfer, but the stadium lease ran to the end of 1965 and the county had begun suit to compel the Braves to fulfill it. The League directed the Braves to play their home games in Milwaukee in 1965. The Braves corporation signed a twenty-five-year lease of a stadium in Atlanta.

In 1965, after the decision to move, attendance dropped to 555,584, and the team finished in fifth place. On or about January 1, 1966, the principal office of the corporation was moved to Atlanta, and the home games have been played there in 1966.

On August 6, **[***3]** 1965, the present action was brought by the state. The complaint described generally the agreements and relationships involved in the organization of professional baseball and alleged that as a result defendants and persons acting in concert with them have monopoly power over major league baseball; that defendants had agreed to an illegal plan to terminate playing of major league baseball in Milwaukee; and that they intended to and would restrain and prevent various types of trade and commerce involved in major league baseball in Milwaukee. The complaint sought recovery of forfeitures, as prescribed by statute, and preliminary and permanent injunctions requiring defendants to facilitate the organization and operation of a major league professional baseball team with Milwaukee as its home, and restraining the Braves from playing home games outside Milwaukee until such required steps had been taken.

Defendants sought to remove the cause to the United States district court for the Eastern district of Wisconsin, but on motion of the state that court remanded the cause to the circuit court for Milwaukee county November 12, 1965. Demurrers were overruled by the circuit court.

After **[***4]** a lengthy trial, the circuit court made findings of fact and conclusions of law. In part they were as follows:

Findings of Fact

"5. The ten corporate defendants are engaged in the business of organizing, promoting and exhibiting professional baseball games played by teams of professional baseball players. Each of said corporate defendants operates a so-called Major League team playing a Major League championship schedule prepared by the defendant, National League. Under said schedule the team of each corporate defendant plays approximately one-half its scheduled championship games in [its home city] and the remainder divided equally at the location of the remaining corporate defendants' principal places of business. During a season the team of each corporate defendant plays an equal number of championship games with the team of each other corporate defendant.

"6. The teams of the corporate defendants are each comprised of professional baseball players, each of whom contracts his services to his employer under a form of contract known as the Uniform Player Contract.

"7. The American League of Professional Baseball Clubs is an unincorporated association comprised of ten **[***5]** corporate members which also organize, promote and exhibit professional baseball games by operating baseball teams which play a championship season schedule of the type described above. The said National League and American League are known as the Major Leagues. Each of the corporate members of each member League of the National Association of Professional Baseball Leagues also organizes, promotes and exhibits professional baseball games in other cities and under the rules of other leagues, these other leagues being known as the minor leagues. All minor leagues are members of the National Association of Professional Baseball Leagues, an unincorporated association. The three unincorporated associations are governed by rules and regulations which recite the interrelation of their activities and the operations of the respective member corporate operators of baseball teams.

"8. Each championship professional baseball game is played on a home ball field of one of the league teams. Each ball field is enclosed from the public, and the public is charged an admission fee to see each game. The visiting baseball team receives a predetermined share of the admission proceeds.

"9. Each team **[***6]** holds a franchise from its respective league to operate a professional Major League baseball club in its franchised territory. The franchise is evidenced by a Certificate of Membership signed by the Major League president. There are ten franchises in each Major League. During the championship season, the corporate defendants do not schedule or play championship professional baseball games with any person to whom the National League has not issued a franchise.

"10. Each of the corporate defendants, including Milwaukee Braves, Inc., has approximately forty professional Major League baseball players under contract. Each of the corporate defendants owns the exclusive right to assign and renew the contract of each such Major League baseball player. Each of the corporate defendants either owns minor league professional baseball teams or has entered into working agreements with such teams, and is thereby able to obtain the services of a large number of minor league professional baseball players.

"11. Each of the corporate defendants plays its scheduled games in accordance with the National League championship schedule. Between January 1, 1953 and December 31, 1965, defendant Milwaukee **[***7]** Braves, Inc. annually played approximately one-half the games scheduled for it on the National League Championship schedule in Milwaukee County Stadium. For each of the years ended December 31, 1960 through 1964, inclusive, the annual receipts of defendant Milwaukee Braves, Inc. and of its corporate predecessor, National League Baseball Club of Milwaukee, Inc., from sales of tickets for such games exceeded $ 1,000,000.

"12. Each of the corporate defendants cooperates with radio and television stations and enters into contracts permitting radio and/or television broadcasting of certain of its championship games. Between January 1, 1960 and December 31, 1964, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., entered into contracts permitting the radio and/or television broadcasting of championship games played in Milwaukee County Stadium. During that period, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., sold the rights to broadcast such games and received therefor substantial sums of money.

"13. The exhibition of Major League championship games attracts **[***8]** widespread public interest and is regularly publicized by newspapers and magazines and is broadcast by network television and radio. The exhibition of Major League baseball is a market separate and distinct from the exhibition of minor league or college baseball games, or other entertainment exhibitions.

". . .

"15. Professional baseball is organized by a series of interrelated agreements among the member teams of the National and American Leagues, between the two Major Leagues, among the minor leagues, and an association of minor leagues, and among the minor leagues. Through these agreements, substantially all relationships among the various leagues, teams, owners, agents and players are regulated.

"16. The corporate defendants are the only members of the National League. No additional members may be admitted to the National League without the unanimous consent of the corporate defendants.

"17. The defendants and the American League and its members are parties to the Major League Agreement.

"18. Defendants and the American League and its members have agreed to and do control the right to employ the services of substantially all present and future professional baseball players **[***9]** of Major League caliber, and have agreed to determine and do determine the time and place of exhibition and broadcast of all Major League games.

"19. The defendants and the American League and its members have agreed to and do prohibit all Major League professional baseball players from contracting to perform and from performing as players during their playing careers otherwise than upon the terms and conditions established by the National League and the American League and its members.

"20. The defendants and the American League and its members have agreed to and do designate and limit the places where Major League professional baseball games may be exhibited to the public.

"21. The defendants and the American League and its members have agreed to and do prevent performances by all Major League professional baseball players and clubs, except upon terms and conditions determined by the defendants and the American League and its members.

"22. The defendants and the American League and its members have agreed to prescribe and enforce and have prescribed and enforced rules and regulations governing substantially all relationships among the various baseball leagues, teams, owners, **[***10]** agents and players.

"23. The defendants and the American League and its members have agreed to establish and have established the office of Commissioner of Baseball, and have agreed to permit him, and have permitted him, to arbitrate disputes and to enforce decisions, in accordance with the terms of the Major League Agreement and the Major League Rules.

"24. The Major League Agreement and the Major League Rules enable the defendants and the American League and its members to eliminate competition between them for the employment of professional baseball players and to prevent persons not parties to that agreement, the Professional Baseball Agreement or the National Association Agreement from engaging the services of professional baseball players.

"25. Over a period of many years, the defendants and the American League and its members have achieved adherence to the Major League Agreement, the Professional Baseball Agreement, and the National Association Agreement of all persons engaged in professional baseball by the use, and threat of use, of practices such as refusing to deal with clubs and leagues not parties to said agreements and excluding from employment as a player any player **[***11]** who failed or refused to submit to or be bound by the terms of those agreements and rules promulgated pursuant thereto. Since the establishment of the American League, all attempts to organize additional Major Leagues have been prevented by the defendants and the American League and its members.

"26. The defendants have agreed to a plan to terminate, and acting together carried out their plan and have terminated the playing and exhibition of Major League baseball games in Milwaukee. The Major League Agreement, the Professional Baseball Agreement, the National Association Agreement, and Rules adopted pursuant to and in accordance with those Agreements, operate to prohibit the establishment of a Major League professional baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds, unless such successor is granted a Certificate of Membership in the National League or the American League. Such agreements and rules prohibit Major League Baseball players from contracting to play Major League baseball in Milwaukee as members of the team of any person (including Milwaukee Brewers Baseball Club, Inc., and

Milwaukee County) not a member of the National League **[***12]** or the American League. By entering into such agreements and adopting such rules the defendants, and the members of the American League, have agreed to and do refrain from scheduling or playing Major League championship baseball games with the team of any person (including Milwaukee Brewers Baseball Club, Inc. and Milwaukee County) who might, without having been admitted to membership in the National League or the American League, organize and prepare to operate a Major League baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds.

"27. In July of 1963 Officers of defendant, Milwaukee Braves, Inc., first became interested in moving the team to Atlanta. This interest continued during the 1964 championship season. The rumors of the defendant Braves' interest in Atlanta printed in the local and national press during 1963 and 1964, adversely effected [sic] attendance at Milwaukee home games during the 1963 and 1964 championship seasons . . .

"28. The exhibition of Major League professional baseball games in the City of Milwaukee has been terminated by the defendants. Major League professional baseball will not again be exhibited in Milwaukee, **[***13]** Wisconsin, until the National League or the American League locates a franchise in Milwaukee.

"29. The Milwaukee Brewers Baseball Club, Inc. and Milwaukee County have each made proper application to the National League and to the American League for membership therein. Each such League has failed or refused to grant each such application.

". . .

"38. The defendants and the American League and its member clubs, the National Association of Professional Baseball Leagues, the member leagues and member clubs of the aforementioned National Association, have an economic monopoly over the exhibition of professional baseball. The Constitution of the National League grants unlimited power and discretion to determine the location of a franchise; provides it no objective standards for determining whether or not to grant a request for a transfer of a franchise, and contains no rules of procedure which would accord the city, county or state from which any such proposed transfer would be made, an opportunity to be heard.

". . .

"40. Over the five year period 1960-1964 on a cash basis the Braves and their corporate predecessors realized total income of $ 836,900. The Braves reported to their **[***14]** shareholders net losses of $ 43,378 in 1963 and $ 45,270 in 1964. Net income from operations was reported as $ 82,393 in 1963 and $ 104,730 in 1964. These net income figures were reduced by interest expense on funds borrowed to purchase the Braves of $ 125,771 and $ 150,000 respectively in arriving at the net loss figures. In 1964 $ 48,800 of expense in connection with relocation of the franchise were charged against income.

"41. Had scouting expenses been capitalized as were player acquisition and development costs as sound accounting methods would require, the Braves would have shown a net income of approximately $ 170,000 in 1963 and $ 151,000 in 1964.

"42. The Braves' net receipts from the sale of radio and television broadcasting rights compare favorably with the net receipts of the defendant clubs that submitted figures to this court.

"43. During the period from 1953 through 1965, the Milwaukee Braves, Inc. and its corporate predecessors had a total home paid attendance of 19,551,163. This was greater than any club in either Major League with the exception of the defendant, Los Angeles (Brooklyn) Dodgers. The average annual attendance for this period in Milwaukee was **[***15]** over 1.5 million. This average was the second highest of any club in either league. The attendance level was 31% more than the average of teams in the defendant National League and 52% higher than the average for teams in the American League. Milwaukee home attendance increased from 773,818 in 1962 to 910,911 in 1964, despite the rumored relocation of the franchise to Atlanta, Georgia. The level of Attendance in 1965 was not representative, due to the fact that the franchise was to be relocated in Atlanta, Georgia for the 1966 season.

"44. The Braves were financially successful during the time it operated a National league baseball club in Milwaukee. Milwaukee has the demographic economic and population characteristics necessary to support a Major League baseball club. Milwaukee has the ability to reasonably support a Major League team.

"45. That expansion of the National League is feasible."

The court also found that a substantial amount of business activity generated by and dependent upon the exhibition of major league games to large crowds, including radio and television broadcasting, has been prevented by termination of major league baseball in Milwaukee.

Conclusions **[***16]** *of Law*

"1. The defendant corporations have violated *Section 133.01 of the Wisconsin Statutes* (1963) in the following respects:

"a. Having agreed among themselves to control and allocate professional baseball players, to assign to the respective corporate defendants exclusive territorial rights and privileges respecting the exhibition of professional Major League baseball games, and to limit the number of members in the National League of Professional Baseball Clubs of which the defendants are all the constituent members, they have now agreed to transfer the site of Major League baseball exhibitions from Milwaukee, Wisconsin, to Atlanta, Georgia, with the result that trade and commerce within the State of Wisconsin have been substantially restrained.

"b. They have combined and conspired among themselves to monopolize the business of Major League professional baseball within the State of Wisconsin.

"2. The National League of Professional Baseball Clubs is and has been the means and instrumentality by which the corporate defendants have engaged in the practices referred to in Paragraph 1 hereof.

"3. By means of the practices outlined in Paragraph 1 hereof the corporate defendants **[***17]** and their counterpart members of the American League of Professional Baseball Clubs have acquired monopolistic control of all available ball players of Major League caliber with the result that the granting of permission from one of the said leagues in the form of a franchise to operate a Major League baseball team is necessary for any person to engage in the business of Professional Major League baseball.

"4. The corporate defendants' monopolistic control of Major League professional baseball requires the defendants to exercise reasonable control and to follow reasonable procedures in the issuance of memberships in the National League of Professional Baseball Clubs and in the definition of sites for baseball exhibitions and as respects the transfer of memberships.

"5. The transfer by the corporate defendants of the franchise in the National League of Professional Baseball Clubs from Milwaukee, Wisconsin, and the refusal to issue a replacement franchise allowing the exhibition of Major League baseball in Milwaukee, Wisconsin, was an unreasonable exercise of the monopolistic control of the business of Major League professional baseball and was in violation of *Section 133.01, Wisconsin* ***[***18]*** *Statutes* (1963).

"6. The refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers Baseball Club, Inc., was a concerted refusal to deal in restraint of trade and commerce within the State of Wisconsin in violation of *Section 133.01, Wisconsin Statutes* (1963)."

On May 5, 1966, the circuit court entered judgment awarding the state recovery from each defendant of $ 5,000 plus costs and disbursements except that recovery from the League was limited to $ 100 costs. The judgment included injunctive relief, the provisions of which are summarized as follows:

Defendants are enjoined from refusing to grant the application for membership in the National League submitted by Milwaukee county or Milwaukee Brewers Baseball Club, Inc., or by some other suitable person interested in operating a National League franchise with Milwaukee as its home; they are required to take action to facilitate the organization and operation of a major league baseball team with Milwaukee as its home beginning in 1967, including the granting of a franchise and the execution of an equitable plan for providing a supply of major league professional **[***19]** players for such team. Unless and until such franchise be granted, defendants are enjoined from playing the Braves' home schedule elsewhere than in Milwaukee county stadium, but this requirement was stayed until May 18, 1966, provided the defendants submit a satisfactory plan for expansion in 1967 to the court by May 16, 1966.

Defendants appealed. Enforcement of the judgment was stayed by the circuit court pending determination of the appeal.

Additional facts will be referred to in the opinion.

Counsel: For the appellants there were briefs by *Ray T. McCann* of Milwaukee, attorney; and *Willkie, Farr, Gallagher, Walton & Fitzgibbon* of New York, New York, attorneys for appellants other than Atlanta Braves, Inc., and *Louis F. Carroll, Bowie K. Kuhn, Louis L. Hoynes, Anthony J. Lynch*, and *Daniel W. Hildebrand*, all of New York, New York, of counsel; and *Winston, Strawn, Smith & Patterson* of Chicago, Illinois, attorneys for Atlanta Braves, Inc., and *Earl A. Jinkinson, Edward J. Wendrow*, and *John W. Stack*, all of Chicago, Illinois, of counsel; and oral argument by *Mr. Jinkinson, Mr. McCann*, and *Mr. Kuhn*.

For the respondent there was a brief by *Bronson* **[***20]** *C. La Follette*, attorney general, and *George F. Sieker*, assistant attorney general; *Robert P. Russell*, corporation counsel for Milwaukee county; *Willard S. Stafford* and *John A. Hansen*, both of Madison, special counsel for the state of Wisconsin; *Steven E. Keane* and *John P. Eppel*, both of Milwaukee, special assistant corporation counsel for Milwaukee county; and *Louis F. Oberdorfer* and *Max O. Truitt, Jr.*, both of Washington, District of Columbia, special counsel for the state of Wisconsin, and oral argument by *Mr. La Follette, Mr. Stafford, Mr. Sieker*, and *Mr. Keane*.

Judges: Fairchild, J. Heffernan, Hallows, and Beilfuss, JJ. (*dissenting*).

Opinion by: FAIRCHILD

Opinion

[*713] **[**8]** It seems crystal clear that under today's structure of organized professional baseball, defendants and the members of the American League have complete power to control participation in major league baseball, and to control the number of teams and the location of their home games; that although the power is shared with the American League, defendants nevertheless have very substantial and effective power of control; that major league baseball, as now carried on, **[***21]** is a business in which large sums are invested, and substantial gains received by players and owners, and that many other business activities are generated by and dependent upon it; that all the continuous interaction which constitutes major league baseball, and which holds the interest and support of the public has for thirteen years reached into Wisconsin, but it now operates entirely outside this state; that defendants have, by agreement among themselves to transfer the Braves, terminated very substantial business activity in Wisconsin, and are totally and effectively preventing its resumption at the present time. On their face, these facts support a conclusion that there is a combination or conspiracy in restraint of trade and commerce, declared illegal by the **[*714]** first sentence of *sec. 133.01*, Stats., as well as a combination to monopolize trade, under the third sentence of the section.

The defense to a charge of violating that section appears to be grounded upon three principal contentions:

(1) *Sec. 133.01*, Stats., does not apply to this type of business;

(2) State regulation of the location of franchises and admission to the League would conflict with congressional **[***22]** policy and unreasonably burden interstate commerce;

(3) If the state has any power to proscribe a decision to transfer a franchise unless reasonably arrived at, the Braves' decision to move from Milwaukee and the concurrence of the other defendants were reasonably arrived at.

1. *Applicability of sec. 133.01, Stats*. It is the contention of defendants that the exhibition of major league baseball games is the supply of a service, not an article or commodity, and that sec. 133.01 prohibits only restraints of trade or commerce in articles or commodities. The claim is that the second sentence in the section restricts the meaning of the first and third sentences.

[9]** There are six sentences in sec. 133.01 (1), Stats., but only the first three need be considered in this context. The first sentence provides:

"Every **HN1**[] contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal."

The second sentence, condensed, provides that every combination, etc., "intended to restrain or prevent competition in the supply or price of any article or commodity . . ." or which "shall in any manner control the price of any such article **[***23]** or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be . . . sold in this state . . . is hereby declared an illegal restraint of trade."

[*715] The third sentence, condensed, provides that every party to any combination, etc., "herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person . . . to monopolize or attempt to monopolize any part of the trade or commerce in this state" shall forfeit for each such offense not less than $ 100 nor more than $ 5,000.

The language is open to the construction that the second sentence is a specific declaration that certain types of combination with respect to the supply or price of an *article* or *commodity* are illegal restraints of trade, but that the first sentence of sec. 133.01 (1), Stats., still embraces other types of restraint of trade not specifically enumerated or described. The third sentence, which imposes a forfeiture, is consistent with this construction, for it imposes a forfeiture on a party to a combination "herein declared unlawful" (first sentence) "or declared to be in restraint of trade" (second sentence). It also suggests **[***24]** broad rather than narrow construction of the section, by imposing a forfeiture on anyone who shall conspire to monopolize any part of the trade or commerce in this state.

The first sentence is identical with ch. 219, sec. 1, Laws of 1893. Sec. 2 of that act imposed a forfeiture for monopolizing or conspiring to monopolize trade or commerce and sec. 5 allowed recovery of damages. The act contained no provision limited to articles or commodities. In the Revised Statutes of 1898, secs. 1, 2, and 5 were combined into sec. 1747e. The second sentence of present sec. 133.01 (1) was inserted by amendment of sec. 1747e by ch. 458, Laws of 1921. There is even less reason for supposing that the second sentence was an exclusive definition of the restraint of trade declared illegal by the first sentence or of the type of monopolization proscribed by the third sentence than if it had been part of the statute when first enacted.

Sec. 133.21, Stats., contains language very similar to the second sentence of sec. 133.01 (1) and provides that **[*716]** any corporation which shall enter into any combination so described, with respect to an article or commodity, shall have its charter canceled. **[***25]** The source of this section was ch. 357, Laws of 1897, later appearing as sec. 1791j-1791m, R. S. 1898. Defendants call our attention to an opinion of the attorney general, 1908 Op. Atty. Gen. 495, stating that a combination of insurance companies seeking to regulate commissions paid to agents did not violate sec. 1791j because an agent's services are not a commodity. No reference was made to sec. 1747e in that opinion.

This court, however, in 1914, pointed out that sec. 1747e, Stats., was taken from the Sherman Act and should receive the same interpretation as that which was placed in the federal act by the supreme court of the United States. [1]

Defendants call our attention to the defeat in 1949 of a bill to amend the second sentence of *sec. 133.01 (1)*, Stats., by adding the words "or service." It appears that there had been a **[***26]** circuit court decision stating, **[**10]** as dictum, that *sec. 133.01 (1)* would not apply to contracts fixing the prices of personal services. Although the defeat of the bill is consistent with defendants' position, we conclude that the insertion of the second sentence in 1921 did not limit the broad language of the first or third sentences to the types of combination described in the second.

Defendants also contend that because of the policy of this court of construing *sec. 133.01*, Stats., consistently with constructions of the Sherman Act, as pronounced by the supreme court of the United States, we should read into our statute the anomalous exemption from the federal act which organized baseball uniquely enjoys. The history of the development of this exemption will be noted elsewhere. Because of such history we do not deem **[*717]** the relevant decisions the type of construction of the meaning of the federal statute which ought to apply to our own.

2. *The power of the state to apply its* ***antitrust law*** *in this instance*. We are dealing with the very fabric of the organization of commercial baseball, the power over participation in this activity which results from the fact **[***27]** that there is an organization, and, in this particular instance, an exercise of such power to the detriment of a community. One of the difficulties in dealing logically with such matters arises from the fact that the leagues have evolved along with the growth of organized baseball and that major league baseball as we know it is inseparable from the existence of leagues, some degree of control over free competition among teams and players, and some limitation of the number and capability of the constituent teams.

For an interesting history of the hundred-year evolution of the "organization" of commercially exhibited baseball, see Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball," resulting from hearings of the subcommittee on Study of Monopoly Power of the Committee on the Judiciary, May 27, 1952.

As part of its conclusion, the subcommittee said, at page 229:

"The subcommittee recognizes, however, that baseball is a unique industry. Of necessity, the several clubs in each league must act as partners as well as competitors. The history of baseball has demonstrated that cooperation in many of the details of the operation of the baseball business **[***28]** is essential to the maintenance of honest and vigorous competition on the playing field. For this reason organized baseball has adopted a system of rules and regulation that would be entirely inappropriate in an ordinary industry."

At least two courts have recognized the unique business character of organized professional sports and the **[*718]** necessity for a league structure. [2] In *United States v. National Football League* [3] it was stated:

"Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

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[1] *Pulp Wood Co. v. Green Bay Paper & Fiber Co. (1914), 157 Wis. 604, 625, 147 N. W. 1058*. See *State v. Lewis and Leidersdorf Co. (1930), 201 Wis. 543, 549, 230 N. W. 692*.

[2] *United States v. National Football League (D. C. Pa. 1953), 116 Fed. Supp. 319, 323*; *American Football League v. National Football League (D. C. Md. 1962), 205 Fed. Supp. 60, 62*, affirmed (4th Cir. 1963), 323 Fed. (2d) 124. See also Professional Sports Act of 1965, Calendar No. 446, Report No. 462, page 12 (Exhibit No. 526).

[3] *Supra*, footnote 2.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete **[**11]** as hard as they can all the time. But it is not necessary and indeed it is **[***29]** unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably." [4]

The state appears to argue that the existence of defendants' power to deprive a community of existing activity in major league baseball plus their exercise of such power with **[***30]** respect to a Wisconsin community is *per se* a violation of our law. The first paragraph of the conclusions of law of the circuit court appears to be in agreement with this contention.

The state argues, additionally, however, that even if monopoly power must be accepted as a concomitant of major league baseball, because of the necessity for league **[*719]** organization, a monopoly has a legal duty to deal reasonably with those who desire to deal with it. The circuit court, as stated in the conclusions of law, agreed, and considered that the transfer of the Braves accompanied by refusal of the league to enfranchise a new Milwaukee team was an unreasonable exercise of monopoly power.

Thus, on this second theory, the circuit court may have recognized the practical necessity of the existence of monopoly power in the members of the major leagues, and have felt that the mere use of that power in depriving a community of major league baseball would not be a violation if the defendants reasonably determined that continued operation in the community would entail losses which would eventually destroy the member club. Evidently the court concluded that the Braves or some other team **[***31]** could have operated profitably in Milwaukee, and the decision to transfer the Braves to Atlanta without enfranchising a new Milwaukee team was an unreasonable one.

But whether unreasonableness of the decision must be or was sufficiently proved or not, or whether the exercise of defendants' power, and resulting destruction of business activity in this state would be enough to constitute a violation in any event, the question arises whether the state law can be applied, either because of the interstate character of the business of major league baseball, or because of such interstate character combined with the unique exemption which such business enjoys under the federal antitrust laws. Because our conclusion on this question disposes of the case, we assume, without deciding, that the findings and conclusions of the circuit court with respect to reasonableness can be sustained. The substantial injury to business activity within Wisconsin caused by the defendants' exercise of their monopoly power is clear, and we assume, at this point, that a violation of Wisconsin law has occurred if our law can be applied.

It is evident that the activity of major league baseball, spread through **[***32]** eight states in the National League and nine states and the District of Columbia in the American **[*720]** League is interstate commerce. Any suggestion to the contrary in 1922 in the *Federal Baseball Case, infra*, has been effectively overruled in the subsequent decisions explaining the exemption enjoyed by organized baseball, hereinafter discussed, and those cases now make it clear that organized baseball is interstate commerce and Congress may therefore regulate it.

Not only are defendants engaged in interstate commerce which involves activity within Wisconsin, but enforcement of the antitrust policy of Wisconsin would directly affect defendants' operations outside the state as well.

[12]** Application of our law to the situation before us would, in essence, require the league to admit a new member club. Although the judgment contains a provision requiring the Braves to return, we view it as an optional alternative to the relief which is more consistent with the policy of an ***antitrust law***, namely expansion in membership when major league baseball is to be extended into new territory. It would be inconsistent with the very policy of an ***antitrust law*** for Wisconsin to **[***33]** insist that the Braves be returned without expansion, because such an outcome would maintain the monopoly at the expense of Atlanta, or communities elsewhere which might

[4] Ibid. at page 323.

seek to have a team. What the circuit court decision says, as we view it, is that as long as it is economically feasible for a major league team to have its home in Milwaukee, defendants must not use their monopoly power to deprive Milwaukee of a home team, but defendants were and still are free to choose whether the Braves should continue in Milwaukee or some new team should operate there.

Because of the nature of the competition within the league and the mechanics of game schedules, it is obvious that expansion in league membership would affect the activities of every defendant, at least to the extent of games between the new and old members at the home location of each, a change in number of games played, and other incidents of scheduling. It also appears that expansion requires a reallotment of available players **[*721]** among all the teams, or some other means of supplying a new team or teams with a sufficient number of players of the requisite ability.

It is clear that in the absence of the antitrust feature **[***34]** of defendants' agreement to remove the Braves (*i.e.*, exercise of monopoly power and agreement in restraint of trade) the state would have no power to prevent or impede the removal of a business enterprise even though such removal injured the interest of the state in preserving business activity within its borders. [5]

The question to be decided under the commerce and *supremacy clauses of the constitution of the United States* is: Does the presence and exercise of monopoly power arising out of the nature of the organization of baseball permit the application of the state's policy in this instance?

The state may, ordinarily, protect the interests of its people by enforcing **[***35]** its antitrust act against persons doing business in interstate commerce, but then, ordinarily, the federal government has an antitrust policy like that of the state. [6] In the case of organized baseball, however, there is no applicable federal ***antitrust law***. The history of judicial action and legislative inaction with respect to organized baseball at leasts suggests a federal policy of approval of the existing structure, and the question readily arises whether there is a conflict between state and federal policy, so that the state policy must yield.

We emphasize that we are dealing here with a decision by the league as to the number and identity of its members (since the real vice of defendants' decision to move the Braves to a different location is the refusal to admit to membership a team with its home in Milwaukee). And **[*722]** a decision by the league on such a matter is a necessary incident of existence as **[***36]** a league.

The baseball exemption from federal antitrust laws was initially determined in 1922 by the decision of the supreme court of **[**13]** the United States in *Federal Baseball Club v. National League*. [7] A league of eight clubs, known as the Federal League, had attempted to become a major league. A settlement of this "baseball war" was reached by agreement among all parties except one club in the new league. It brought suit against the major leagues and others, claiming treble damages because the settlement agreement allegedly violated the Sherman Act.

In an opinion by Mr. Justice Holmes, the court held that exhibitions of baseball were purely state affairs, were not trade or commerce in the ordinarily accepted use of the words, and the interstate transportation of players was merely incidental. [8] This case, of course, involved an aspect of control over participation in major league baseball closely related to the one now before us.

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[5] *Oklahoma v. Kansas Natural Gas Co. (1911), 221 U.S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716*; *Pennsylvania v. West Virginia (1923), 262 U.S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117*; *Toomer v. Witsell (1948), 334 U.S. 385, 68 Sup. Ct. 1156, 92 L. Ed. 1460*; *Hood & Sons v. Du Mond (1949), 336 U.S. 525, 69 Sup. Ct. 657, 93 L. Ed. 865*.

[6] *State v. Allied Chemical & Dye Corp.* (1960), 9 Wis. (2d) 290, 295, 101 N. W. (2d) 133.

[7] (1922), *259 U.S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898*.

[8] See also ***National League v. Federal Baseball Club (1920), 269 Fed. Rep. 681***, for the opinion of the court of appeals of the District of Columbia, affirmed and relied upon by the supreme court.

[*37]** Thirty-one years later the question again reached the supreme court of the United States in *Toolson v. New York Yankees*. [9] This and companion cases were treble-damage actions by players who alleged they were damaged by control of their freedom to participate as players. The short *per curiam* decision (from which two justices dissented) appears to treat *Federal Baseball* as a decision that ***HN2***[] Congress did not intend to include the business of baseball within the federal antitrust laws, to suggest that the court might not have reached the same decision in 1953 as it did in 1922, but to hold that because the business had developed for thirty years on the understanding **[*723]** that it was exempt, any change should be left to Congress where legislation would have only prospective effect. The court also noted that Congress had had the ruling under consideration, but had not seen fit to legislate on the subject.

[*38]** The court's view of the situation was made more explicit in two subsequent cases.

In *United States v. Shubert* [10] (applying the Sherman Act to the performance of legitimate stage attractions), the court said, at page 229:

"In *Toolson*, where the issue was the same as in *Federal Baseball*, the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball* **[***39]** . Instead, '[w]ithout reexamination of the underlying issues,' the Court adhered to *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.' 356 U.S., at 357. In short, *Toolson* was **[**14]** a narrow application of the rule of *stare decisis*."

The baseball cases were also discussed in *Radovich v. National Football League:* [11]

"In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was **[*724]** concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to **[***40]** make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

"The Court was careful to restrict *Toolson's* coverage to baseball, following the judgment of *Federal Baseball* only so far as it 'determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' . . . As long as the Congress continues to acquiesce we should adhere to -- but not extend -- the interpretation of the Act made in those cases. . . .

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business

[9] (1953), *346 U.S. 356, 74 Sup. Ct. 78, 98 L. Ed. 64*, affirming *Toolson v. New York Yankees (D. C. Cal. 1951), 101 Fed. Supp. 93*, *Toolson v. New York Yankees* (9th Cir. 1952), 200 Fed. (2d) 198, *Kowalski v. Chandler* (6th Cir. 1953), 202 Fed. (2d) 413, and *Corbett v. Chandler* (6th Cir. 1953), 202 Fed. (2d) 428.

[10] (1955), *348 U.S. 222, 75 Sup. Ct. 277, 99 L. Ed. 279*.

[11] (1957), *352 U.S. 445, 77 Sup. Ct. 390, 1 L. Ed. (2d) 456*.

claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate **[***41]** error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. . . ." [12]

On July 16, 1965, a report from the Committee on the Judiciary (Senate) stated:

[*725] "The Congress has shown awareness of the problems created by the various decisions of the Supreme Court affecting organized professional **[***42]** team sports and has given consideration to their antitrust aspects for 14 years. In that time approximately 60 bills have been introduced dealing with the status of professional team sports under the antitrust laws. Some of these bills sought to remedy the anomaly under which baseball was held to be outside the antitrust laws while other professional sports were declared within those laws." [13]

Thus it appears that organized baseball enjoys, by reason of long continued reliance on *Federal Baseball* and the policy reasoning of the supreme court that any change should be brought about by legislation, with prospective effect only, an exemption from the federal antitrust laws which no **[**15]** other organized sport enjoys even where the structure and operation of the organization may be similar.

We venture to guess that this ***HN3***[] exemption does not cover every type of business activity to which a baseball club or league **[***43]** might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of league structure, [14] but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it. The type of decision involved in this case, in essence, whether to admit a new member in order to replace an existing member which desired to move to a new area, appears to be so much an incident of league operation as to fall within the exemption.

[*726] If Congress were to provide expressly that these matters were, **[***44]** for the present, to be left free from state as well as federal control, no state would have the power to regulate, reexamine, or review, or find violation of its ***antitrust law*** in decisions made with respect to location or transfer of a franchise or with respect to admissions to membership.

But we do not have an express provision, and the question is whether such intent is to be implied under the circumstances.

One author has described the problem as follows:

". . . The problem is not identical with the ascertainment of the intent of Congress, as that phrase is commonly used in the construction of a given statute. Rather the Court is seeking consistency with the tendency manifested by the relevant action of Congress. Thus it seems fair to say the Court seeks consistency with the policy apparent in federal legislation, so far as the Court can ascertain that policy. The Court has to guess, and in guessing it is likely to conceive that its wisdom coincides with the wisdom of Congress. Where no relevant policy can be perceived, the will of Congress is nonexistent.

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[12] Id. pages 450-452.

[13] Professional Sports Act of 1965, Calendar No. 446, Report No. 462, p. 6 (Exhibit No. 526).

[14] See *United States v. National Football League (D. C. Pa. 1953), 116 Fed. Supp. 319*, holding restrictions imposed by the National Football League on the sale of radio and television rights illegal; Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball," pages 7, 230 (Exhibit No. 7).

"In effect, then, this approach emphasizes the idea that state statutes, having a material relation to interstate commerce, **[***45]** are to fail if they do not fit into the federal legislative policy for such commerce. That scheme of things involves three familiar categories: (1) subjects which are to be free from all regulation, at least for the time being; (2) subjects which Congress has regulated directly or through its agencies; and (3) subjects which Congress desires to be left to the states, at least for the time being. . . ." [15]

The supreme court of the United States has said that:

". . . the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose" but "The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise."

[*727] The court explained further, in a footnote:

"The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed **[***46]** the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the **[**16]** need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority [citing cases]." [16]

The court has also said that ***HN4***[] while various tests may be used for guidance as to the regulatory power left to the states where Congress is silent, the ultimate question is whether the state action conflicts with national policy:

"Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce. *Cooley* ***[***47]*** *v. Port Wardens, 12 How. 299*; *Southern Pacific Co. v. Arizona, 325 U.S. 761, 768*. See Ribble, *State and National Power Over Commerce*, ch. 10. ***HN5***[] Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.

"There is no longer any question that Congress can redefine the areas of local and national predominance, *Prudential Insurance Co. v. Benjamin, 328 U.S. 408*; *Southern Pacific Co. v. Arizona, supra, at 769*, despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause -- a grant of power -- admit of no other result. When Congress enters the field by legislation, we **[*728]** try to discover to what extent it intended to exercise its power of redefinition; here we are closer to an intent that can be demonstrated with assurance, **[***48]** although we may employ presumptions grounded in experience in doubtful cases.

"But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy? The *Cooley* rule and its later application, *Southern Pacific Co. v. Arizona, supra*, the question of congressional 'occupation of the field,' and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of this initial principle." [17]

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[15] Ribble, State and National Power Over Commerce, Columbia University Press (1937), p. 212.

[16] *Graves v. New York ex rel. O'Keefe (1939), 306 U.S. 466, 479, 59 Sup. Ct. 595, 83 L. Ed. 927*.

[17] *California v. Zook (1949), 336 U.S. 725, 728, 729, 69 Sup. Ct. 841, 93 L. Ed. 1005*. See also *Southern Pacific Co. v. Arizona (1945), 325 U.S. 761, 767, 768, 65 Sup. Ct. 1515, 89 L. Ed. 1915*, wherein it is stated: "But ever since *Gibbons v. Ogden* . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. . . . *Whether or not this long-recognized distribution of power between the national*

[*49]** **[**17]** The situation which confronts us is not one where Congress has been silent as to a particular type of regulation in a broad field of interstate commerce, where the proposition may readily be implied that although no need **[*729]** has been found for federal regulation, state regulation of local aspects may be quite appropriate. Rather, here, Congress has remained silent as to regulation of a particular industry, either by imposition of antitrust laws or otherwise, in the face of and seemingly in response to a series of judicial decisions which uniquely and emphatically pose the question to Congress of whether there shall be regulation in antitrust terms or otherwise. This industry has been organized for many years with a structure of which monopoly and restraint of trade are characteristics. The decisions suggest the probability, if not certainty, that the operations of organized baseball are rife with violation of the Sherman Act if it were to be applied, decline to apply the act because of the investment which has been made in reliance upon the belief that the act does not apply and, because of the havoc that retrospective application of the act would cause, call **[***50]** upon Congress to enact whatever regulation for the future it deems wise.

Reports of committees of both houses already referred to [18] show that substantial attention has been given to the question. The fact that Congress will, when motivated, act in response to judicial concern over organized professional sports is shown by its action following a federal court decision holding that certain television practices of the National Football League violated federal antitrust laws. [19] Congress enacted a statute which permits the member clubs of a league in the organized team sports to pool their individual television rights for sale by the league as a package. [20]

[*51]** **[*730]** It is plausibly argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; that the control of the various elements of the structure which would otherwise involve prohibited monopoly or agreement in restraint of trade or commerce is, for the present, to be left completely to those who have that authority under the agreements and rules which cement the structure; that there is to be self-regulation until such time as Congress decides that the public interest requires other control.

Some members of this court, including the writer of this opinion, conclude that the silence of Congress in this context sufficiently implies such policy, and that application and enforcement of a state ***antitrust law*** to decisions of the league as to the location of franchises and membership in the league would conflict with the national policy in this segment of interstate commerce. We deem it unrealistic to interpret **[***52]** these decisions of the supreme court of the United States plus the silence of Congress as creating a mere vacuum in national **[**18]** policy, leaving the states free to regulate the membership of the baseball leagues.

Other members of the court prefer the view that the structure of the leagues, their decisions as to their own membership, location of franchises, and things of that nature, require uniformity of regulation, and since organized

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and the state governments is predicated upon the implications of the commerce clause itself, . . . or upon the presumed intention of Congress, where Congress has not spoken, . . . the result is the same." (Emphasis added); Flynn, Federalism and State Antitrust Regulation (1964 Michigan Legal Publications), wherein the author states on page 199: "What is being suggested therefore is that in the area of concurrent state and federal jurisdiction, state antitrust laws should only be exempted or suspended from operation to the extent that federal antitrust laws are precluded from operation by federal regulatory legislation and antitrust exemptions. To permit application of state antitrust policy where federal antitrust policy is forbidden to tread, would defeat, obstruct, and frustrate the congressional scheme of regulation or defeat a national policy enunciated by an exemption from the federal antitrust laws." Also, Dowling, Interstate Commerce and State Power, 27 Virginia Law Review (1940), 1.

[18] Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball;" Professional Sports Act of 1965, Calendar No. 446, Report No. 462, page 6 (Exhibit No. 526).

[19] *United States v. National Football League (D. C. Pa. 1953), 116 Fed. Supp. 319* and (D. C. Pa. 1961), *196 Fed. Supp. 445* (construction of final judgment).

[20] Public Law 87-331, Sept. 30, 1961, 75 Stat. 732; *15 USCA, Secs. 1291-1295*; H. R. 9096, 87th Congress, U. S. Code Congressional and Administrative News (1961), page 3042.

baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress. [21]

As already pointed out, the operations of each league cover a number of states. Wisconsin is presently concerned over the problem created by removal of a team **[*731]** from one of its communities. Other states (Washington, for example, or Georgia if the Braves had not moved there) have no major league baseball activity but have an interest in the granting of a franchise in some presumably **[***53]** eligible community within them. Texas, one of whose communities has a team, and is therefore not faced with a serious problem of obtaining personal jurisdiction, has an apparent interest in a favorable decision on application by a club in another of its communities. There may well be a limit to the number of teams which can feasibly be included in a major league, and the answer to this question involves the exercise of discretion. There could be an applicant in a community which is economically incapable of supporting a team, and economic feasibility is another issue to be decided. There may well be thought to be a national interest in a wider distribution of available franchises throughout the country, but it may be doubted that a state will be objective in deciding whether that is an appropriate consideration, nor what the answer should be in a given case. If Wisconsin can reach her problem by application of her antitrust statute, other states would have equal standing to apply other types of regulatory rules and procedures, involving differing standards for decision. We have already observed that ***HN6***[] the regulations of league membership imposed by any state necessarily affect **[***54]** activities of members in other states.

It is true that the suggested confusion of state regulation does not appear presently to be a fact, [22] but those who adhere to this view consider that variance in the local interests, and the standards which would be applied, and the impact of a state's action on activities outside its borders are sufficient that we should not read into the silence of Congress permission for the individual states to regulate these matters.

[*732] A majority of this court (though not in complete agreement as to which of the two theories just stated is controlling), conclude that the Wisconsin antitrust statute cannot, because of requirements of the federal constitution, be applied to concerted action by the defendants in moving the Braves from Milwaukee and refusing applications by others for a franchise.

Accordingly the judgment will be reversed and the complaint dismissed.

We **[***55]** must observe, however, that the record in this case emphasizes the existence of a problem, even though the state is powerless to deal with it. The record strongly suggests that the defendants gave little heed to the interests of the Milwaukee community, and to the injury which the move would cause. There ought, we think, to be included in any law which Congress may pass upon this subject some provision which would protect communities, either those who have or hope to have home teams, from arbitrary and unfair dealing.

By the Court. -- Judgment reversed, cause remanded with directions to dismiss the complaint.

Dissent by: HEFFERNAN; HALLOWS; BEILFUSS

Dissent

Heffernan, Hallows, and Beilfuss, JJ. (*dissenting*).

We respectfully dissent from the opinion of the majority and conclude there is neither **[**19]** federal preemption of the Wisconsin law nor is the remedy sought by the state of Wisconsin in this action of a nature that the enforcement of the trial court's order will burden interstate commerce in the sense proscribed by the constitution. The majority

[21] *Graves v. New York ex rel. O'Keefe, supra*, footnote 16.

[22] Cf. *Huron Cement Co. v. Detroit (1960), 362 U.S. 440, 448, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852*.

opinion admits that the operations of baseball complained of clearly violate the well established standards of business behavior **[***56]** prescribed by Wisconsin antitrust statutes. Moreover, the majority opinion specifically subscribes to the trial court's findings that these specific violations of law by organized baseball have caused substantial injury to business activity in Wisconsin.

We are thus confronted with activities carried on by a business enterprise that, in the absence of some immunity, **[*733]** are clearly unlawful. The majority finds that there is such immunity and, alternatively, bases that conclusion upon two reasons: (1) That the silence of Congress evinces a congressional policy that baseball shall be free of all control, state as well as federal; and (2) that any state regulation of baseball is *ipso facto* a burden on interstate commerce, since, by its nature, professional baseball is an area of commerce that can be controlled, if at all, only by uniform rules that in a practical sense can be promulgated by Congress alone. It is noteworthy that the opinion of the majority does not reflect unanimity of its reasons but only the result.

The argument of the majority is that the failure of the Congress to act in the face of the importunings of the United States supreme court is equivalent **[***57]** to a positive declaration of congressional will that baseball should not only be unregulated federally but should also be free of state control. The acceptance of federal preemption under the circumstances of this case appears to be contrary to the past pronouncements of this court. In the recent case of *Chicago & N. W. R. Co. v. La Follette* (1965), 27 Wis. (2d) 505, 512, 135 N. W. (2d) 269, we restated the rule which this court has long followed and which follows the decisions of the United States supreme court on the subject -- that "before pre-emption will be found to exist, that intention of Congress must be clearly manifested."

In *Welch Co. v. New Hampshire (1939), 306 U.S. 79, 85, 59 Sup. Ct. 438, 83 L. Ed. 500*, the United States supreme court stated:

"'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'"

[*734] That being the standard where specific legislation is involved, can **[***58]** there be a less rigorous criterion for the preemption of state police power where our only clue to congressional intent is nonaction? Can we conclude that congressional silence amounts to a manifestation that it is the national policy and the congressional will that baseball be free of *all* regulation? We think not. [1] The majority opinion subscribes to the view "that the silence of Congress in this context sufficiently amounts to an expression of such policy." No authority is quoted for this proposition, nor does a review of the briefs of the appellants reveal the citation of any prior adjudications which hold that we may predicate a policy of preemption upon silence. The most that possibly can be concluded from the failure of Congress to enact some regulation of baseball is that it reveals a congressional complacency with its own policy of nonaction and inertia. Even that is a strained interpretation since the record shows that there have been several unsuccessful attempts to enact congressional regulation **[**20]** which would clarify the attitude of Congress toward the regulation of organized baseball.

[*59]** The supreme court of the United States in *Federal Baseball Club v. National League (1922), 259 U.S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898*, held that baseball was not in interstate commerce and, therefore, not subject to the federal antitrust laws. Subsequent decisions make it abundantly clear that the rationale of *Federal Baseball* is invalid and that, in fact, baseball is in interstate commerce. However, the United States supreme court, relying upon *stare decisis*, has continued to extend the umbrella of protection from *federal* antitrust legislation over the baseball business. Congressional inaction can be construed as acquiescence in the court's interpretation, **[*735]** but this in no way constitutes an expression of intent that Congress shall exclusively occupy the field or that there shall be no control whatsoever. As was pointed out in *Graves v. New York ex rel. O'Keefe (1939), 306 U.S. 466*, footnote 1, 479, *59 Sup. Ct. 595, 83 L. Ed. 927*:

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[1] See *Federal Trade Comm. v. Dean Foods Co. (1966), 384 U.S. 597, 86 Sup. Ct. 1738, 16 L. Ed. (2d) 802*; *Helvering v. Hallock (1940), 309 U.S. 106, 119-121, 60 Sup. Ct. 444, 84 L. Ed. 604*.

"The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters **[***60]** of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority."

The majority opinion, moreover, hypothesizes a conflict between state and federal legislation where none exists in fact. In *Huron Cement Co. v. Detroit (1960), 362 U.S. 440, 443, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852*, the court said:

"'The intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.'"

The United States supreme court in the same case referred to its "teaching . . . which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co. v. Detroit, supra*, page 446.

The majority opinion by construing the silence of Congress as conflicting with the state's **[***61]** policy as expressed in its antitrust laws appears to disregard this admonition.

It seems clear that the proposition that the majority asserts is a novel one without prior foundation in constitutional **[*736]** law and is an express repudiation of the doctrine that there shall be preemption or a superseding of state regulations only by express legislation.

A more difficult problem is presented by the second facet or alternate basis of the majority's opinion. The majority states the proposition, "that the structure of the leagues, their decisions as to their own membership, location of franchises, and things of that nature, require uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress." It is generally stated:

"Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a **[***62]** national interest in the unhampered operation of interstate commerce." *California v. Zook (1949),* ***[**21]*** *336 U.S. 725, 728, 69 Sup. Ct. 841, 93 L. Ed. 1005*.

This argument partakes of the theory that irrespective of congressional action or inaction, there is a certain sphere of interstate commerce within which a state may not operate at all. This area is one in which congressional intent is immaterial. Our federal system envisages the free flow of commerce, in the various meanings of that phrase, from one state to another unhampered by state action. Hence, if our federal political union is to thrive, certain aspects of interstate commerce cannot be interfered with, irrespective of congressional will or the claims of state police power. The majority opinion, as an alternative to the argument based on the manifestation of congressional will, follows this line of reasoning. The majority's approach, however, overlooks the recognized necessity of balancing national interest versus **[*737]** local interest as such interests are juxtaposed in a given situation. As the United States supreme court pointed out in *California v. Thompson (1941), 313 U.S. 109, 113, 61 Sup. Ct.* ***[***63]*** *930, 85 L. Ed. 1219*:

"The Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce."

That case cites numerous instances where the United States supreme court has upheld the exercise of state police power which clearly regulated some phase of interstate commerce. In the same opinion, the United States supreme court, speaking through Mr. Justice Stone, stated:

"It has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce **[***64]** Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints." *California v. Thompson, supra*, page 113.

The court concluded its discussion upholding a California police regulation by stating:

"In any case, until Congress undertakes its regulation, we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation . . . by local authority."

[*738] The majority opinion points out the cavalier disregard of either law or reasonableness in the exercise of the baseball monopoly. We cannot conclude that the state is less able to resist this treatment of its legitimate interests by organized baseball than it is to prevent the entrance into its boundaries of contagious disease, although such disease is carried in interstate commerce. *Morgan's Steamship Co. v. Louisiana (1886), 118 U.S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237*; *Compagnie Francaise v. Board of Health (1902), 186 U.S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209*. The record, as the majority indicates, strongly **[***65]** suggests that the defendant gave little heed to the Milwaukee community and to the injury which the move of the Braves out of Wisconsin would cause. Organized baseball is engaged in a boycott of Wisconsin business. The argument is posed that, although this injury be admitted, for the state of Wisconsin by its decree either to order the **[**22]** Braves team to stay here or to direct the National League to furnish an expansion team would burden interstate commerce, which, if it is to be burdened at all, can be done uniformly only by congressional action. It appears, however, that in view of the particular circumstances of this case, the paramount interest in regulating baseball is a Wisconsin interest, not a national interest. As stated in *California v. Thompson, supra*, page 115:

"Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation."

The National League and the Milwaukee Braves, Inc., saw fit to come within the jurisdiction of the Wisconsin courts, and for thirteen years continued to play its home games in Milwaukee. It is not contradicted that **[***66]** as a result of the Braves' presence in Wisconsin, transportation facilities were expanded, municipal services were augmented, and industries of various types were created **[*739]** or expanded to support organized baseball in Milwaukee. The record shows, and the findings of the court are not disputed by the majority, that the National League baseball team was a profitable enterprise during the time that it was located in Wisconsin. Admitting that the order of the trial court to either return the Braves to Milwaukee or, in the alternative, have the National League furnish an expansion team within a reasonable length of time is to prevent a boycott of Wisconsin commerce, does that factor *ipso facto* constitute a burden on interstate commerce?

We think not. It is well settled that a state may exercise its police powers through such devices as the antitrust laws even though an incidental benefit may be to local commerce, providing that the law or its operation do not discriminate against interstate commerce or disrupt its required uniformity. *Huron Cement Co. v. Detroit (1960), 362 U.S. 440, 448, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852*; *Head v. New Mexico Board (1963), 374* ***[***67]*** *U.S. 424, 83 Sup. Ct. 1759, 10 L. Ed. (2d) 983*; *Cooley v. Board of Wardens (1851), 53 U.S. (12 How.) 299, 13 L. Ed. 996*. There is no intimation by the appellant that the Wisconsin antitrust laws are applied in a discriminatory manner. It is equally clear that state antitrust laws can be enforced concurrently with, or in the absence of, federal regulation. *Watson v. Buck (1941), 313 U.S. 387, 403, 61 Sup. Ct. 962, 85 L. Ed. 1416*; The Commerce Clause and State Antitrust Regulation, 61 Columbia Law Review (1961), p. 1469. Here, the Wisconsin antitrust laws concededly are being applied in exactly the same fashion that they would be applied to a wholly domestic corporation.

Clearly, the order of the trial court imposes some restrictions upon baseball's conduct in interstate commerce, but this dissenting opinion concludes that the valid interests of the state of Wisconsin, which are entitled to protection, outweigh the restrictive effect on interstate commerce that might result from the enforcement **[*740]** of Wisconsin's laws. Under such circumstances, the preemption argument or overriding-national-interest argument should be rejected and the state law sustained. See Constitutional **[***68]** Law, West Publishing Company (1963), 310, 319, reprinting Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stanford Law Review (1959), 208.

The violation of Wisconsin's antitrust laws is apparent and the wrong that has been done to Wisconsin and its citizens is substantial. As the trial court determined in its findings, the unbridled exercise of monopoly by the Braves baseball team will deprive the public and various businesses located in Milwaukee of substantial economic and recreational benefits, [2] and as the **[**23]** court concluded as a matter of law the conduct of the Braves ball club constitutes a violation of Wisconsin's antitrust statutes. The majority in arriving at its conclusion concede the antitrust violation, if the application of the statute is not otherwise barred.

The trial court's order directs that these wrongs shall be rectified by providing, in the alternative, that the **[***69]** baseball team shall either return to Milwaukee or that an expansion team be furnished by the league.

This would not appear to be an onerous burden upon baseball. The direction is merely to return to Milwaukee, where operations have been profitable and where, as a matter of fact, the trial court has found that continued profitable operations are feasible. The trial court also found, as a matter of fact, that expansion of the league is feasible. What the trial court has directed is not the curtailment or burdening of interstate commerce, but its emancipation from the monopolistic practices of baseball. It has directed that baseball, in its dealings with a community where it has prospered for thirteen years, act reasonably. All that is prohibited is the **[*741]** *unreasonable* use of monopoly power. It can hardly be argued that it is in the national interest to preserve a monopoly that may with impunity flout the laws of the state of Wisconsin and injure its citizens and economy. The appellant argues that the affirmance of the trial court's ruling will undermine the very essence of organized baseball. It may well be that baseball as presently operated, above the law, should **[***70]** in some respects be modified, but we conclude that organized baseball underestimates the viability of the national pastime and exaggerates the potential state control that can emanate from an affirmance of the trial court's order. Only in the unique case, as the facts reveal here, where a baseball club in collusion with others unreasonably determines to boycott *in toto* an area previously served would the relief sought by the state of Wisconsin be possible. It is not contended that an antitrust or other regulatory action could be brought where there had not been a prior offering of regular baseball exhibitions.

We are not convinced that for baseball to be successful it must be unlawful. Admittedly, the judgment of the Braves' management (whose wisdom was severely challenged in the course of trial) to leave Milwaukee or for the league to totally abandon the area would be superseded by the affirmance of the order of the trial court. This, however, is a usual result where relief is sought under an antitrust statute. Management decisions are superseded if the compelling public interest so requires. The balance that must be struck in determining whether a state policy burdens **[***71]** interstate commerce is not dependent upon the effect it may have upon the particular item of commerce, but rather upon its impact on the national interest in preserving that commerce in its unregulated form. [3] It is difficult to see that any national interest is served by preserving a flow of commerce that at will **[*742]** violates the laws of one of the states and the legitimate interests of its citizens.

The fact that Congress has not acted would appear to be persuasive reason for the state to act. As pointed out in *Parker v. Brown (1943), 317 U.S. 341, 362, 63 Sup. Ct. 307, 87 L. Ed. 315*, state regulations of interstate commerce are to be upheld "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical **[***72]** difficulties involved, *may never be adequately dealt with by Congress."* (Emphasis supplied.)

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[2] One witness testified that the annual economic benefit to Milwaukee amounted to $ 18,000,000.

[3] *Parker v. Brown (1943), 317 U.S. 341, 362, 63 Sup. Ct. 307, 87 L. Ed. 315*.

Baseball has heretofore successfully evaded all control. In *Federal Baseball,* ***[**24]*** *supra*, it contended, and successfully persuaded the United States supreme court, that it was purely in intrastate commerce and therefore immune from federal regulation. By a process of legal ossification it manages to preserve this immunity, while at the same time it asserts that it is in interstate commerce and therefore immune from state control. We are unwilling to ascribe to our legal system the impotency that the representatives of baseball would confer upon it.

The record shows that the Braves organization is no innocent that has unexpectedly run afoul of an unreasonable state's efforts to preserve its share of a monopoly. The record is rife with evidence that the corporation acted surreptitiously and deceitfully in an effort to prevent a timely exercise of Wisconsin's jurisdiction. The officers of the club represented that no change in location was contemplated when, in fact, the negotiations for that change were substantially complete. The contract with Atlanta contained an exculpatory **[***73]** clause allowing the team to terminate its contract with Atlanta if litigation should force it to remain in Milwaukee. It is apparent that the baseball club contemplated the likelihood **[*743]** of being called to task for its conduct. The defendants have not sustained the burden of showing that Wisconsin's reasonable enforcement of its ***antitrust law*** constituted a prohibited burden upon interstate commerce.

It is difficult to see what national interest is preserved by immunizing this organization from the consequences of its violation of state law. Where, as here, the Congress has failed to act to protect the states from monopolistic predators, it is apparent that in the balance the salutary effect of law enforcement upon local welfare outweighs any spurious national interest that allegedly exists in preserving an unlawful interstate conspiracy that claims freedom from all legal restraints and sanctions.

We would affirm.

Rutherford v. United States

United States Court of Appeals for the Ninth Circuit

August 11, 1966

No. 20,377

Reporter
365 F.2d 353 *; 1966 U.S. App. LEXIS 5207 **; 1966 Trade Cas. (CCH) P71,859

Robert E. Rutherford, Appellant v. United States, Appellee.

Disposition: [1]** Affirmed.

Core Terms

antitrust, immunity statute, anti trust law, False Claims Act, proceedings, immunity, milk, action for damages, grant immunity, civil damages, questions, damages

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Evidence > Privileges > Self-Incrimination Privilege

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN1[] **Antitrust & Trade Law, Exemptions & Immunities**

The immunity granted by 15 U.S.C.S. § 32 applies to testimony elicited in any proceeding, suit, or prosecution under the antitrust statutes.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

See 32 Stat. 903-904 (expired June 30, 1904).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN3[] Antitrust & Trade Law, Exemptions & Immunities

A civil antitrust damage action constitutes enforcement of the antitrust laws and is a proceeding or suit within the meaning of *15 U.S.C.S. § 32*.

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > General Overview

Evidence > Privileges > Self-Incrimination Privilege

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN4[] Self-Incrimination Privilege, Immunity

Where the proof necessary to sustain two claims is substantially identical and testimony is not separated as between the two claims, it must necessarily be assumed that all of the testimony is germane to the antitrust claim and is therefore protected by *15 U.S.C.S. § 32*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Evidence > Privileges > Self-Incrimination Privilege > General Overview

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > Privileges > Self-Incrimination Privilege

HN5[] Antitrust & Trade Law, Exemptions & Immunities

A trial court determination that, because of the similarity between a non-antitrust claim and a joined antitrust claim, all testimony received in the case will be conclusively presumed to be germane to the antitrust claim and therefore protected by the immunity statute, *15 U.S.C.S. § 32*, is in actuality a ruling in favor of a witness seeking to safeguard his *U.S. Const. amend. V* privilege against self-incrimination. It is not necessary for such a witness to obtain appellate confirmation of such a ruling, through the expedient of contempt proceedings, for acquiescence in such ruling, and the giving of testimony subject to the immunity thus afforded, is binding upon all federal and state prosecuting officials.

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > Compelled Testimony

Evidence > Privileges > Self-Incrimination Privilege

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > General Overview

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > False Statements Under Grant of Immunity

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > Scope of Immunity

Criminal Law & Procedure > Trials > Witnesses > Criminal Records

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN6[] **Immunity, Compelled Testimony**

15 U.S.C.S. § 32 protects a witness against prosecution for crimes based on his testimony in a civil damage suit, other than perjury committed in such suit. This immunity covers any past crimes, including those subsequent to a grand jury proceeding, which may be disclosed by his testimony.

Judges: Hamley, Merrill and Browning, Circuit Judges.

Opinion by: HAMLEY

Opinion

[*354] HAMLEY, Circuit Judge:

In this proceeding Robert E. Rutherford was adjudged to be in contempt of court, and sentenced to imprisonment, for refusing to testify by way of deposition in a pending civil suit. Rutherford appeals, asserting that he was justified in declining to testify on his claim of privilege under the *Fifth Amendment*. We affirm.

Rutherford is an employee of Carnation Company of Washington (Carnation), a distributor of milk and milk products. In March, 1962, he was called to testify before a United States grand jury in connection with an investigation of ***antitrust law*** violations. He refused to waive immunity and was required to testify.

The grand jury returned an indictment charging Carnation, Inland Empire Dairy Association (Inland), and an official of Inland, with a conspiracy in violation of the Sherman Act in the sale of milk and milk products to Fairchild Air Force Base in Washington. All of the defendants were convicted and fined upon their pleas of *nolo contendere*.

Shortly thereafter, the United States commenced a civil suit against Carnation and Inland **[**2]** in the same district court to recover damages in connection with the same conspiracy. The complaint contains two counts. One of these invokes R.S. §§ 3491 and 3492 (1875), 31 U.S.C. §§ 232 and 233 (1964), commonly known as the False Claims Act. The other count is based on section 4A of the Act of October 15, 1914, as added by the Act of July 7, 1955, 69 Stat. 282, *15 U.S.C. § 15a (1964)*, a provision of the Clayton Act.

The Government subpoenaed Rutherford for the purpose of taking his pretrial deposition in this civil suit. He appeared at the appointed time and place but refused to answer questions propounded by Government counsel, claiming his *Fifth Amendment* privilege against self-incrimination. He persisted in such refusal despite the assurance of Government counsel that he had immunity under the antitrust immunity statutes, 32 Stat. 904 (1903), *15 U.S.C. § 32 (1964)*.

Pursuant to *Rule 37(a), Federal Rules of Civil Procedure*, the United States then moved for a court order compelling the witness to testify. The district court denied the motion, holding that the immunity **[*355]** statute did not apply because **[**3]** one of the claims stated in the complaint was founded on the False Claims Act rather than the antitrust laws.

Thereafter, this court decided *Kronick v. United States, 9 Cir., 343 F.2d 436*, involving refusal to testify in a civil suit in which recovery of damages was sought under alternative counts, one based on the Clayton Act, and the other on section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U.S.C. § 489 (1964). On the basis of that decision, the Government moved for reconsideration of its motion made under *Rule 37(a)*.

Upon reconsideration, the district court held that the decision in *Kronick* was dispositive and required the court to set aside the previous order. Holding that Rutherford would be afforded complete immunity under *15 U.S.C. § 32*, the court ordered Rutherford to answer the questions to be then put to him during the taking of his deposition in open court. When the questions were put to Rutherford, however, he again invoked the *Fifth Amendment* and refused to answer. The court then ordered the witness to answer the questions propounded by counsel for the Government, **[**4]** and for Inland, stating that he had immunity. Rutherford again declined to answer on the ground that his answers might tend to incriminate him.

In a formal order entered the next day, the district court adjudged Rutherford to be in contempt of court, and committed him to the custody of the Attorney General for imprisonment for a term of ninety days. Execution of the sentence was stayed pending appeal, it being provided that if the contempt order were sustained on appeal, Rutherford would be afforded an opportunity to purge himself within sixty days thereafter.

HN1[] The immunity granted by *section 32 of 15 U.S.C.* applies to testimony elicited in any "proceeding, suit, or prosecution" under the antitrust statutes. Rutherford urges that a civil damage action brought by the Government pursuant to section 4A of the Clayton Act (*15 U.S.C. § 15a*), does not qualify as a "proceeding, suit, or prosecution" within the meaning of the immunity statute, and that his refusal to testify in this case was therefore justified.

This immunity statute was enacted in 1903 as part of an **[**5]** appropriations act; the entire statute is reproduced in the margin. [1] The appropriation provision of the act, by its terms, expired June 30, 1904, and only the immunity provision has been codified in *15 U.S.C. § 32*. However, this code provision has not been enacted into positive law which makes it necessary, in construing its terms, to resort to the original enactment. *United States v. Welden, 377 U.S. 95, 98-99, 12 L. Ed. 2d 152, 84 S. Ct. 1082, n. 4*.

[6]** The Supreme Court in United States v. Welden, was called upon to consider the **[*356]** applicability of the immunity statute to an investigation conducted by a congressional subcommittee. The Court held that the immunity granted by the statute extends only to judicial proceedings. In arriving at this conclusion, the Court found that the phrase "proceeding, suit, or prosecution" related to the phrase "in the Courts of the United States" in the immediately preceding clause of the act.

Rutherford's argument is based on a similar analysis. He reasons that the phrase "proceeding, suit, or prosecution" should be modified by the word "enforcement" found in the act's introductory sentence. Accordingly, only those actions brought to enforce the antitrust laws would be covered. "Enforcement" as defined by Rutherford would relate only to criminal prosecutions, injunction and investigatory proceedings and not to civil damage actions filed by the Government. He refers to the latter actions as "remedial" only.

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[1] "That ***HN2***[] for the *enforcement* of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts. . . ." 32 Stat. 903-904.

The Government contends that Rutherford's definition of what constitutes an enforcement action is too narrow, and that all of the actions brought by the Justice Department whether **[**7]** criminal or civil should be characterized as enforcement proceedings. It is urged that the antitrust responsibilities are unitary and cannot be divided between civil and criminal proceedings, or between injunction and damage suits.

Rutherford has raised a novel issue: Does the immunity statute apply in a civil damage action instituted by the Government? The defendant in *Kronick v. United States, 9 Cir., 343 F.2d 436*, was a witness in such a Government damage action. This court held that the immunity statute provided the necessary protection against prosecution, but there was no discussion of the issue presented here and no similar contention was raised in *Kronick*. Although the holding in *Kronick* is not dispositive of the question posed by Rutherford, we are of the opinion that the immunity statute was properly invoked in that case and that it is equally applicable in the instant case.

Our holding is based on the conclusion that ***HN3***[] a civil antitrust damage action constitutes enforcement of the antitrust laws and is a "proceeding," or "suit" within the meaning of *15 U.S.C. § 32*.

[8]** These Government damage actions were authorized by Congress in 1955, due in part to a recognition of the large amount of procurement done by the Government, particularly during periods of defense mobilization. The Senate report accompanying the bill which ultimately became *15 U.S.C. § 15a*, contains language which makes it clear that Congress considered private antitrust actions to be of prime importance in the enforcement of the antitrust laws and the nation's antitrust policies. [2]

The Government by statute has been accorded the status of a private party for purposes of instituting damage actions. If private actions generally are viewed as vehicles for enforcing the nation's antitrust laws, it is difficult to conclude that Government damage actions do not also enforce the antitrust laws. Rutherford points out that the Government can recover only actual damages while private claimants are entitled to treble damage awards; this **[**9]** he asserts distinguishes the Government actions from private enforcement proceedings. The omission of a treble damage provision in the statute authorizing Government suits can be attributed to the opinion of Congress that since the Government has the basic responsibility of enforcing the antitrust laws, no special inducement to sue in the form of treble damage awards is necessary. But this distinction does not mean that the Government's actions do not enforce the antitrust laws. [3]

[*357] The argument which Rutherford has constructed is based on a too narrow definition of the concept of enforcement of antitrust laws. This concept does not exclude suits for damages **[**10]** brought by the Government and based on antitrust violations. The fact that the Government's action is one for damages does not therefore preclude the operation of the immunity statute.

Rutherford also contends that, in any event, the immunity statute is inapplicable in the pending Government suit, due to the joinder of a claim under the False Claims Act.

In *Kronick v. United States, 9 Cir., 343 F.2d 436*, we had this to say about a similar problem:

> "Nor does Kronick contend that the immunity provided by *section 32* is inapplicable in the pending civil action because only the second of the two claims involved in the suit invoked the antitrust laws, the first, and alternative, claim being brought under the Federal Property and Administrative Services Act of 1949. Such a contention would be without merit. ***HN4***[] The proof necessary to sustain both claims is substantially identical and Kronick's testimony was not separated as between the two claims. Under these circumstances it must necessarily be assumed that all of his testimony is germane to the antitrust claim and is therefore **[**11]** protected by *section 32*." *343 F.2d at 441*.

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[2] U.S. Code Cong. and Admin. News 1955, pp. 2329-2330.

[3] Fines in criminal antitrust cases are limited to $50,000 and it is often subsequent civil actions which make such conduct truly unprofitable and deter future violations. Inland and Carnation were each fined $20,000 in the criminal prosecution; the Government in its damage action is seeking to recover about $296,000 from these companies.

Rutherford does not appear to challenge the soundness of this statement, but rather, concerns himself with differentiating the *Kronick* case from the instant case. Specifically it is argued that the proof required to establish violations of the False Claims Act is materially and substantially different from the proof necessary to establish antitrust violations, and that the scope and coverage of the laws differ substantially. In support of this proposition, Rutherford relies primarily on the fact that the False Claims Act requires proof of intent to defraud whereas fraud is not an element of an antitrust violation.

But this apparent distinction is too insubstantial to dictate a conclusion different from the one reached in the *Kronick* opinion. The non-antitrust statute in *Kronick* allows recovery for fraud in the disposal of Government property and other transactions; the False Claims Act covers generally the presentation of "false, fictitious or fraudulent" claims to the Government and conspiracies to defraud the United States by such claims. The similarity between the two statutes is significant -- **[**12]** they both involve fraud.

The complaint in the Government's case against Inland and Carnation establishes that both counts are based on the same alleged course of conduct. The antitrust count charges an agreement to fix prices and to submit noncompetitive, collusive, rigged bids on the sale of milk and milk products to Fairchild Air Force Base. In the False Claims Act count, the Government alleges that the defendants submitted noncompetitive, collusive and rigged bids, while representing that they were competitive bidders.

The similarity between the two claims is patent, and the proof required to establish them is virtually identical. To afford Rutherford complete protection it will be conclusively presumed, as in *Kronick*, that the testimony which the Government intends to elicit from Rutherford will be germane to the antitrust claim, thus affording him immunity as to all of this testimony in this cause. [4]

[13]** **[*358]** We hold that the inclusion of a claim under the False Claims Act does not, in this case, render the antitrust immunity statute inapplicable.

Rutherford raises an additional argument to the effect that his refusal to answer the Government's questions was justified because of the possibility that his answers would involve him in crimes committed subsequent to his grand jury testimony. He states that the immunity granted by *15 U.S.C. § 32* extends only to those crimes disclosed by him before the grand jury, which were committed on or before the date of his testimony before the grand jury.

This argument involves a *non sequitur*. Our concern is with the immunity granted by *15 U.S.C. § 32* in the civil damage action and not with the immunity granted Rutherford in the grand jury proceedings. ***HN6***[] *Section 32 of 15 U.S.C.*, as applied in this case, will protect Rutherford against prosecution for crimes based on his testimony in the civil damage suit, other than perjury committed in such suit. This immunity covers any past crimes including **[**14]** those subsequent to the grand jury proceeding which may be disclosed by his testimony. Rutherford's fears that *15 U.S.C. § 32* provides inadequate protection against prosecution for possible past crimes are unfounded, and his argument based on these fears is without merit.

Finally, Rutherford urges that this court should rule that the immunity statute involved in this case is contrary to the *Fifth Amendment* and therefore unconstitutional. In view of the Supreme Court's position regarding the constitutionality of immunity statutes generally (*Ullmann v. United States, 350 U.S. 422, 100 L. Ed. 511, 76 S. Ct. 497*), we think that such a ruling is unwarranted. Nor do we perceive, as Rutherford does, the indication of a new doctrinal trend in matters concerning the *Fifth Amendment* which would undermine the validity of *Ullmann*.

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[4] ***HN5***[] A trial court determination that, because of the similarity between a non-antitrust claim and a joined antitrust claim, all testimony received in the case will be conclusively presumed to be germane to the antitrust claim and therefore protected by the immunity statute (*15 U.S.C. § 32*), is in actuality a ruling in favor of a witness seeking to safeguard his *Fifth Amendment* privilege against self-incrimination. It is not necessary for such a witness to obtain appellate confirmation of such a ruling, through the expedient of contempt proceedings, for acquiescence in such ruling, and the giving of testimony subject to the immunity thus afforded, is binding upon all federal and state prosecuting officials. See *Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 53, 12 L. Ed. 2d 678, 84 S. Ct. 1594*, note 1, 77-79.

Affirmed.

Wash. v. Am. Pipe & Constr. Co.

United States District Court for the Western District of Washington, Southern Division; Western District of Washington, Northern Division; District of Oregon; District of Hawaii; Northern District of California, Northern Division; Northern District of California, Southern Division; Southern District of California, Central Division; Southern District of California, Southern Division

August 22, 1966

Nos. 3157 (W.D. Wash., S. Div.), 6568 (W.D. Wash., N. Div.), 65-266 (D. Ore.), 2360 (D. Hawaii), 9160 (N.D. Cal., N. Div.), 42929 (N.D. Cal., S. Div.), 64-832 (S.D. Cal., C. Div.), 3396 (S.D. Cal., S. Div.)

Reporter

41 F.R.D. 59 *; 1966 U.S. Dist. LEXIS 10194 **; 1966 Trade Cas. (CCH) P71,883

STATE OF WASHINGTON, et al. v. AMERICAN PIPE & CONSTRUCTION CO., et al. WASHINGTON PUBLIC POWER SUPPLY SYSTEM v. AMERICAN PIPE & CONSTRUCTION CO., et al. STATE OF OREGON et al. v. AMERICAN PIPE & CONSTRUCTION CO., et al. STATE OF HAWAII et al. v. AMERICAN PIPE & CONSTRUCTION CO., et al. SACRAMENTO MUNICIPAL UTILITY DISTRICT v. KAISER STEEL CO., et al. EAST BAY MUNICIPAL DISTRICT, et al. v. KAISER STEEL CO., et al. UNITED STATES of America, et al. v. AMERICAN PIPE & CONSTRUCTION CO., et al. CITY OF SAN DIEGO, et al. v. AMERICAN PIPE & CONSTRUCTION CO., et al.

Core Terms

disclosure, depositions, discovery, cases, grand jury, grand jury transcript, antitrust, end-user, plaintiffs', proceedings

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Grand Juries > Indictments > General Overview

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

HN1[] **Grand Juries, Indictments**

Fed. R. Crim. P. 6(e) specifically authorizes government attorneys to use matters occurring before the grand jury, other than its deliberations and votes, in the performance of their duties. This, of course, includes the use by the government of grand jury transcripts in preparing civil cases for trial.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

Civil Procedure > ... > Methods of Discovery > Depositions > Written Depositions

HN2[] Regulated Practices, Private Actions

Under the Publicity in Taking Depositions Act, *15 U.S.C.S. § 30*, all depositions taken on behalf of the government in a private antitrust action are required to be open to the public.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > General Overview

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

Criminal Law & Procedure > ... > Secrecy > Disclosure > General Overview

Criminal Law & Procedure > ... > Secrecy > Disclosure > Judicial Discretion

Criminal Law & Procedure > ... > Grand Juries > Secrecy > Legislative Intent

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN3[] Standards, Particularized Need Standard

A violation of traditional grand jury secrecy may be permitted upon a showing of particularized and compelling need. There is no absolute prohibition against disclosure but rather, the same is left to the judicial discretion of the district court.

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

HN4[] Grand Juries, Secrecy

Disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript in camera before permitting disclosure of relevant testimony therein.

Judges: [1]** Pence, D.J.

Opinion by: PENCE

Opinion

[*60] Decision on Defendants' Motion for Reconsideration of Court's Order on Disclosure of Grand Jury Transcript

and

Alternative Motion for Certification Under *28 U.S.C. § 1292(b)*

PENCE, D.J. :

The government and all other plaintiffs in the above actions have brought **[*61]** civil antitrust suits against the defendants for money damages. In the course of the extensive but consolidated pre-trial discovery hearings found necessary for the expeditious handling of the multitude of cases here involved, the recurring problem of such civil antitrust litigation, viz., the determination of the propriety of release of grand jury testimony for deposition discovery purposes, is again presented to this court for resolution.

After hearings beginning in September 1962, indictments against most of the present defendants were returned on March 10, 1964 by a grand jury in the Southern District of California, charging them with violations of the Sherman Antitrust Act in the manufacture and sale of their several concrete and steel pipe product lines. On March 30, 1964, the defendants named in those indictments plead *nolo contendere.* The judge before whom **[**2]** the pleas were made directed counsel for both the defendants and the government to submit confidential reports to the probation officer for use in preparing a presentence investigation report. Pursuant to those directions, the government prepared and turned over to the probation officer a "Memorandum of Government Relating to the Imposition of Sentences and Fines."

The government admits that the document contained information coming within the purview of the grand jury secrecy provision of *Rule 6(e) of the Federal Rules of Criminal Procedure*. The sentencing judge, in exercise of his discretion, permitted defense counsel to inspect the Memorandum before their clients were sentenced.

Before the termination of the criminal proceedings, six competitor private treble damage suits had been commenced against the corporate defendants who had been indicted, [1] and subsequent to the imposition of sentences, the plaintiffs in those civil actions sought access to the government Memorandum. The judge hearing those suits, on October 6, 1964, ruled that the sealing order on the Memorandum should be vacated and ordered disclosure of the same to the civil plaintiffs as part of discovery proceedings. **[**3]**

On appeal from that ruling, [2] the court sustained (with certain modifications) the district court's order unsealing the Memorandum.

Since the conclusion of the criminal proceedings, the government as well as some 400 "end-user" plaintiffs have filed treble damage actions against the present defendants in all districts in the states of Hawaii, Washington, Oregon and California.

In December 1965, this judge was assigned to sit in all those districts and handle all of the "pipe" cases, both "competitor" and "end-user" wherever filed in the Ninth Circuit, and all "pipe" cases then and thereafter filed in any district have been transferred to my calendar.

On February 28, **[**4]** 1966, over the government's objections, this court by Pre-Trial Order No. 3 (End-User), consolidated all discovery in all end-user cases and as a part of such consolidation ordered the government to cooperate and work in concert with all other end-user plaintiffs in all discovery proceedings.

On June 30, 1966, over strong opposition of defense counsel, this court ordered that in the taking of depositions, counsel for the United States was authorized to (1) suggest to other plaintiffs' counsel subject matters of inquiry for particular witnesses and (2) discuss with other plaintiffs' counsel matters into which the government desired inquiry to be made (including, by inference, authority to apprise counsel interrogating for plaintiffs at any deposition that the testimony of a **[*62]** witness is or may be inconsistent with his grand jury testimony). The order expressly provided, however, that counsel for the government should not refer or otherwise make available to counsel for any other plaintiff a copy of the grand jury transcript or any portion thereof, or extracts or summaries thereof, or reveal to non-government counsel that specific testimony of any witness except to the witness **[**5]** himself.

Defendants have now moved (1) the court for reconsideration of that order on the ground that the order permits disclosure of matters occurring before the grand jury to persons other than attorneys for the government in the performance of their duties, claiming that such disclosure would be in violation of *Rule 6(e) of the Federal Rules of*

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[1] Civil antitrust suits were first filed by competitors as early as March 1963.

[2] *U.S. Industries, Inc. v. United States District Court, 345 F.2d 18, 23 (9th Cir. 1965)*.

Criminal Procedure, or (2), in the alternative, that the court certify the order as appealable pursuant to *28 U.S.C. § 1292(b)*.

HN1[] *Rule 6(e)* specifically authorizes government attorneys to use matters occurring before the grand jury (other than its deliberations and votes) in the performance of their duties. This, of course, includes the use by the government of grand jury transcripts in preparing civil cases for trial. [3]

[6]** ***HN2***[]

Under the Publicity in Taking Depositions Act, *15 U.S.C. § 30*, all depositions taken on behalf of the government in a private antitrust action are required to be open to the public. As indicated above, this court by Section III-B of Pre-Trial Order No. 3 (End User) ordered that all

> "depositions shall be taken by the plaintiffs on a joint basis. Insofar as possible, plaintiffs shall select one counsel to conduct the interrogation of each deponent; provided, however, that counsel for other plaintiffs may also examine any such deponent on any subject on which examination is permitted under this order peculiar to a case or cases in which that counsel is of record. No duplicative examination will be permitted by such other counsel."

By virtue of that order it is conceivably possible that government attorneys could act as interrogating counsel in taking all depositions and, if so, the grand jury transcripts would be available for use by them, and the information in the depositions elicited as a result thereof would become open for use by all plaintiffs. However, it was never the intention of the court that the government counsel would be saddled with the burden of examining **[**7]** all deponents, and it is not necessary that they should carry such a burden.

One of the reasons for this court's order in Section III-B was to limit the number of times a witness could be deposed. Most if not all of the depositions contemplated by the plaintiffs will be of employees, past and present, of the Defendants, including in that term, of course, many of the top administrative officials of the defendant corporations. The tightly timed series of some 50 depositions has already been scheduled and if there is not close cooperation between government and other plaintiffs' counsel in the taking of those depositions, this court's discovery program aimed at bringing the government case to trial in October 1967 and making all other plaintiffs' cases ready for trial within a very short period thereafter, will fail. These are compelling reasons for permitting the government to make suggestions and disclosures to other plaintiffs' counsel within the limits of the June 30, 1966 order.

It is now well settled that ***HN3***[] a violation of traditional grand jury secrecy **[*63]** may be permitted upon a showing of particularized and compelling need. [4] There is no absolute prohibition against **[**8]** disclosure but rather, the same is left to the judicial discretion of the district court. [5] Of the five reasons for preserving inviolate the minutes of the grand jury set forth in *U.S. v. Amazon Ind. Chem. Corp., 55 F.2d 254 (D. Md. 1931)*, and approved by the Ninth Circuit in *U.S. Industries, supra* note 2, *345 F.2d at 22*, only the fourth: "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes", has any possible application to the instant problem, and here, even it is no longer of much weight.

Over two and one-half years have passed since the indictments were returned and pleas entered by the defendants. Over one year has passed since the government Memorandum was unsealed. From the U.S.

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[3] *United States v. Procter and Gamble Co., 356 U.S. 677, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958)*; *United States v. Carter Products, Inc., 27 F.R.D. 243 (S.D.N.Y. 1961)*; *United States v. Pennsalt Chemicals Corp., 260 F. Supp. 171 (E.D. Pa. 1966)*; *U.S. v. Badger Paper Mills, Inc., 243 F. Supp. 443 (E.D. Wis. 1965)*.

[4] *Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395, 400, 3 L. Ed. 2d 1323, 79 S. Ct. 1237 (1959)*; *United States v. Procter and Gamble Co., supra* note 3, *356 U.S. at 683*.

[5] *U.S. Industries, Inc. v. U.S. District Court, supra* note 2, *345 F.2d at 21*.

Industries **[**9]** opinion it would appear that there is very little information now in the government files which was not heretofore disclosed to defendants and defendants' counsel, as well as certain competitor plaintiffs and their counsel (some of whom are counsel for certain plaintiffs in the end user cases). In addition thereto, the government, the party most concerned, for the fourth reason, supra, with the effect of disclosure upon future antitrust and other criminal prosecutions, is here urging that it be permitted to make disclosures within the limits of the court's order of June 30, 1966, supra. [6]

Apparently all of the plaintiffs in these end-user cases are either states, municipalities, or corporations actually or closely akin to quasi-public corporations. What Judge Clary said in the City of Philadelphia case (note 6 at 489), viz.:

> "The unique nature of these cases and this program of discovery must be given considerable **[**10]** weight. These depositions are binding upon all plaintiffs. And most of these plaintiffs--states, municipalities and public utilities--are inherently charged with the duty to protect wide-range public interests."--

is just as true in the cases now before this court, and the compulsive joinder of the government with the other plaintiffs in all discovery adds to that uniqueness. If the discovery program is to proceed with the speed and efficiency demanded, there is a compelling need for the disclosure requested. Such disclosure is also required in furthering the vigilant enforcement of the antitrust laws allegedly here applicable to these defendants. The Ninth Circuit has already put its stamp of approval upon the release of grand jury information in support of liberal discovery rules. [7]

It is **[**11]** now well settled that ***HN4***[] disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, [8] and it is no longer necessary in **[*64]** every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein. [9]

As indicated above, this multiple litigation was referred to a single judge to conserve the time, energy and cost of the litigants and the court through coordinated, efficient and economic administration as well as speedy resolution of pretrial discovery and other problems of multiple litigation. In the implementation **[**12]** of these objectives, here this court sees a "particularized need"--certainly for the plaintiffs and the court--for the lifting of the secrecy of the grand jury proceedings in the limited and discreet manner requested by the plaintiffs and heretofore authorized by this court in its bench ruling and order of June 30, 1966--without thereby inferring that no fuller disclosure or use of the grand jury transcript might not be permitted upon proper showing of need therefor.

In view of the court's determination of the need for the limited discovery authorized here, as well as the liberality of disclosure of grand jury information authorized by *Olympic Refining, U.S. Industries and Dennis, supra*, [10] this court finds no merit in defendants' alternate motion that this court's order of June 30, 1966 include a statement certifying said order as appealable pursuant to *28 U.S.C. § 1292(b)*. The court does not see that there is any reasonable

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[6] Cf. *City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 486 (E.D. Pa. 1962)*.

[7] *Olympic Refining Co. v. Carter, 332 F.2d 260, 264 (9th Cir. 1964)*, cert. denied November 9, 1964, ***379 U.S. 900, 85 S. Ct. 186, 13 L. Ed. 2d 175***; *U.S. Industries, Inc. v. U.S. District Court, supra* note 2.

[8] *Dennis v. U.S., 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973* (June 20, 1966), note 15; *Atlantic City Electric Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963)*; *U.S. Industries v. U.S. District Court, supra* note 2; *Olympic Refining Co. v. Carter, supra* note 7.

[9] *Dennis v. U.S., supra* note 8.

[10] See also Denis McInerney, Discovery and Use of Grand Jury Minutes, 1966 ***Antitrust Law*** Symposium, CCH Trade Reg. Rep. 91, 104-08.

"ground for a difference of opinion" on the necessity for and lawfulness of the disclosure here authorized by the court.

[13]** Defendants' motions are denied, without argument.

Malco Mfg. Co. v. Nat'l Connector Corp.

United States District Court for the District of Minnesota, Fourth Division

September 13, 1966

4-61 Civ. 243

Reporter
1966 U.S. Dist. LEXIS 7220 *; 151 U.S.P.Q. (BNA) 255 **

MALCO MANUFACTURING COMPANY et al. v. NATIONAL CONNECTOR CORPORATION

Core Terms

terminal, patent, connector, sleeve, pin, dimension, transverse, aperture, infringement, gripping, shank, locking, insulating, assembly, notches, novelty, baseboard, bushings, blocks, self-locking, spacing, electrical, metallic, molded, prior art, female, manufacture, utilization, invention, electronics

Counsel: **[*1]** WILLIAM MARSHALL LEE, ROY E. HOFER, and HUME, GROEN, CLEMENT & HUME, all of Chicago, Ill., and H. DALE PALMATIER, Minneapolis, Minn., for Malco Manufacturing Company and Malco Manufacturing Company, Inc.

ERWIN C. HEININGER, JACK GUTHMAN, and MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT, all of Chicago, Ill., and LOWELL F. HAMMOND, Broadview, Ill., for Amphenol-Borg Electronics Corporation.

JOHN D. GOULD, ROBERT T. EDELL, and MERCHANT, MERCHANT & GOULD, all of Minneapolis, Minn., for defendant.

Opinion by: NORDBYE

Opinion

[256]** NORDBYE, District Judge.

FINDINGS OF FACT

1. Plaintiff Malco Manufacturing Company is a partnership comprising Margaret R. Just, the wife of Alex Just, and Rosemary Winters and Lynne Carole Stoneberg, Mr. Just's married daughters, all of whom are residents of the County of Cook, State of Illinois, hereinafter sometimes referred to as "Malco partnership". Mr. Alex Just, at all relevant times up to his death in April 1963, was a member of and the operating head of the Malco partnership.

2. Plaintiff Malco Manufacturing Company, Inc., is an Illinois corporation having its principal place of business at 4025 West Lake Street, Chicago, Illinois, hereinafter **[*2]** sometimes referred to as "Malco corporation". It was formed in April, 1963, and became the operating company taking over most of the functions of the Malco partnership.

3. Plaintiff Amphenol Corporation, formerly Amphenol-Borg Electronics Corporation, is a Delaware corporation having its principal office at 2801 South 25th Avenue, Broadview, Illinois, hereinafter sometimes referred to as "Amphenol".

4. Defendant National Connector Corporation is a Minnesota corporation **[**257]** having a regular and established place of business in Minneapolis, Minnesota.

5. By their complaint, plaintiffs charge the defendant with infringement of the following United States Letters Patents:

Patent No	Patentees	Issue Date
2,995,617	Alex Just et al.	August 8, 1961
3,086,074	Alex Just et al.	April 16, 1963
3,136,591	Alex Just et al.	June 9, 1964

Plaintiffs seek an accounting for past damages, an injunction against future infringement, costs and other relief.

6. Defendant, by its answer, denies that the three patents in suit are valid and infringed and alleges patent misuse. Defendant also counterclaims for declaratory judgment declaring the three patents in suit **[*3]** to be invalid and not infringed.

7. Defendant also counterclaims charging the plaintiffs with violations of the antitrust laws of the United States and seeks an accounting for damages. Plaintiffs, by their answer, deny any patent misuse or ***antitrust law*** violation.

8. The accused terminal connectors and terminal connector assemblies of the defendant are of six types, referred to hereinafter as Type A (PX 57 Series). Type B (PX 59 Series), Type C (PX 60 Series), Type D (PX 64 Series) Type E (PX 65 Series) and Type F (PX 66 Series). Each of these terminal connectors and terminal connector assemblies have been manufactured, sold and/or offered for sale within the District of Minnesota and elsewhere in the United States of America and the defendant National Connector Corporation continues to manufacture, sell and/or offer for sale these terminal connectors and terminal connector assemblies. Defendant National Connector Corporation has sold Type A, B, C, D, E and F terminal connectors and terminal connector assemblies for non-governmental uses since the issue date of the patent or patents that each are alleged to infringe. Type A through F terminal connectors and terminal connector **[*4]** assemblies have been offered for sale to the electronics industry in general without restriction as to governmental or non-governmental uses.

9. The Court has jurisdiction over the parties and the subject matter. The issues presented are the validity and infringement of the three patents in suit and the questions presented under defendant's antitrust counterclaim and patent misuse.

10. In the middle of the late 1940's Alex Just founded Malco in Chicago, Illinois. Malco began as a sole proprietorship, but subsequently was converted to the Malco partnership and then into a corporation. Until the development of the inventions covered by the patents in suit, Malco's business was primarily with terminals for the radio, television and telephone industry.

Since the advent of "modern electronics," e.g., electronic computers, electronic telecommunications systems, there has been a long-felt need for multiple terminal connectors capable of making hundreds, thousands, and even tens-of-thousands of individual electrical connections through a single terminal connector. Prior to the inventions of the patents in suit this need had to be met with a composite of "molded connector blocks". **[*5]** Molded connector blocks comprise a plurality of terminals held in spaced relation in a molded plastic block. A plurality of these molded connector blocks held in side-by-side relation by a frame member form a composite of molded connector blocks.

11. Molded connector block composites have been used for many years and are still used by some large electronic companies which have spent millions of dollars in manufacturing and tooling equipment. The molded connector block composites are subject to a number of inherent deficiencies. It is not possible to obtain extreme accuracy of placement of individual terminals in a single connector block because of the shrinkage problem which occurs during molding. The problem is multiplied in the composite because of the inaccuracies introduced due to tolerance accumulations when the molded blocks are individually secured to the large panel or frame. The individual blocks

are also subject to displacement with respect to the other blocks in the frame and provide no flexibility for circuit change since, once the block is molded, it is fixed and terminals which are molded in place must stay there, while others which may be necessary in the future **[*6]** cannot be added in any commercially practical manner. The rack with the molded blocks attached is heavy and subject to warpage. Since the molded blocks themselves are of insulating material they cannot be used as an electrical grounding plane for the entire connector. The blocks themselves are relatively fragile and subject to breaking and chipping.

12. The first patent in suit, United States Patent No. 2,995,617, relates to a self-locking terminal connector comprising a metallic baseboard, a somewhat softer terminal sleeve, and a metallic terminal pin. The terminal pin has an integral connector portion, generally at each end, for connecting to an electrical **[**258]** lead. The pin is mounted in a passage in the sleeve and the sleeve is locked in a receiving aperture in the baseboard through an opposed pressure interference fit.

More specifically, between its connector ends the metallic terminal pin has a gripping shank with a non-round cross-section and a maximum transverse dimension larger than the passage in the sleeve. Preferably, the gripping shank has a rectangular cross-section, the maximum transverse dimension being the width of the gripping shank. When the terminal pin **[*7]** is inserted in the passage in the sleeve, which has been placed in the aperture in the baseboard, the maximum transverse dimension of the gripping shank has a substantial interference fit in the sleeve passage and tends to expand the sleeve within the baseboard aperture. The opposed interference fit between the terminal pin and sleeve causes the sleeve to firmly grip the board at two opposite sides. The terminal pin is firmly held in the sleeve and the sleeve firmly held in the baseboard. The self-locking terminal connectors of the first patent in suit have many advantages, particularly for precision, high density application in complex electronic devices such as computers.

13. A fundamental requirement of non-floating connectors is positive resistance to displacement forces encountered in handling, shipping, wirewrapping, connection and disconnection and environmental shock-loading. Terminal pins of self-locking terminal connectors of plaintiffs' patent No. 1 are rigidly held with respect to their sleeves and baseboards such that they successfully resist all such displacement forces. The terminal pin is resistant to twisting or torque force which could occur, for example, **[*8]** in wire-wrapping operations or environmental shock-loading. The terminal pins also resist forces which tend to tilt them from their perpendicular relation to the baseboard, such as might occur in wire-wrapping or handling. The terminal pin and sleeve are held in the baseboard in a manner that they cannot easily be pushed out of the baseboard, commonly referred to as push-out resistance. Though the self-locking terminal connector has high torque resistance and high push-out resistance, relatively small force is required to insert the terminal pin in the sleeve when assembling the terminal connector in the baseboard. This force is commonly referred to as the "insertion force." Low insertion forces are vital for practical manufacture.

14. Plaintiffs' self-locking terminal connector made possible for the first time the employment of a matrix plate containing large numbers of closely spaced terminal connectors capable of being wired upon the automatic wire-wrap machine of the Gardner-Denver Company. The matrix plate connector is preferred over the molded block type of panel connector, which was the only other available connector which may be automatically wire-wrapped when the **[*9]** patent application herein was filed.

15. Claims 1, 2, 3, 5, 6, 7, and 9 of the first patent are in issue, Claims 1 and 5 being the only independent claims. The specification of the first patent in suit contains a description of the invention adequate to enable it to be practiced by those skilled in the art of electrical terminal connectors. The claims of the first patent in suit are amply supported by the specification of this patent, but they are narrower than the disclosure of the application as originally filed and which remained when the patent was granted. Claims 1, 2, 3, 5, 6, 7 and 9 do not define subject matter which was in public use or on sale in this country more than one year prior to the effective filing date of the first patent in suit.

16. Claim 1 is representative of the independent claims of the first patent in suit and reads as follows:

"A terminal connector for securing in an aperture of predetermined size in a terminal baseboard comprising a terminal sleeve having a passage therethrough and having normal transverse outside dimensions approximately the same as the normal transverse dimensions of said baseboard aperture, a metallic terminal pin having **[*10]** a gripping shank with a maximum transverse dimension having a substantial interference fit in the transverse dimension of said passage, said gripping shank having a minimum transverse dimension substantially smaller than the transverse dimension of said passage, whereby the outside dimension of the sleeve in the direction of the maximum transverse dimension of the pin is expanded to firmly grip the portion of said terminal board defining said board aperture when said sleeve is inserted in said aperture and said pin is inserted in said sleeve."

17. During the prosecution of the first patent in suit some of the application claims were directed to the locking notches in the gripping shank. The examiner rejected these application claims inasmuch as locking notches were shown to be old by the prior art. Applicants acquiesced in the examiner's rejection **[**259]** of these claims and cancelled them so that none of the claims in the first patent in suit are directed to locking notches.

18. The prior art relied upon by the defendant does not contain anything constituting a complete anticipation of Claims 1, 2, 3, 5, 6, 7 or 9 of the first patent in suit. Every terminal connector taught by the **[*11]** prior art lacks one or more of the features required by each of these claims. Nothing in the prior art cited against the first patent in suit shows or suggests the terminal connector defined by Claims 1, 2, 3, 5, 6, 7 or 9 of that patent. The subject matter of these claims is novel and involves invention over the prior art. The subject matter defined by the claims of the first patent in suit has filled a long-felt want and terminal connectors embodying such subject matter have found wide use and commercial success in industry.

19. The subject matter of Claims 1, 2, 3, 5, 6, 7 and 9 of the first patent was not obvious at the time the invention was made to persons having ordinary skill in the art to which said subject matter pertains.

20. Defendant's Type A terminal connector is charged to infringe Claims 1, 2, 3, 5, 6, 7 and 9 of the first patent in suit and responds fully and in every respect to all requirements of each of said claims, and infringes each of said claims.

21. Defendant's Type A terminal connector has a terminal sleeve having normal transverse outside dimensions which are approximately the same as the normal transverse dimensions of the baseboard aperture. **[*12]** The terminal pin has a gripping shank with a maximum transverse dimension having a substantial interference fit in the transverse dimension of the passage in the sleeve.

22. Defendant's Type B terminal connectors are a crimp terminal connector and a solder terminal connector. The Type B crimp terminal connector and the Type B solder terminal connector have terminal sleeves with normal transverse outside dimensions which are approximately the same as the normal transverse dimensions of the baseboard apertures. The terminal pins have a gripping shank with a maximum transverse dimension having a substantial interference fit in the transverse dimension of the passages in the sleeves. Each of these terminal connectors infringe Claims 1, 2, 3, 5, 6, 7 and 9 of the first patent in suit.

23. None of the metallic terminal pins utilized in defendant's Type A and B terminal connectors utilize locking notches, and hence do not have a minimum transverse dimension in the gripping shank which is in the form of locking notches. But although the Court finds that the term "minimum transverse dimension of the gripping shank" as used in the claims of Patent No. 2,995,617 refer to the area **[*13]** of the locking notches rather than to the thickness of the pin, that is, to identify a non-round pin, as plaintiffs contend, the patent does not make any claim of novelty in the locking notches, which element was expressly omitted from the claims at the request of the Patent Examiner when the patent was being processed through the Patent Office. It is the utilization in defendant's Types A and B of a "terminal connector for securing in an aperture of predetermined size in a terminal baseboard comprising a terminal sleeve having a passage therethrough and having normal transverse outside dimensions approximately the same as the normal transverse dimensions of said baseboard aperture, a metallic terminal pin having a gripping shank with a maximum transverse dimension having a substantial interference fit in the transverse dimension of said passage * * * whereby the outside dimension of the sleeve in the direction of the maximum transverse dimension of the pin is expanded to firmly grip the portion of said terminal board defining said

board aperture when said sleeve is inserted in said aperture and said pin is inserted in said sleeve" which is the heart of plaintiffs' novelty in patent **[*14]** No. 2,995,617, and which defendant in its Types A and B series infringes. As reflected in Figures 3, 9, 10, 11, 12, 13 and 14 of the patent drawings, the locking notches are illustrated as part of the gripping shank. These figures and a reading of the specifications would indicate that the locking notches are necessarily embraced in the portion of the claim reading "said gripping shank having a minimum transverse dimension substantially smaller than the transverse dimension of said passage." However, Figures 21, 23 and 24 of the patent drawings do not reflect that the locking notches are the seat of the minimum transverse dimension in the gripping shank. Rather, in these figures the gripping shank has a maximum and a minimum transverse dimenson which does not include the so-called locking notches. The seeming confusion apparently arises because the original patent specifications included the locking notches as part of the patent novelty of the self-locking terminal, and when the novelty of the locking notches claims was omitted at the Patent Examiner's **[**260]** request the specifications were not modified accordingly.

24. Notwithstanding the depicting of locking notches in the gripping **[*15]** shank in some of the patent drawings, no patent was issued thereon, and by reason of the abandonment by the inventors of this alleged phase of the original patent claims, any reference thereto in the specifications or otherwise has necessarily been released to the public. It may be noted that plaintiffs' commercial product of the self-locking terminals, which were on the market before Patent 2,995,617 was issued, contained no so-called locking notches in the gripping shank of the self-locking terminals. By eliminating locking notches and adopting the other main features of plaintiffs' patent, defendant cannot absolve itself from infringement.

25. Defendant's Type C female terminal connector does not utilize a terminal sleeve "having normal transverse outside dimensions approximately the same as the normal transverse dimensions of said baseboard aperture" as required by all of the claims of United States Patent 2,995,617. The gripping shank of the terminal pin of defendant's Type C female connector does not have "a substantial interference fit in the transverse dimension of said passage" as required by all of the claims of U.S. Patent 2,995,617. Defendant's Type C female terminal **[*16]** connector is not the equivalent of the details recited in the claims of U.S. Patent 2,995,617, and plaintiffs are not entitled to a broadening of the claims of this patent under the "doctrine of equivalents" to include defendant's Type C female terminal connector within these claims.

Patent No. 2 - No. 3,086,074

1. The second patent in suit, Just et al., 3,086,074, is entitled "Self-Orientating Terminal Connectors" and allegedly relates to the utilization of square or polygonal-shaped heads on the insulating sleeves to insure proper alignment of the electrical terminal so as to achieve a proper mating between the female connector and a male connector which is plugged into the female. Connectors of the type involved in suit may be either a female connector or a male connector, and the male and female connectors plug together to form what is known as a mated pair. As shown in U.S. Patent 3,086,074, the terminal pin of the female connector is formed from a stamping and comprises a pair of female tines which are adapted to receive a flat male blade. In the ideal situation, the plane of the male blade portion of the male connector will be at a 90 degree relationship with respect **[*17]** to the plane of the female tines of the female connector. While the perfect 90 degree relationship between the male and female terminals is the ideal situation, it is not absolutely necessary that this relationship be maintained and a small deviation, or angular misorientation, is permitted. United States Patent 3,086,074 pertains to the utilization of square heads on the insulating bushings; and to the spacing of adjacent squareheaded bushings so that if the squareheaded bushings are rotated until they contact adjacent bushings, the electrical terminals will still be within the permitted angular misorientation, and a proper mating between male and female connectors can be achieved. United States Patent 3,086,074 refers to this permitted angular misorientation as "the predetermined tolerance of angular orientation".

2.The prior art, Netherlands patent 64,131 and Powell 2,930,020, discloses terminal boards with a plurality of apertures therethrough and into each of which there is mounted a terminal connector comprising a metal contact and an insulating sleeve with an enlarged collar in the form of a regular polygon. The tubular base portion of the insulating sleeve is mounted **[*18]** in an aperture of the sleeve and completely fills the aperture. Although this prior art discloses polygonal heads which touch each other, it would be quite obvious to anyone with ordinary skill in the art, that in terminal boards utilizing hundreds and even thousands of connector sleeves, and in view of tolerance variations, a small space therefor between the polygonal heads would be advisable, and if it was the inventor's concept of novelty in Patent 3,086,074 that the terminal spacing is determined by the aperture spacing, while the aligning head portions maintain the predetermined angular orientation, and therefore Powell did not anticipate invention of the second patent, it seems reasonable that Netherlands 64,131 did anticipate the alleged novelty in Patent No. 2. The fact that Netherlands teaches that the polygonal-shaped insulators should abut does not negative its importance as prior art. The purpose was that after the bushings had been mounted in the proper position, they then could not be rotated unintentionally.

3. In view of the tremendous growth of the electrical and electronics industry in the early 1960's when it became necessary to have many thousands of terminal **[*19]** connectors assembled in a single plate, it was quite obvious that with this confined space and the close proximity of the polygonal heads it was **[**261]** inevitable that the spacing of the apertures in the terminal plates had to be so designed that the polygonal head portions of the sleeves should be so spaced that there would not be a movement thereof which would be so great that it would permit mismating of the male and female connectors. But merely because the polygonal heads do not touch one another in a terminal assembly, does not establish that the assembly was arranged by a predetermined tolerance of angular orientation of the terminal connectors or that the touching of the heads comes within the predetermined angular orientation. The variations in the so-called "predetermined tolerance of angular orientation" are so pronounced that that expression becomes vague and indefinite.

4. The evidence herein is convincing that there is no exact predetermined angle at which mismating will occur, and moreover, any movement of the adjacent square-headed bushings in a terminal board is usually minimal. This seems quite evident not only from the physical evidence in court, but in applying **[*20]** for Patent 2,995,617 the patentees, two of whom were the patentees in the second patent, claimed that the bushings were held so firmly in their apertures that the shanks of the terminal pins would twist before the pins would move in the bushings or the bushings would move in the board.

5. The Court finds, therefore, as to the second patent that it discloses no novelty over the prior art other than the utilization of mechanical skill in the spacing of a multitude of apertures in a terminal board requiring a compactness of bushings and terminal pins in a small area and the recognition of the necessity of some spacing between the polygonal bushings in view of the necessity of replacing damaged bushings. The showing herein is that if a bushing is rotated at a certain number of degrees so that it touches the adjacent bushing or bushings, that fact does not establish that they are spaced by any predetermined tolerance of angular orientation so as to prevent mismating of the male and female connectors.

6. In utilizing the mechanical skill necessary to align the apertures in terminal boards which were to receive the bushings and the connectors in the electrical and electronics industry, **[*21]** it was obvious that in spacing the apertures in the terminal board, the space between them could not be so great that the inserted bushings and the terminals therein could be moved or turned to the number of degrees which would permit mismating of the terminals.

7. It is urged that included in the novelty of the second patent in suit is the idea that in providing a spacing of the heads of the terminal sleeves from one another and when manufacturing tolerances are considered, the sleeves will not interfere with one another to the extent that there will be a bulging or bowing of the base plate, but it seems obvious that if this is a result of the assembled arrangement which the plaintiffs have devised in Patent No. 2, it was a mere exercise of mechanical skill in assembly and not invention.

8. The Court finds that Claims 1, 2, 3 and 4 of the second patent in suit are invalid and plaintiffs have not sustained the burden of proof in establishing that defendant's Types A, B, C, D and F infringe.

Third Patent - No. 3,136,591

1. United States Patent 3,136,591, the third patent in suit, relates to a terminal connector, or header, which is mounted to a vertically extending printed **[*22]** circuit board. The header portion of the printed circuit board

assembly comprises a plate having a plurality of holes therethrough, and in each of which is mounted an insulating sleeve. A metal contact extends through a central aperture in each of the insulating sleeves, with the upper portion of each of the metal contacts bent at a 90 degree angle. The 90 degree portions of the metal contacts extend through apertures in a vertically extending printed circuit board and are soldered or otherwise suitably mounted thereto in contact with the circuitry on the printed circuit board.

2. Claim 1 of the third patent, the only independent claim, reads as follows:

"A terminal connector assembly, comprising a metallic base plate, a printed circuit board mounted on said base plate and extending substantially perpendicular thereto, said circuit board having electrical circuitry thereon, a plurality of apertures formed in said metallic base plate and disposed in at least one row generally parallel to said circuit board, a terminal connector mounted in each of said apertures, each of said terminal connectors including a metallic terminal pin extending through a sleeve formed of relatively **[*23]** soft insulating material and seated in a corresponding aperture, each of said pins having one portion at one end extending generally parallel to said base plate and forming an electrical connection with said circuitry, and another portion at the opposite end **[**262]** for electrical connection into electrical means of which the printed circuitry forms a component."

3. Plaintiffs charge contributing infringement as to the third patent in that the defendant does not manufacture the printed circuit board, but its assembly is made for a circuit board substantially as set forth in Claim 1 of the patent. Types C and D of defendant's terminal connector assembly are charged to infringe Claims 1 and 2 of the third patent. Type E of defendant's terminal connector assembly is charged to infringe Claim No. 1.

4. Defendant's Type C, the male header, and Types D and E, terminal connectors, are sold by the defendant with the knowledge that printed circuit boards are to be attached to the terminal connector assembly. None of defendant's printed circuit boards would ultimately be mounted on the base plate as the patent requires. However, this variance would not absolve the defendant from infringement **[*24]** if Patent No. 3 is valid. The evidence fully establishes a finding, and the Court does find, that defendant's contributing structures achieve the same result as taught by Claims 1 and 2 of Patent No. 3 and in substantially the same manner.

5. The purpose of Patent No. 3 is to provide a high concentration of terminals, but the use of circuit boards was old in the art and the evidence fully justifies a finding, and the Court does find, that the only difference between U.S. Patent 3,136,591, the third patent in suit, and U.S. Patent 3,086,074, the second patent in suit, is that the terminals in the third patent are bent at 90 degrees for connection to a vertically extending circuit board. These two patents were co-pending, but the second patent was filed February 13, 1961, and issued April 16, 1963. The third patent was filed February 12, 1962, and issued June 9, 1964. The bending of the tips of the pin at this angle for connection to a vertically extending printed board was known in the prior art in molded printed circuit board headers, and therefore in the rapidly advancing technique in the manufacture of the high concentration of terminals the bending of the pins at 90 degrees **[*25]** in a terminal connector assembly for a connection to a vertically extending circuit board would seem quite obvious to one with ordinary skill in the art.

6. The Court finds, therefore, that Patent 3,136,591 is invalid by reason of the known prior art and that the alleged novelty therein would be obvious to one with ordinary skill in the art.

7. The defendant contends that Patent No. 3 is invalid since the alleged invention was in public use or on sale in this country more than one year before the date of the application for the patent contrary to the requirements of *35 U.S.C. 102(b)*. This defense is based upon alleged sales to Control Data Corporation on January 18, 1961, but the evidence fairly establishes that this purchase order was for experimental purposes only and that the experiments with respect thereto were not completed until a date less than a year before the patent application was filed on February 12, 1962. The evidence does not sustain the contention of the defendant that a sale in violation of *35 U.S.C. 102(b)* was made to National Cash Register of a printed board header more than a year prior to the filing date of Patent No. 3. Hence the Court finds that Claims **[*26]** 1 and 2 of Patent No. 3 do not define subject matter which was in public use or on sale in this country more than one year prior to the effective filing date of said patent.

8. Although the Court finds that Claims 1 and 2 of U.S. Patent 3,136,591 are invalid, as heretofore stated, it finds that if they are valid, defendant by using and selling the Type C, D and E series contributed to the infringement of said claims and would be, in view of the evidence, a contributory infringer.

Counterclaim of Defendant and Charge of Patent Misuse

1. The defendant, as an additional defense to the charge of infringement of the patents in suit, contends that plaintiffs have engaged in patent misuse and have violated the antitrust laws.

2. On July 1, 1961, Malco and Amphenol-Borg Electronics Corporation entered into an agreement whereby Malco granted Amphenol a fifty per cent interest in various patents, including Patent 2,995,617 and Patent 3,086,704. A fifty per cent interest in the third patent, 3,136,591, was assigned to Amphenol on June 9, 1964.

3. On July 1, 1961, an agreement was entered into between these parties wherein it was agreed that neither party could grant any licenses **[*27]** under the patents above referred to without the written consent of the other, and a supplemental agreement between the parties provided for joint prosecution of patent infringement claims.

4.On July 20, 1961, another agreement was entered into between Malco and Amphenol whereby Malco granted Amphenol the option to purchase an undivided fifty per cent interest in any **[**263]** future patent application which Malco may file on self-locking terminal devices and Amphenol made a reciprocal agreement to the same effect with Malco.

5. Mandex Manufacturing Company is an Illinois corporation which was closely related to the Malco partnership through family ownership by Mr. and Mrs. Alex Just, the latter being the owners of the stock of Mandex, the corporation, and were the principal partners in Malco, the partnership.

6. On June 15, 1961, Malco made an agreement with Mandex whereby the latter company was granted a nonexclusive license to manufacture and sell self-locking terminal devices covered by the agreements between Malco and Amphenol, which covered five pending patent applications including two applications which ultimately matured into the first and second patents in suit herein. In **[*28]** this agreement Mandex was to pay Malco a ten per cent royalty on all net sales of self-locking terminal devices. The agreement provided that any improvements made in such devices by Mandex must be assigned by it to Malco. The non-exclusive license granted to Mandex is non-assignable except to a corporation which acquires Mandex' entire business relating to electrical devices, provided, however, that Alex Just, or other specified persons, have the controlling interest in the succeeding company, and that the succeeding company agrees to be bound by the Mandex non-exclusive contract.

7. The agreement Malco made with Mandex provided that it would terminate if Alex Just and the other persons specified by him ceased to own fifty per cent of the voting stock of Mandex, or in the event of bankruptcy of Mandex, or 120 days after Malco gives written notice to Mandex that the former elects to terminate the agreement, but unless sooner terminated under one of the provisions noted, the non-exclusive license will continue for the life of the last to expire patents. Obviously, however, there has been no attempt to collect royalties from Mandex beyond the date of expiration of any of the patents **[*29]** covered by the agreement.

8. In that Malco and Amphenol are joint owners of the patents covered by the agreement referred to herein and their agreement to the effect that no assignments under the patents would be made by either party without the written consent of the other, it is not an illegal agreement. Under the evidence herein, these joint owners of the patents in suit only safeguarded their rights therein to the same extent as an individual owner thereof. Their agreement in this regard does not violate the patent laws, and there is no evidence that any illegal monopoly has been created, or that any antitrust laws of the United States have been violated, and defendant has failed to establish that any contracts or business understanding or manufacturing arrangements between Malco and Amphenol, or between Malco and Mandex, constitute any patent misuse, or that they violate the antitrust laws, or that the defendant has been damaged in any way by reason of any alleged illegal conduct created by the agreements referred to.

Upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject **[*30]** matter of the issues as raised by the pleadings.

2. U.S. Letters Patent 2,995,617 entitled "Self-locking Terminal Connectors" as to each of the Claims 1, 2, 3, 5, 6, 7 and 9 is in all respects valid.

3. The defendant, under *Section 271, 35 U.S.C.*, by using and selling terminal connectors and terminal assemblies thereof in its Types A and B series, has infringed the claims herein under Patent 2,995,617, but the defendant by using and selling terminal connectors and terminal assemblies in its Type C series has not infringed said patent 2,995,617.

4. Claims 1, 2, 3 and 4 of U.S. Letters Patent 3,086,704 are invalid and defendant has not infringed any valid claim of said patent.

5. Claims 1 and 2 of U.S. Letters Patent 3,136,591 are invalid, but they are not invalid by reason of any alleged sale more than one year prior to the filing date of the patent application for said patent.

6. The Malco-Mandex license was entered into on a voluntary basis and is an agreement between companies closely associated by reason of the persons controlling both companies, and this agreement does not constitute any patent misuse or violate any of the antitrust laws of the United States.

[*31] 7. The agreement between the joint owners, Malco and Amphenol, is not an illegal extension of a patent monopoly.

8. The patent improvement grantback clause in the Malco-Mandex agreement and the Malco-Amphenol option agreement, on this showing, are not illegal.

9. Defendant has not shown that it is a person injured in its business, property, or otherwise by reason of any alleged illegal conduct growing out of the agreements referred to which plaintiff **[**264]** entered into with Amphenol and which it entered into with Mandex.

10.Plaintiffs are entitled to an injunction against the defendant and all those in privity with it enjoining further infringement of Patent 2,995,617, as stated herein, with respect to the Types A and B series of the defendant, and an accounting to ascertain the amount of damages sustained by the plaintiffs as the result of said infringement, and judgment for the damages so ascertained.

11. The determination of costs and attorneys' fees to be allowed herein will be deferred until the further order of the Court.

12. Every Finding of Fact herein which may be deemed a Conclusion of Law is hereby adopted as a Conclusion of Law.

Judgment shall be entered **[*32]** accordingly. Exceptions are allowed.

MEMORANDUM

In that the above Findings of Fact recite in some detail the Court's views as to many of the issues which have arisen in this lengthy and involved patent litigation, this memorandum will be curtailed in length, but some observations should be made which will set forth in some additional detail the Court's views.

First Patent

It seems clear that the first patent in suit amply fulfills the requirement as to novelty, utility and non-obviousness. The immediate acceptance by the electrical and electronics industry of the self-locking terminal connector is highly significant. Its resistance to the forces of wire wrapping and its ability to withstand displacement forces encountered by the industry in ordinary use was immediately recognized by the Government and private concerns. The temptation to use one's hindsight as to obviousness should not be applied to the first patent in view of Oxley, 2,911,460. There, the use of a round shank with the so-called barbs had a central portion substantially the same uniformity in diameter as the aperture which extended through the terminal sleeve. The concept of the Oxley patent did not utilize **[*33]** or suggest an interference fit between the central portion of the shank and the passage of the terminal sleeve. This is particularly evident from the physical exhibits and charts in evidence. Moreover, it may be noted that there is no showing that the Oxley device had any commercial acceptance whatsoever. The other prior art such as Clark, 2,774,812, British, 641,917, and Carlson, 2,919,300, or a combination thereof with Oxley, did not teach or suggest to one of ordinary skill the embodiments of the novelty and utility of the first patent.

Due consideration has been given to *Grapam v. John Deere Co., 383 U.S. 1, 148 USPQ 459*, and *United States v. Adams, 383 U.S. 39, 148 USPQ 479*, and the recent decisions of the Eighth Circuit which have commented upon them. At times the presumption of validity which accompanies the issuance of a patent seems to be but a tenuous support for an inventor when he is faced with an attack on his patent in the courts, but here as to the self-locking terminal connectors, there can be no question as to novelty and utility. That, in part at least, has been amply sustained by the phenomenal acceptance of plaintiffs' invention by private industry and the **[*34]** Government's Polaris program.

The difficulty which confronted the Court primarily with reference to the first patent pertained to the interpretation of the phrase "minimum transverse dimension" of the gripping shank. The Court indicated in its findings the apparent reason for confusion arising in the attempt to reconcile the specifications with the claims of the patent. But, as stated heretofore, where no invention is claimed in the locking notches depicted in some of the drawings by reason of the express direction of the Patent Office, and where it is the gripping shank without the locking notches which is the novelty claimed, and which features were purposely copied by the defendant, it would seem that plaintiffs have amply sustained their claim of infringement. The phrase "the minimum transverse dimension" in the claims of the patent does not enter into the patentees' claims of novelty whether that term refers to the thickness of the pin or the minimum width of the pin in the gripping shank.

In finding that the female contact of Type C of defendant's series does not infringe, it should be stated that the evidence is clear that it is the sleeve that is compressed in Type **[*35]** C - not expanded as taught by plaintiffs' first patent. Thus, the novelty in the Type C series functions in a manner which is opposite to that taught by Patent No. 1. In other words, plaintiff's first patent utilizes a substantial interference fit between the gripping shank of the pin and the aperture of the insulator. The teaching is that thereby the insulator or sleeve is expanded to grip the aperture in the board. Defendant, however, in its Type C series locks the insulator in the board and thereby the terminal pin in the sleeve. Under the circumstances herein, an opposite method of **[**265]** producing a self-locking terminal cannot be said to invoke the doctrine of equivalency. In addition, reference should be made to the locking step on the Type C female connector which locks the insulator in the metal board and the pin in the sleeve - a feature not disclosed in plaintiffs' first patent.

Second Patent

As noted in the Findings, this patent was first held invalid by the Patent Office in view of Powell, with reference to which the Patent Examiner stated, p. 57 of the file history,

"* * * Powell teaches the concept of providing terminal sleeves with polygonal portions 29 to aid **[*36]** in precise orientation of the parts, * * *."

And later, on the same page,

"To provide the insulating sleeves of the publication with polygonal portions to assure proper seating and positioning would be obvious in view of Powell."

And later, on page 58,

"Applicants argue that the Powell teaching of square insulators cannot be applied to the connectors in the publication since the Powell insulators are not aligned by an interference relationship therebetween. It is not exactly understood what applicants mean by 'interference relationship' but at any rate, Powell teaches how to properly align insulators and it is obvious that it is desirable to have the connector insulators shown in the publication properly aligned. Accordingly, to apply the alignment concept of Powell to the publication insulators would not be inventive."

In the file history, it was pointed out by the applicants for the second patent that in Powell when only a few connectors are concerned, the dominant variations may be of little consequence, but where thousands of terminal sleeves are concerned, the tolerance variations make it imperative that the heads of adjacent insulating sleeves be separated an "amount **[*37]** at least equal to the allowable dimensional tolerance of the heads." (p. 63).

Necessity of the separation of the heads in modern plates where a multitude of insulator's were involved was evident at the time this patent application was made. Mechanical skill dictated that.The Patent Examiner stoutly resisted the claims of patentability and it was only after a tortuous road involving redrafted claims and personal visits that the patent was eventually allowed. However, the Court concludes that the Patent Examiner's original views as to Powell are highly pertinent here in this litigation in view of Netherlands 64,131 (not before the Patent Office). The evidence here in this proceeding is wholly insufficient to sustain a finding of patentable novelty in the second patent, and if so it was obvious to one of ordinary skill in the art. In any event, the evidence is wanting to sustain a finding that the defendant directly or indirectly aligns the head portions on its terminal boards to maintain a predetermined angular orientation, or that the terminal boards made by defendant are designed for that purpose so as to stamp it as a contributory infringer.

Third Patent

The alleged novelty **[*38]** of facilitating connection of a circuit board into a basic circuit by bending the pins at a 90 degree angle in light of the prior art did not constitute invention. This patent has not sustained the test of either novelty or nonobviousness.

Alleged Patent Misuse and Antitrust Violations

There is but little that the Court can add to its findings under this phase of the litigation. It may be emphasized again that the Malco-Mandex contracts were between two closely allied concerns and entered into voluntarily with apparent benefits to each of the parties. Whether Mandex or its successor will have any complaints in the future as to the contract provisions is not for this Court to determine. There is an utter absence of any showing as to any patent misuse or any violation of the Sherman Act pursuant to a conspiracy or otherwise which this defendant may utilize for any relief as to it in this litigation.

This memorandum is hereby made a part of the above Findings of Fact and Conclusions of Law.

United States v. Johns-Manville Corp.

United States District Court for the Eastern District of Pennsylvania

September 29, 1966

No. 31791

Reporter

259 F. Supp. 440 *; 1966 U.S. Dist. LEXIS 10453 **; 10 Fed. R. Serv. 2d (Callaghan) 1361; 1966 Trade Cas. (CCH) P71,961

United States of America v. Johns-Manville Corporation

Core Terms

pipe, specifications, prices, deposition, motion to strike, conspiracy, tests, producers, affiant, off-book, no evidence, requests, summary judgment motion, documents, meetings, sales, list price, hydroxide, summary judgment, criminal trial, price-fixing, predatory, promoting, domestic, calcium, foreign-made, injunction, uncombined, cases, bids

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

Evidence of consciously parallel pricing will not alone support a finding of conspiracy under the Sherman Act.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN2[] **Injunctions, Permanent Injunctions**

The remedy of injunction looks to the future. Its "sole function" in antitrust cases is to forestall future violations.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN3[] **Market Definition, Relevant Market**

The United States Supreme Court applies a test of reasonable interchangeability to determine the relevant market in an ***antitrust law*** case.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Any concerted activities engaged in by a party to influence the decision of public officials on legislative matters related to that party's business are constitutionally protected and cannot be the basis of a finding of violation of the antitrust laws, regardless of the intent with which they were undertaken.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN5[] **Antitrust & Trade Law, Exemptions & Immunities**

It is within the province of the trial judge to exclude evidence of lawful activities to establish anti-competitive intent if he finds that it is not probative or is unduly prejudicial.

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

HN6[] **Summary Judgment, Supporting Materials**

Fed. R. Civ. Proc. 56(e) requires that the court's permission be obtained before the record on a summary judgment motion is supplemented by depositions.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > ... > Testimony > Refreshing Recollection > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN7[] **Judges, Discretionary Powers**

Whether opposing counsel may inspect portions of evidence used to refresh a witness's memory is within the discretion of the trial judge.

Judges: [1]** Van Dusen, J.

Opinion by: VAN DUSEN

Opinion

[*444] Memorandum Opinion Sur Motion of Defendant, Johns-Manville Corporation, for Summary Judgment Under *Rule 56* (Document 87)

VAN DUSEN, J..

This case is before the court on the motion of Johns-Manville Corporation (hereinafter J-M or defendant) for summary judgment under *F.R. Civ. P. 56* (Document 87).

On July 25, 1962, the United States Government filed a Complaint under *§ 4* of the Sherman Anti-Trust Act (*15 U.S.C. § 4*) against J-M, Keasbey & Mattison Company (hereinafter K & M) and Certain-teed Products Corporation (hereinafter Certain-teed), seeking injunctive relief against alleged violations of *§§ 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*). The Complaint alleges that the above-named companies combined and conspired in unreasonable restraint of, and to monopolize, interstate and foreign trade and commerce, and that defendants have attempted to monopolize the aforesaid interstate and foreign trade and commerce in asbestos-cement pipe and couplings (Document 1).

K & M sold its asbestos-cement pipe and coupling business to Certain-teed on or about April 16, 1962 (Document 37, par. 5). On December 22, 1964, this court granted **[**2]** K & M's motion for summary judgment, principally because that company had abandoned its business activity in the asbestos-cement pipe and coupling field and there was a lack of evidence of any probability that it would ever resume it. *United States v. Johns-Manville Corporation, 237 F. Supp. 885 (E.D. Pa. 1964)*. Certain-teed's Motion for Summary Judgment was granted on August 10, 1965, principally because there was no evidence showing that that company (which had been in the asbestos-cement pipe and coupling business for only two months before the complaint in this case was filed) had joined in any illegal activities in which J-M and K & M might have been involved. *United **[*445]** States v. Johns-Manville Corporation, 245 F. Supp. 74 (E.D. Pa. 1965)*.

The documents which constitute the record in this case are enumerated in the margin. [1] **[**4]** Rulings on the motions of both parties to strike certain portions of the Gerin and Hogan depositions, plaintiff's motions to strike certain portions of the defendant's affidavits filed in support of the instant Motion, and plaintiff's supplemental motions to strike certain portions of affidavits filed in support of Certain-teed's Motion for Summary **[**3]** Judgment are set forth in Appendix A to this opinion. [2]

As noted above, the Government has charged J-M with violation of both *§§ 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*). Under *§ 1*, the Government alleges a two-pronged conspiracy: first, a conspiracy with other domestic producers (chiefly K & M and later Certain-teed) to maintain domestic asbestos-cement (hereinafter a-c) pipe prices at a uniform level, and second, a conspiracy among the same companies to keep foreign-made a-c pipe out of the

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[1] The record before the court on the instant Motion for Summary Judgment consists of the plaintiff's Complaint (Document 1), the Answer of defendant J-M (Document 8), plaintiff's statement of contentions (Document 84), defendant J-M's statement of contentions (Document 93), the affidavits filed in connection with K & M's Motion for Summary Judgment (Documents 33, 36, 38, and the three affidavits attached to Document 34), the affidavits filed in connection with Certain-teed's Motion for Summary Judgment (Documents 52-63, 68-70), the affidavits attached to Document 87, except those portions excluded by the rulings in this Memorandum Opinion, including Appendix A, the affidavits filed by the Government as Documents 101-104, 110-113, the affidavit of Roy J. Barloga (attached to Document 114), the depositions taken by the Government (Documents 94-96, 100, 105-109, 121, 126), the affidavit filed by the Government in support of its Motion for stay of discovery proceedings (Document 19), and the transcript of the argument on the Motion for Summary Judgment, insofar as it contains rulings (Document 125). Also, the parties have stipulated that the court may, in disposing of J-M's Motion for Summary Judgment, consider the testimony given at the criminal trial (*United States v. Johns-Manville Corporation et al., 231 F. Supp. 690*), exhibits identified under oath at that trial, and GX-3004, which was marked for identification at that trial at N.T. 2658, to the extent that such testimony, exhibits and documents are relevant to this Motion (Document 99).

[2] With regard to the Government's motion (Document 114) for reconsideration of the pre-trial order of April 14, 1966 (Document 92) to permit consideration of the affidavit of Roy J. Barloga (attached to Document 114), the court informed counsel at the oral argument of this Motion that this affidavit would be considered on J-M's Motion for Summary Judgment (Document 125, p. 3).

United States market. The latter aspect of the conspiracy is subdivided into two parts: first, a campaign to promote the adoption by the American Society for Testing Materials (ASTM), the American Water Works Association (AWWA), and municipal authorities of certain restrictive **[**5]** specifications for a-c pipe for the sole purpose of excluding foreign-made pipe, which does not meet such specifications, and, second, miscellaneous concerted activities designed and intended to exclude foreign pipe.

Under *§ 2* the Government alleges that J-M and co-conspirators have attempted to monopolize interstate and foreign commerce in a-c pipe.

I. *Alleged Conspiracy to Fix Prices*

In ruling on the defendants' motion for acquittal in the companion criminal case (*United States v. Johns-Manville Corporation, et al., 231 F. Supp. 690*), this court found that there was evidence in the record which would support a jury finding that J-M and K & M agreed on prices during the period 1954-1959. [3] *United States v. Johns-Manville* ***[*446]*** *Corporation, 231 F. Supp. 690, 696 (E.D. Pa. 1964)*. The record in this case contains no direct evidence of any price-fixing activity since that period. [4] In order to show, as it must in this suit for an injunction, that the defendant is engaged in a presently existing conspiracy to maintain prices on a-c pipe and couplings, the Government relies upon evidence of alleged identical list prices maintained by J-M and K & M up until 1962 and thereafter **[**6]** by J-M and Certain-teed (brief for plaintiff, p. 9). In short, the Government contends that evidence of conspiratorial behavior occurring about four years before the filing of the Complaint and eight or nine years before the filing of the instant Motion for Summary Judgment, plus a continued identity of book prices, establish a continuing conspiracy to fix prices.

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[3] Actually the direct evidence of price-fixing activity extends only to the middle of 1958. According to the testimony of the participants, the last meeting between representatives of J-M and K & M to discuss list prices for a-c pipe occurred no later than the summer of 1957 (N.T. 3043-4, 4959-63, 4966-9). The most recent documentary evidence of price-fixing activity is a letter dated in August of 1956 (GX-726). The last telephone conversation between J-M and K & M representatives to discuss the prices to be bid on specific jobs occurred no later than the middle of 1958 (N.T. 3087).

[4] The Government points to GX-511 and GX-546 as evidence that the conspiracy persisted through 1960. GX-546 (which bears the printed date 6/1/60) is an official K & M price list for an area that corresponds with J-M's Atlanta District. GX-511 is a price sheet prepared by W. D. Gibson, the manager of J-M's Atlanta District (N.T. 5379). It is not an official J-M price sheet; rather, it represents a reduction from the then prevailing J-M prices (N.T. 5380). Since GX-511 also bears the date 6/1/60 and since the prices on GX-511 and 546 are identical, the Government contends that these price sheets can only be the result of collusion. However, Mr. Gibson testified that the decision to go off book was made sometime between May 15 and June 1, 1960, and that the actual typing and mailing of the list may have occurred as early as May 20, 1960 (N.T. 5386). Thus, these two price sheets were not necessarily issued simultaneously. Moreover, Mr. Gibson flatly denied that GX-511 was the result of collusion with K & M (N.T. 5382).

The Government argues that the affidavit of William J. Hogan shows that there is a continuing conspiracy between J-M and Certain-teed to fix prices on a-c pipe. Paragraph 20 of that affidavit is as follows:

> "The prices quoted by Johns-Manville and Certain-teed are *about* ten percent higher where imported pipe is not permitted to compete. Following the adoption by Tucson of the testing in the United States requirement, the prices quoted by Johns-Manville and Certain-teed rose to their published list prices. When TUSI began operation of its local testing facility, the prices of domestic pipe dropped to the previous level."

Mr. Hogan does not say that J-M's and Certain-teed's prices are the same. Even if they are, his statement is not inconsistent with a pattern of behavior in which Certain-teed raises its prices after J-M has done so. Moreover, the raising and lowering of prices depending on whether there is competition from the generally cheaper foreign pipe would seem to be normal competitive behavior. Although consideration of Mr. Hogan's deposition (Document 126) is not necessary for the above conclusion, it is noted that pages 65-105 of that deposition fully support the above construction of Mr. Hogan's affidavit.

[7]** As to the alleged continued identity of book prices, there is no evidence in this record that J-M and Certain-teed or any other domestic producer are currently using identical price lists. [5] However, assuming that J-M and Certain-teed are using the same list prices, there is testimony in the record that it was K & M's policy to follow the J-M book prices (Reichel Deposition, p. 93; N.T. 10,551), and that Certain-teed continued the pricing policy which had been employed by K & M (Reichel Deposition, pp. 66-67). There is also in the record expert testimony that the only practicable course for a small producer like K & M or Certain-teed in an oligopolistic market is to follow the prices of the larger producer (N.T. 11,069-73). It is well settled that ***HN1***[] evidence of consciously parallel pricing will not alone support a finding of conspiracy under the Sherman Act. *United States v. Johns-Manville Corporation, 245 F. Supp. 74, 80 (E.D. Pa. 1965)*, and cases there cited.

[8]** Moreover, the defendant has submitted the affidavits of the three J-M officials **[*447]** who have responsibility for setting a-c pipe prices (all these affidavits are attached to Document 87). Mr. Orth, who has the final responsibility for approving changes in J-M's list prices for a-c pipe, denies conferring with any competitor on such price changes (Orth affidavit, par. 26). The other two affiants, Mr. Wahl and Mr. Sandt, deny that they ever discussed price changes with any competitor and state affirmatively that they know of no discussions of price changes between J-M employees and the employees of any competitor (Wahl affidavit, par. 6; Sandt affidavit, par. 7). It is noted that such evidence was not in the record at the criminal trial.

The crucial flaw in the Government's price-fixing case, however, is that the record fails to deny or explain the defendant's evidence on transaction prices, i.e., the prices at which sales were actually made as opposed to the official list prices. There is massive and convincing evidence in the record that since 1958, the last year for which there is any direct evidence of meetings between J-M and K & M representatives, [6] J-M has made **[**9]** a considerable portion of its sales at "off-book" prices, i.e., prices which are below those listed in the official J-M price sheets. This evidence demonstrates two things: (1) that there is vigorous price competition among domestic a-c pipe producers, and (2) that it is extremely unlikely that such producers are currently involved in a price-fixing conspiracy.

Whenever a J-M district manager permits his salesmen to sell "off-book," he must submit a form called a price request to the Product Manager. The price request must contain a statement of the reason why the district manager has had to go off book. Several hundred of these price requests were received in evidence at the criminal trial (Exhibits DJM-1001 to 1680). The frequency with which the reason "to meet K & M competition" appears in these price requests leaves little room for doubt that there is effective price competition among domestic a-c pipe producers. The record also contains extensive evidence of price concessions **[**10]** made by K & M to compete with J-M (e.g., Exhibits DKM-61, 63, 76, 77, 77A, 85, 93).

The Government contends that all these sales at off-book prices were the result of prior agreement between J-M and K & M to meet price competition from "others" (Document 84, pars. 14, 16, 18). The only evidence of this in the record is the testimony of Vernon F. Stompler, the former manager of K & M's a-c pipe department, that on several occasions up until 1958 he was a party to telephone conversations in which K & M and J-M officials agreed to quote the same off-book price on particular jobs (N.T. 3029-30, 3084-7, 3155-6, 3159, 3166-9). There is no evidence of collusion on off-book prices since that time. On the other hand, there is substantial evidence of widely varying transaction prices, which could not possibly be the result of a price-fixing conspiracy.

Exhibits introduced at the criminal trial show for the years 1958-1961 the large proportion of total J-M sales made at off-book prices. In 1958, 44.6% of J-M's pressure, sewer and irrigation pipe business was done on the basis of price requests; in 1959 the amount of such business done on the basis of price requests increased to 59.8%. For **[**11]** the years 1960 and 1961, the comparable figures are 50.8% and 55.8%, respectively (Exhibits DJM-401, 400A). Some districts sold off-book more frequently than others, and pressure and sewer pipe were sold at off-book prices more frequently than was irrigation pipe. For example, in the New York Sales District in 1960, off-book

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[5] This was admitted by Government counsel at the oral argument on this Motion for Summary Judgment (Document 125 at pp. 75-76).

[6] See footnote 3, supra.

orders represented 99.2% of total sewer pipe business; in the Denver Sales District in 1959 and 1960, 108.5% and 117.4%, respectively, of total business in pressure pipe was done at off-book **[*448]** prices. [7] (Exhibits DJM-306E, 302, 302E, 410, 412).

[12]** The Government has not shown affirmatively that these deviations from list price conform to a consistent pattern. On the contrary, the evidence indicates that the discounts from list price varied erratically from district to district and from transaction to transaction within each district. Pressure pipe figures for the year 1960 show that the average discount on off-book orders in the Philadelphia Sales District was 8.1%, whereas the average discount in such orders in the St. Louis District was 10.8% and in the Seattle District 13.1% (Exhibit DJM-302E). Pressure pipe figures for 1961 show average discounts of 8.6%, 17.1% and 21.3% in those same sales districts, respectively (Exhibit DJM-303F). Exhibit DJM-434, which shows reductions allowed as a percentage of book price in the St. Louis District in 1960, indicates discounts ranging from 1.6 to 14% in the first quarter, from 2.4 to 12.6% in the second quarter, from 4.3% to 22% in the third quarter, and from 4.8% to 15.8% in the fourth quarter. The proportion of J-M pipe sales made at off-book prices has not declined in the years following the criminal trial. Exhibits attached to J-M's Motion for Summary Judgment (Document 87) **[**13]** show that in 1962 71.6% of total water pipe securements was due to price requests, in 1963 70.9% was due to price requests, in 1964 74.7%, and in 1965 67.9%. In 1962 the percentage of total sewer pipe securements due to price requests was 66.8%, in 1963 it was 61.9%, in 1964 64.9%, and in 1965 77.3%.

Mr. Clarence Marion, who testified as an expert at the criminal trial, concluded from this erratic price behavior that J-M could not possibly have pre-planned such a pricing policy, let alone conspire with another company on it (N.T. 12,553-5, 12,654-5). He further testified that it was unreasonable to believe that businessmen would agree upon a price level at which they knew they could not sell (N.T. 12,664). It is indeed incredible that J-M and other companies diligently worked out mutually acceptable list prices for a-c pipe and then went out into the field and charged anything but those list prices in order to compete with one another on price.

Evidence of conspiratorial behavior occurring eight years ago, plus a continuing identity of book prices, does not create a genuine issue of fact as to the existence of a current price-fixing conspiracy where, as here, the identity of list **[**14]** prices is satisfactorily explained and the actual market situation is shown to be one of vigorous price competition. [8]

HN2[] The remedy of injunction looks to the future. *Douglas v. Jeannette, 319 U.S. 157, 165, 87 L. Ed. 1324, 63 S. Ct. 877 (1943)*; *Unistrut Corporation v. Power, 280 F.2d 18, 23 (1st Cir. 1960)*. Its "sole function" in antitrust cases is to forestall future violations. *United States v. Oregon State **[**15]** Med. Soc., **[*449]** 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)*. The introduction of evidence of vigorous price competition among domestic a-c pipe producers satisfies the defendant's burden of proving abandonment of the price-fixing conspiracy. See *United States v. W. T. Grant Co., 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)*. As noted above, the only company with which J-M could possibly be shown to have conspired is no longer in the business of selling a-c pipe. It cannot be assumed that Certain-teed or any other domestic producer will enter into a price-fixing conspiracy with J-M at some time in the future when there is no evidence in the record that any of these companies has been a party to such a conspiracy in the past. It is, therefore, concluded that an injunction against price-fixing is unnecessary in

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[7] Percentage figures in excess of 100% are due to the fact that there was frequently a time lag between the report that the order had been secured and the submission of the price request on the order. For example, the report that the order had been secured might be received at J-M headquarters at the end of 1960 and so would be considered a 1960 securement. The price request on that order, however, might not be received until the beginning of 1961 and so would be reflected as a 1961 price request (N.T. 12,349-50). Although this means that the percentage figures given above for particular years are not completely accurate, it can safely be said that during the period 1958-1961 J-M made about half of its a-c pipe sales at off-book prices.

[8] There is no merit to the Government's contention that J-M's activities with respect to pipe specifications are probative to show participation in a price-fixing conspiracy. Much of the activity to secure specifications was constitutionally protected under *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, and *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. Also, the evidence of actual market activity is contrary to a conclusion that domestic a-c pipe prices were the result of collusion.

this case. See *United States v. Johns-Manville Corporation, 237 F. Supp. 885, 890 (D.C. 1964)*, and cases there cited.

II. *Activities to Limit Foreign Competition Other Than Contentions as to Restrictive Specifications*

The Government's next contention is that J-M and K & M conspired to restrict competition from foreign-made a-c pipe in ways other **[**16]** than the promotion of restrictive specifications (Document 84, pars. 39-42). In support of this contention, the plaintiff has introduced evidence of several activities engaged in by J-M which, it is asserted, indicate the existence of this phase of the conspiracy. [9] These are: (1) a series of meetings which took place in various European cities in 1959 and 1960 between representatives of J-M and certain European producers of a-c pipe; (2) the institution of a patent suit against Eternit of Genoa and its American importer, Italit, Inc.; [10] **[**17]** and (3) the use of Mexican-made a-c pipe as a "fighting brand." [11]

[18]** The Government does not dispute that the latter two activities were carried **[*450]** on exclusively by J-M. However, the Government contends that J-M initiated them to fulfill a threat made at a meeting in Paris in March of 1960 by J-M Vice President, Robert Orth, who was acting pursuant to a prior agreement with K & M (brief for plaintiff, Document 133, p. 37). There is evidence on the record indicating that Mr. Orth attended the Paris meeting to persuade the Europeans to agree to limit their exports of a-c pipe to the United States to $5,000,000 worth per year and to divide up the American market geographically among themselves (N.T. 7904-6, 7919). [12] **[**21]** There

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[9] The Government also alleges that J-M and K & M engaged in certain predatory price reductions in connection with this phase of the case (brief for plaintiff, p. 30). The situation referred to is the alleged simultaneous issuance of identical price sheets in the Southeastern United States on June 1, 1960. It has been seen above that the Government's evidence on these price sheets fails to show concerted action by J-M and K & M. See note 4, supra.

[10] It is noted that the record fails to support the claim that a patent suit without merit was instituted against an importer of Italit a-c pipe in 1960. The United States District Court hearing the case upheld J-M's claim of infringement and the fact that this ruling was reversed by the United States Court of Appeals for the Fifth Circuit does not make the ruling groundless. Although the Government, at page 39 of its brief (Document 133), cited "Feskoe Aff." in support of its argument on this point, this affidavit (Document 63) does not mention patents. The Orth affidavit attached to Document 87 covers some recent discussions concerning patents by J-M, as well as certain agreements on this subject.

[11] It is noted that there is no testimony in the record that Mr. Orth specifically threatened the use of Mexican-made a-c pipe as a "fighting brand." Mr. Gerin stated at page 38 of his deposition (Document 121) that Mr. Orth mentioned "that J-M had bought some interest in Asbestolit and would sell Asbestolit in this country," but he did not remember the context in which this statement was made. There was later read to him isolated questions and answers which he had given to a grand jury on February 8, 1962 (p. 91 of Document 121), as follows (p. 103 of Document 121):

> " Mr. Raymond Carson: That was page 1316.
>
> "Q. At the same page:
>
> "'Q. Did he say outright that he would fight the European manufacturers with Mexican Pipe?'
>
> "Page 1317:
>
> "'A. He didn't say with Mexican pipe. He said he would fight us, and later he talked about Mexican pipe, so you could connect the two ideas.'
>
> "Did you so testify?
>
> "A. Yes."

Since plaintiff refused to make the grand jury testimony available to defendant (p. 106 of Document 121), the deposition was concluded without any cross-examination by defendant concerning the above excerpts from the grand jury testimony (pp. 106-7 of Document 121) and such vague grand jury testimony, which has not been subject to cross-examination, could not be the basis of a finding affecting defendant's rights under these circumstances, particularly when it was taken two days before the hearing on the Motion for Summary Judgment.

is further evidence that he threatened reprisals if agreement was not reached on these matters (N.T. 7939). There is, however, no evidence from which it could legitimately be concluded that Mr. Orth was acting on behalf of anyone besides J-M. There is testimony that Mr. Colton, Vice President of Johns-Manville International, conversed with Mr. Bateman, managing partner of Turner & Newall, Ltd., which owned all the stock of K & M, for about ten minutes on the evening of the meeting in Brussels in June of 1959 (N.T. 7898-7900), **[**19]** and it is not disputed that Mr. Orth met Mr. Bateman at the London airport after the Paris meeting in 1960 (N.T. 9338-40, 13,343-4). [13] There is no evidence, however, of the contents of the brief discussion between Colton and Bateman, and the only evidence of what was said at the Orth-Bateman meeting is Orth's testimony that he told Bateman (his version of) [14] what had transpired at the Paris meeting (N.T. 13,364-5). These brief meetings [15] do not support an inference that Mr. Bateman or Turner & Newall, Ltd., was engaged in a conspiracy with J-M. Moreover, the undersigned has previously ruled that the evidence produced at the criminal trial was insufficient to support the charge that Turner & Newall, Ltd., was a party to the conspiracy alleged in the indictment, *Application of Turner and Newall, Ltd., 231 F. Supp. 728 (E.D. Pa. 1964)*, and that there is no evidence of illegal action on the part of Mr. Bateman. *United States v. Johns-Manville Corporation, 237 F. Supp. 885, 893, n. 12 (E.D. Pa. 1964)*. Mr. Costa, an officer of Eternit of Genoa, who was present at the European meetings, testified that Orth told the Europeans that "the American manufacturers" were tired of foreign **[**20]** competition and would take all possible measures to protect their market (N.T. 7936, 7939). However, the record contains no evidence that Orth had authority to speak for K & M, which, at that time, was the only other American manufacturer of a-c pipe. Mr. Costa also testified that Orth told the Europeans not to worry about whether K & M would go along with the agreement **[*451]** because he (Orth) would go to London to see Turner & Newall on the subject of K & M. Assuming that Mr. Orth did make this statement, it does not indicate that he had any prior agreement with K & M. On the contrary, the statement indicates that if the Europeans agreed on the $5,000,000 quota and the division of United States markets, then Mr. Orth would seek K & M's consent to abide by the arrangement. This evidence does not create a triable issue of fact as to conspiracy when viewed as a whole. The picture it presents is one of unilateral action by J-M. No employee of K & M or Turner & Newall, Ltd. was present at any of the European meetings, and there is absolutely no evidence that either of these companies authorized Mr. Orth to speak for it at the meetings. [16]

[22]** Since there is no showing that the alleged miscellaneous activities (enumerated under (1) - (3) above) directed against foreign competition (excluding evidence of acts designed to effect restrictive specifications, which subject is discussed below) were carried on in pursuance of a conspiracy between J-M and some other entity, the Government's case on this aspect of the alleged conspiracy must fail.

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[12] Mr. Orth denied that he made any such proposals (N.T. 13,273, 13,279, 13,281). His testimony is supported by that of Mr. Gerin of Belgian Eternit, who was also at the meeting (Gerin deposition, pp. 35-42). Mr. Orth testified that, to the contrary, the Europeans were seeking a guarantee of a $5,000,000 American market (N.T. 13,247-9, 13,273, 13,282).

[13] Mr. Orth testified that this meeting was at his request and lasted for about 20 or 30 minutes. Mr. Bateman had just arrived by plane from Majorca (N.T. 13,343-5).

[14] See note 12, supra.

[15] Mr. Koons' testimony that Orth told him after the Paris meeting that he had been to London to see Mr. Soothill, a director of Turner & Newall, before the Paris meeting is not persuasive since (a) this testimony is inconsistent with Mr. Koons' testimony before the grand jury, wherein he made no mention of a statement by Orth that he had seen Mr. Soothill before the meeting (N.T. 9808-9810), and (b) he had an interest in the outcome of this litigation due to his company's pending treble damage suit (N.T. 9354-7). Mr. Orth denied going to London before the Paris meeting (N.T. 13,285). His testimony, supported by that of Mr. Frazza, is that he flew directly from New York to Paris (N.T. 13,276, 11,740-2).

[16] It is noted that when, on the defendants' motion for judgment of acquittal in the criminal case, the undersigned ruled that the jury could find from the above testimony of Mr. Costa and other evidence that the activities at the foreign meetings were carried on pursuant to a conspiracy between J-M and K & M, the defendants had not introduced any evidence. In addition, the record did not at that time contain the affidavits attached to Document 87 or the several depositions that the Government has filed since the criminal trial.

In any event, the Government concedes that any efforts to obtain agreements to restrict foreign competition have been abandoned (brief for plaintiff, p. 40). Therefore, even if it were established that such efforts were made, an injunction should not issue. *United States v. Oregon State Med. Soc., supra.*

III. *Asbestos Cement Pipe and Couplings As a Relevant Market*

In the companion criminal case, the undersigned ruled that there was no evidence in the record from which the jury could conclude beyond a reasonable doubt that a-c pipe constituted a relevant market for purposes of the alleged violation of *§ 2* of the Sherman Act. *United States v. Johns-Manville Corporation, 231 F. Supp. 690, 698-701 (E.D. Pa. 1964)*. After reviewing extensively some of the massive evidence of vigorous **[**23]** competition among the producers of the various kinds of pipe, [17] the undersigned said:

> "There is every indication in this record that the above types of pipe were 'reasonably interchangeable' by consumers for the same purposes, except in certain soils such as are present in Southwest Texas. See *United States v. E. I. Du Pont, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994* . . . . Even in such soils, plastic, tile and concrete pipe were used."

United States v. Johns-Manville Corporation, supra, at 699.

[24]** When the relevant market issue was raised again on Certain-teed's motion for summary judgment, the undersigned expressed his belief that the six affidavits added to the record in the interim did not justify a change in his statements on that issue in the criminal case. *United States v. Johns-Manville Corporation, 245 F. Supp. 74, 82, n. 9 (E.D. Pa. 1965)*. The scant evidence that the Government **[*452]** has added to the record on the question of relevant market since the ruling on Certain-teed's motion for summary judgment does not justify a reversal of the views previously expressed.

The Government's argument based on testimony that ASTM has different specifications and "similar, but not identical" test requirements for each kind of pipe (Cran deposition, Document 107, pp. 12-13) must be rejected. This evidence only indicates a difference in performance characteristics - the same kind of difference that existed among the various types of packaging material involved in the *Du Pont case*, supra, *351 U.S. at 397-8*. The Government next refers to testimony that all over the country there are purchasers who prefer one type of pipe over the others and will pay a premium for it [18] **[**25]** (Sandt deposition, Document 109, pp. 44, 47). However, there is no indication as to how many such purchasers exist or what percentage of the pipe market they represent. In the face of the substantial evidence of competition among the producers of the various types of pipe contained in this record, it would be speculation to conclude from this testimony that there is any general pattern among pipe consumers to buy only one type of pipe to the exclusion of the others. The evidence of substantial differences between the prices of a-c and cast iron pipe in this record (Documents 53, 55, 56, 101, 102, 113) is also ineffective to establish a-c pipe as a relevant market. Aside from the fact that cast iron is only one of the many alternative types of pipe available, there was a substantial difference between the price of cellophane and those of other flexible packaging materials in the *Du Pont case*, *351 U.S. at 396, 400-401*. In addition, this evidence, as well as evidence that a-c pipe prices have decreased while cast iron prices have not (Exhibit DJM-435, Document 102), is explained by the fact that in many areas sellers of a-c pipe have to "break into" territories which have

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[17] It is noted that at the time of this court's first ruling on the relevant market issue, only the Government's evidence had been introduced, since that ruling was on the defendants' motions for judgment of acquittal. During the presentation of their case, the defendants substantially increased the quantum of evidence showing a highly competitive situation among the various types of pipe. There is a concise review of some of this evidence at pages 110-115 of the defendant's brief. See especially, the citations to the many price requests in which the reason given by the district manager for going "off-book" is competition from some other kind of pipe.

[18] In his deposition, Mr. Hogan testified that within the Arizona sales territory there were "almost countless" bids where only a-c pipe was involved (Document 126, pp. 112-113). This evidence may show that a-c pipe constitutes a relevant market in Arizona or the southwestern United States, but it does not show that this is true for the country as a whole. See, also, *United States v. Johns-Manville Corporation, 245 F. Supp. 74, 82, n. 9 (E.D. Pa. 1965)*.

traditionally **[**26]** used cast iron pipe (N.T. 11,658; Exhibits DJM-1005, 1027, 1028). The domestic producers must, at the same time, meet competition from the generally cheaper foreign-made a-c pipe (Exhibits DJM-1025, 1029, 1030, 1360, 1370).

The recent decision of the Supreme Court of the United States in *United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*, does not require a different ***HN3***[] result. As in *Du Pont*, the court applied in that case the test of reasonable interchangeability to determine the relevant market. At page 572, the court **[**27]** said "But there is here a single use, i.e., the protection of property, through a central station that receives signals." So in the instant case, there is a single use, i.e., the transportation of liquid through a stationary tubular conduit. Moreover, it is questionable whether that case is apposite at all, since the court is careful to point out at page 572: " . . . we deal with services, not with products . . . ."

IV. *Alleged Campaign to Influence Local Officials to Adopt Restrictive Specifications*

The Government alleges that J-M and co-conspirators worked concertedly to bring about the adoption by ASTM, AWWA and local governmental authorities of pipe specifications designed either to increase the cost of selling foreign-made a-c pipe in the United States or to exclude such pipe entirely (Document 84, pars. 26-38). The undersigned remains of the opinion, expressed on several previous occasions, [19] that ***HN4***[] any concerted activities engaged in by J-M to **[*453]** influence the decision of public officials on pipe specifications are constitutionally protected and cannot be the basis of a finding of violation of the antitrust laws, *Eastern R. Presidents Conf. v. Noerr Motor **[**28]** Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, regardless of the intent with which they were undertaken. *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*.

Relying on footnote 3 to the *Pennington* opinion, [20] the Government contends that even though J-M's activities with respect to local specifications are lawful in themselves, evidence of such activities may be used to establish anti-competitive intent. The second step in the Government's argument is to assert the proposition that predatory intent can make conduct, otherwise lawful, an unreasonable restraint of trade or an attempt to monopolize. See, e.g., *United States v. Columbia Steel Co., 334 U.S. 495, 525, 92 L. Ed. 1533, 68 S. Ct. 1107 (1948)*; *Nash v. United States, 229 U.S. 373, 378, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)*; *United States v. Reading Co., 226 U.S. 324, 370, 57 L. Ed. 243, 33 S. Ct. 90 (1912)*. On the other hand, not only is **[**29]** it illogical to infer from evidence that J-M engaged in certain completely lawful conduct that it also engaged in other conduct which was unlawful, but it would seem that to draw such an inference in this case would be an infringement upon the defendant's *First Amendment* rights. Cf. *Bates v. Little Rock, 361 U.S. 516, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960)*. It is noted that none of the cases cited by the Government in its Memorandum Regarding Evidence of Predatory Intent To Establish Unlawfulness of Restraint of Trade or by the Supreme Court in footnote 3 of the *Pennington* case involved a situation in which predatory intent was inferred from participation in constitutionally protected activities.

[30]** In any event, by the terms of that footnote, ***HN5***[] it is within the province of the trial judge to exclude such evidence if he finds that it is not probative or is unduly prejudicial. In this case, evidence of activities in promoting specifications to be adopted by state and local governmental units would only be corroborative of other evidence indicating a predatory intent on the part of J-M in advocating the local testing requirement in ASTM and AWWA. On the other hand, allowing the introduction of evidence of these activities would unnecessarily prolong the trial.

V. *Alleged Predatory Promotion in ASTM and AWWA of Specifications on Alkalinity-Uncombined Calcium Hydroxide Tests and on Testing in the United States*

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[19] N.T. 2310, 2553, 8157, 8638, 13,900.

[20] That footnote reads:

" n.3 It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

J-M and K & M, through their representatives, promoted the adoption by ASTM and AWWA of: (1) an alkalinity test for a-c pipe (this was later replaced by the uncombined calcium hydroxide or "free lime" test), and (2) a requirement that all a-c pipe installed in the United States be tested in this country. With respect to the former, i.e., the chemical tests, there is substantial evidence in the record that these were scientifically justified. This evidence includes **[**31]** not only the testimony of scientific personnel employed by J-M, K & M and Certain-teed, but also of independent scientists not so employed (N.T. 13,485-6, 11,960-1, 11,976, 11,980, 12,023, 12,685-12,694; Cran Deposition, p. 96; Cran Affidavit, par. 4(j)). There is no evidence of a scientific nature which indicates that these tests are not scientifically useful. Nor is there any evidence that J-M proposed the alkalinity and free lime tests for the purpose **[*454]** of impeding foreign competition. Most of the documents relied on by the Government as support for its allegation that J-M advocated these tests for a predatory purpose were written by K & M personnel. Those documents which were written by J-M employees merely refer to meetings between J-M and K & M research personnel to discuss specifications to be submitted to ASTM and AWWA. [21] These give no indication that J-M's motive in promoting the chemical tests was predatory. John R. Cran, the J-M employee who recommended to ASTM the adoption of the alkalinity and free lime tests, denies that he did so for the purpose of excluding foreign pipe (Cran Affidavit, par. 4(j)). Under these circumstances, the record would not justify **[**32]** the grant of injunctive relief based on the activities of J-M concerning the specifications covering alkalinity and uncombined calcium hydroxide tests.

With respect to J-M's activities in advocating the adoption by ASTM and AWWA of a requirement that all pipe be tested in the United States, however, there is an issue of fact which must be resolved by a trial. The evidence now on the record on the necessity for this requirement is not as one-sided as in the case of the chemical tests (see the documents referred to on page 2 of the Government's brief - Document 133 - but see evidence such as par. 14 of Orth affidavit attached to Document 87). In addition, there is some evidence that in promoting this requirement J-M may have been motivated by a purpose to exclude foreign pipe **[**33]** (N.T. 2613; Exhibit GX-454).

Also, there is no affidavit or deposition specifically denying plaintiff's contentions (Document 84) such as 43.

VI. *Applicability of F.R. Civ. P. 56*

The Government argues that with respect to all issues summary judgment is improper in this case, first, because questions of motive or intent are involved, *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, and, second, because principles of sound judicial administration preclude granting summary judgment in complex cases, *Kennedy v. Silas Mason Co., 334 U.S. 249, 92 L. Ed. 1347, 68 S. Ct. 1031 (1948)*; *United States v. Bethlehem Steel Corporation, 157 F. Supp. 877 (S.D.N.Y. 1958)*. All of the cases relied on by the Government are distinguishable from the instant one in that in this case the court has had the benefit of an extensive record, including the testimony of witnesses given during a criminal trial lasting over four-and-a-half months. These witnesses were cross-examined, and their demeanor was appraised by the undersigned. Summary judgment is required on this record on the Government's contentions discussed in I - IV above and on the contention **[**34]** discussed in V that defendant's efforts to secure a national specification on the alkalinity-uncombined calcium hydroxide tests justify injunctive relief under *15 U.S.C. § 4*. See *United States v. Johns-Manville Corporation, 237 F. Supp. 885, 892-3 (E.D. Pa. 1964)*, and cases there cited; *Waldron v. Cities Service Co., 361 F.2d 671 (2nd Cir. 1966)*.

Counsel shall submit within 15 days an appropriate order entering partial summary judgment in accordance with the foregoing so that these contentions (Document 84) are denied:

1, 2, 9-23, 27, 28, 32, 33, 36, 37, 39-42 and 47;

and these contentions are modified as follows:

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[21] J-M and K & M representatives on Committee C-17, the a-c pipe specification section of ASTM, were asked by the committee chairman to collaborate on specifications to be submitted to the committee as a whole for approval (N.T. 13,155-6).

26, in lieu of the last two sentences the following one will be inserted: "A restrictive provision requiring that all pipe be tested in the United States was agreed upon, drafted and vigorously promoted by representatives of J-M and K & M to and within the **[*455]** appropriate committees of ASTM and AWWA";

31, by deleting the words "the Alkalinity Clause and."

The order shall reflect that the Motion for Summary Judgment is denied as to the following contentions:

3-8, 24, 25, 26 (as modified), 29, 30, 31 (as modified), 34, **[**35]** 35, 38, 43-46.

Appendix A

To Memorandum Opinion of September 29, 1966, in Civil Action No. 31791

Rulings on Various Objections and Motions of Both Parties

On April 14, 1966, this court filed a Pre-Trial Order providing that any material to be added to the record by the Government for purposes of the Defendant's Motion for Summary Judgment was to be filed by May 16, 1966 (Document 92, par. I-B). The Government filed the deposition of Jacques Gerin (Document 121) on July 11, 1966, and the deposition of William J. Hogan (Document 126) on August 5, 1966. ***HN6***[] *Rule 56(e)* requires that the court's permission be obtained before the record on a summary judgment motion is supplemented by depositions. *F.R. Civ. P. 56(e)*; *United States v. Johns-Manville Corporation, 237 F. Supp. 893 (E.D. Pa. 1965)*. In the instant case, no reason appears why the Gerin and Hogan depositions should not have been considered in disposing of this Motion for Summary Judgment. Neither party objected to the consideration of these depositions on the ground that they were too late, and it does not appear that either party could be prejudiced by a ruling that they were timely. Accordingly, this court has considered **[**36]** the relevant portions of these depositions in deciding this motion, except where parts of them have been stricken for other reasons. A

1. *Ruling on defendant's motion to strike certain testimony of Mr. Gerin (Document 121, pp. 106-7)*

At the close of Mr. Gerin's deposition, counsel for defendant moved to strike all of the deponent's testimony occurring after the recess noted at page 90 of the transcript (Document 121, pp. 106-7). Government counsel had used the grand jury minutes from the criminal proceeding to refresh Mr. Gerin's recollection as to conversations he had with Messrs. Orth and Frazza, of J-M. The basis of defendant's motion to strike is that the Government's use of the minutes gave defendant's counsel the right to see them for purposes of cross-examination. ***HN7***[] Whether, in such a situation, defendant's counsel may inspect the relevant portions of the grand jury minutes is within **[**37]** the discretion of the trial judge. *United States v. Consolidated Laundries Corporation, 291 F.2d 563 (2nd Cir. 1961)*; *Continental Baking Company v. United States, 281 F.2d 137 (6th Cir. 1960)*. See, also, *Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L. Ed. 2d 1323, 79 S. Ct. 1237 (1959)*. In any event, the trial judge has considered the testimony given by Mr. Gerin after the recess and consideration of all that testimony would not alter the disposition of the motion for summary judgment (see reasons given above at page 16). Defendant is entitled to have this motion granted.

2. *Ruling on plaintiff's motion to strike certain testimony of Mr. Hogan (Document 126, p. 117)*

At the close of Mr. Hogan's deposition, Government counsel moved to strike all the cross-examination of the deponent on certain bid tabulations from the City of Tucson (Document 126, p. 117). Defendant's counsel had used the tabulations to impeach statements made by Mr. Hogan in his affidavit (Document 103, par. 20) and his deposition (Document 126, pp. 21-26) that the price behavior of J-M and Certain-teed in the **[*456]** Tucson area bore a direct relationship to the presence or absence **[**38]** of competition from foreign-made pipe. Government counsel contend that, since defendant's counsel referred to only a few selected bids or official tabulations of bids and did not produce all the bids or records of such bids prepared during the relevant period, the entire cross-examination on this subject must be stricken. This contention is rejected. The possibility that the tabulations used by defendant's counsel in cross-examining Mr. Hogan represent only aberrations in a general pattern of behavior, which conforms to his testimony on direct, may be considered in determining the weight to be accorded this cross-examination. It is noted that there was nothing to prevent plaintiff from producing other bids or records of such bids on re-direct examination or from asking for the deposition to be continued for this purpose.

3. *Rulings on plaintiff's motion to strike the affidavit of John R. Cran (Document 115)*

The Government's first motion to strike (Document 115) is directed to the affidavit of John R. Cran (attached to Document 87). The Government's motion to strike affiant's statement in paragraph 3 that he will trace the history of the presentation to, and consideration **[**39]** by, ASTM and AWWA of the uncombined calcium hydroxide test and the testing in the country of installation note is denied. After having served as a research physicist and engineer, Mr. Cran assumed responsibility for J-M's a-c water and sewer pipe specifications in June of 1956. At about the same time, he began to work on the establishment of specifications for a-c pipe by ASTM and AWWA. His duties included representing J-M at various meetings of these agencies and presenting J-M's views concerning specifications. He officially became a member of ASTM Committee C-17, which is responsible for a-c products, in 1959, although he had participated in its meetings prior to that year. His responsibilities in connection with specifications continued until January 1965 (see par. 1 of his affidavit). In the performance of these various duties, Mr. Cran would have become familiar with the history of these specification provisions in the learned societies. However, any statements in the affidavit relating to matters of which Mr. Cran would not have personal knowledge (for example, what transpired at Committee C-17 meetings at which Mr. Cran was not present) will be disregarded. The fact **[**40]** that certain statements of the affiant contained in paragraph 4(a) of his affidavit are in conflict with his deposition (Documents 107, 108) is not grounds for excluding the statements in the affidavit. 6 Moore's Federal Practice, Par. 56.22(1). However, the testimony in the deposition will be treated as more reliable than the statements in the affidavit. Ibid. The Government's motion to strike the statements in paragraph 4(c) that the Department of Justice began putting pressure on ASTM to drop the uncombined calcium hydroxide test is denied, since the existence of pressure from an outside organization would be within the first-hand knowledge of a member of the Committee charged with drafting the test. For the same reason, affiant's statement in paragraph 4(f) that the pressure applied by the Department of Justice increased will not be stricken. However, Mr. Cran's statement in paragraph 4(c) that, as a result of a meeting with the Department in Washington in 1960, ASTM agreed to refer the uncombined calcium hydroxide test back to Committee C-17 for further study will be stricken because there is no showing that affiant had first-hand knowledge of the meeting or that it was the **[**41]** cause of referring the test back to Committee C-17.

Mr. Cran's statement in paragraph 4(e) that after a meeting of Subcommittee VI of Committee C-17 in December of 1960 a letter ballot was sent out to the Committee as a whole is admissible, since copies of such letter ballot were put in the record at the criminal trial (Exhibit DJM-51).

[*457] Mr. Cran's statement in paragraph 4(g) that he had "difficulty in understanding the position of the Department of Justice because, from the information available to us, it was . . . based upon . . . the complaints of the foreign producers" will also be stricken. His difficulty in understanding the Department of Justice's position is immaterial to this action and there is no affirmative showing that he is competent to testify to the Department's reasons for its action in advocating the elimination of the uncombined calcium hydroxide test from the ASTM specifications. Affiant's statement in paragraph 4(j) that J-M "has always been of the opinion that there should be a chemical requirement" in the ASTM specifications will be modified by striking out the word "always" and substituting therefor the phrase "since at least 1956," which is the **[**42]** first year Mr. Cran would have had first-hand knowledge of J-M's position on the subject. The Government's motion to strike Mr. Cran's statement in paragraph 4(k) that, "*Each* purchaser determines, on the basis of his own soil and water conditions and safety requirements, the maximum allowable percentage of uncombined calcium hydroxide" is denied. Mr. Cran is not saying that *every* purchaser takes this action; he is merely testifying to the use to which ASTM specifications are put by a-c pipe purchasers. As a member of the Committee that drafts the specifications and an officer of a corporation which, as a seller of a-c pipe, must of necessity know how buyers select the pipe they will purchase, Mr. Cran is competent to testify as to how, generally, purchasers make use of ASTM specifications. Mr. Cran's statements in paragraph 5(c) that a meeting was held in April 1961 between representatives of ASTM and the Department of Justice, that the Department adopted a certain position at this meeting, and that the Executive Subcommittee of Committee C-17 adopted a revised note as a result of this meeting will be stricken. There is no showing that either Mr. Cran or

Subcommittee VI, **[**43]** of which he was a member, had any connection with the events related. The Government's motion to strike Mr. Cran's statement in paragraph 5(d) that the testing in the country of installation note was "scientifically unimpeachable" and his statement in paragraph 5(e) that he has "always believed" that testing in the country was an important safeguard against in-transit damage is denied. Mr. Cran's credentials as an expert in a-c pipe specifications have been referred to above (see, also, paragraph 1 of his affidavit). These statements are competent as the opinion testimony of an expert on the subject. Affiant's statement in paragraph 5(f) that neither he nor his company recommended the testing in the United States note "as part of a conspiracy or an attempt to exclude foreign pipe" will not be considered as a legal conclusion of what amounts to a "part of a conspiracy," but may be considered as his statement of the intent with which he acted for his employer.

Finally, Mr. Cran's statements in paragraphs 6(b), referring to a draft of revised AWWA standards, 6(c) referring to a telegram, 6(e) referring to a letter ballot, and 7(a) referring to an original proposed revision of AWWA's **[**44]** standard, are admissible. To the extent that documents referred to in these paragraphs are not in the record, the weight accorded Mr. Cran's statements will be affected by the defendant's failure to attach copies of such documents to the affidavit. B

4. *Rulings on plaintiff's motion to strike the affidavit of Robert F. Orth (Document 116)*

The Government's second motion to strike (Document 116) is directed **[*458]** to the affidavit of Robert F. Orth (attached to Document 87). Mr. Orth makes statements in paragraph 6 of his affidavit, by which he purports to set forth the substance of two contracts, and in paragraph 10 that technical assistance and patent license agreements similar to those entered into with Flintkote have **[**45]** been offered to and rejected by Certain-teed and Capco Company. The fact that a patent licensing agreement has been entered into and that two others have been offered are relevant on the alleged predatory intent with which plaintiff contends J-M has used its patents. On the other hand, the Government is entitled to have the full terms of the contracts (rather than a summary) submitted to it if a fact finder is to base a finding on such terms, so that the court has not considered the description of the contracts as complete or fully accurate.

5. *Rulings on plaintiff's motion to strike the affidavit of George R. Wahl (Document 117)*

The Government's next motion to strike (Document 117) is directed to the affidavit of George Wahl (attached to Document 87). The Government's motion to strike Mr. Wahl's statement in paragraph 5 that he obtained personal knowledge of all the reasons for changes in certain pipe prices is granted, since Mr. Wahl would not necessarily have had personal knowledge of all the reasons why his superior, Mr. Orth, approved price recommendations which Mr. Wahl submitted to him (see par. 4(a) of Wahl affidavit). These five statements in paragraph 16 with **[**46]** respect to the reasons for certain price changes will be read as prefixed by the phrase "to the best of my knowledge." Pursuant to the Government's suggestion, the statement in paragraph 6, "To the best of my knowledge such changes were the result of completely independent decisions by Johns-Manville without prior consultation or communication of any kind with any of its competitors," will be modified to read that to the best of his knowledge no such communications were had. The Government's motion to strike paragraph 16 of the affidavit, that the reason for certain price changes was competitive pressures since 1958, is denied. Although it appears that affiant's knowledge of such pressures is based on hearsay (see par. 13 of Wahl affidavit and par. 6 of Sandt affidavit), namely, price requests and communications from J-M salesmen and district managers, these sources would be admissible in evidence under the business records exception to the hearsay rule. See 6 *Moore's Federal Practice, § 56.22(1)*.

Mr. Wahl's statement in paragraph 17 that price reductions were arrived at as a result of studies by the Product Manager and Product Group Manager, who then consulted with Mr. Wahl and **[**47]** submitted their recommendations to him, is a statement of the procedures followed by him so that no hearsay is involved. The absence of such studies and recommendations, if written, as attachments to the affidavit goes to the weight of the allegations but does not preclude their admissibility.

6. *Rulings on plaintiff's motion to strike the affidavit of Hartley Sandt (Document 118)*

The Government has also moved to strike (Document 118) the affidavit of Hartley Sandt (attached to Document 87). As with the similar statement in the Wahl affidavit, affiant's statement, "To the best of my knowledge such changes were the result of totally independent decisions by Johns-Manville without any prior consultation or communication of any kind with any of its competitors," will be read to say that to the best of his knowledge no such communications were had. The Government's motion to strike affiant's statements in paragraphs 12, 14, 18, 23 and 27, that certain post-1961 price reductions were made as a result of competitive pressure, is denied. Although affiant states that he acquired knowledge of these competitive pressures through price requests and reports submitted to him by J-M **[**48]** district managers and salesmen (see par. 6 of his affidavit), such **[*459]** price requests and reports would be admissible in evidence under the business records exception to the hearsay rule. See 6 *Moore's Federal Practice, § 56.22(1)*. It is noted that no copies or examples of post-1961 price requests or reports are attached to the affidavit or otherwise contained in the record. C Similarly, the statements in paragraph 13 that price reductions were arrived at as a result of studies by the Product and Product Group Managers and recommendations made by them and the General Sales Manager, in paragraph 24 by which Mr. Sandt purports to set forth the contents of documents submitted to J-M by Flintkote pursuant to their patent license agreement, and in paragraph 26 by which he purports to set forth what is "clearly indicated" by reports of J-M salesmen and district managers, are affected by the failure to attach verified copies of any of these documents to the affidavit. The Government's motion to strike that portion of paragraph 26 in which affiant states an estimate of the rate at which Capco is presently securing orders is granted, since no facts are stated upon which such estimate **[**49]** is based and it does not appear affirmatively that affiant would be competent to testify to such estimate on personal knowledge.

7. *Rulings on plaintiff's supplemental motion to strike the affidavit of Malcolm Meyer (Document 119)*

The Government has also filed two supplemental motions to strike affidavits. The first of these (Document 119) is directed to the affidavit of Malcolm Meyer (attached to Document 34). As pointed out above in connection with the affidavit of Mr. **[**50]** Cran, the fact that statements of Mr. Meyer in paragraphs 5 and 10 of his affidavit are in conflict with testimony in his deposition (Document 100) is not grounds for striking the offending statements in the affidavit. The proper procedure is to consider the statements in the affidavit in light of the testimony given at the deposition and, where there is a conflict, to accord greater weight to the latter. 6 Moore's Federal Practice, Para. 56.22(1). The Government's motion to strike Mr. Meyer's statement in paragraph 7 that instructions contained in a certain directive issued on his orders were followed by all Certain-teed personnel is granted, since testimony of Mr. Meyer at pp. 66-67 of his deposition reveals that this statement was based upon hearsay; namely, information conveyed to Mr. Meyer by Certain-teed's legal department. D

[51]** 8. *Rulings on plaintiff's motion to strike the affidavit of James R. Reichel (Document 120)*

The Government's second supplemental motion to strike (Document 120) is directed to the affidavit of James R. Reichel (attached to Document 34). The Government's motion to strike Mr. Reichel's statement in paragraph 10 that Certain-teed has never proposed specifications to ASTM, AWWA, or local authorities for the purpose of restricting or eliminating competition from foreign-made a-c pipe is denied, since, although Mr. Reichel never attended an ASTM meeting (Reichel deposition, p. 196), he has been in charge of Certain-teed's a-c pipe sales from the date of that company's acquisition of K & M's assets until the present and so would know whether the promotion of restrictive specifications in the learned societies was among his company's arsenal of weapons for **[*460]** combatting competition, foreign or otherwise. However, Mr. Reichel's testimony on this subject at his deposition will be given greater weight than the above statement in his affidavit.

Ayers v. Pastime Amusement Co.

United States District Court for the District of South Carolina, Charleston Division

October 6, 1966

Civil Action Nos. 6481, 6482

Reporter

259 F. Supp. 358 *; 1966 U.S. Dist. LEXIS 10211 **; 1966 Trade Cas. (CCH) P71,927

Lawrence H. Ayers Plaintiff v. Pastime Amusement Company and Consolidated Theatres, Inc. Defendants, Civil Action No. 6481. Lawrence H. Ayers and Ruth T. Ayers Plaintiffs v. Pastime Amusement Company and Consolidated Theatres, Inc. Defendants, Civil Action No. 6482

Core Terms

distributors, tort-feasors, covenant, cause of action, parties, state law, Pictures, exhibitors, reserved, settlement, motions, rights, Film, antitrust, releases, cases

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Torts > Procedural Matters > Multiple Defendants > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Torts > ... > Settlements > Releases From Liability > General Overview

HN1[] **Types of Contracts, Covenants**

The release of one joint tort-feasor discharges all other joint tort-feasors.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Civil Procedure > Settlements > Releases From Liability > General Overview

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN2[] Types of Contracts, Covenants

A settlement with and a release of one tortfeasor in which the right is expressly reserved against the other tortfeasors is not technically a release but a covenant not to sue.

Torts > Procedural Matters > Multiple Defendants > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Torts > ... > Settlements > Releases From Liability > General Overview

HN3[] Procedural Matters, Multiple Defendants

There is a divergence of opinion among the state and federal courts as to whether a release of one joint tort-feasor, with a reservation of rights against other joint tort-feasors accompanied by a dismissal with prejudice of the action against the released joint tort-feasors by operation of law releases all joint tort-feasors.

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] Maritime Workers' Claims, Maintenance & Cure

Federal rather than state law controls suits involving alleged violations of the federal antitrust laws. State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory schemes of the antitrust laws.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > Procedural Matters > Settlements > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

HN5[] Types of Contracts, Covenants

The intention of the parties in executing the instrument is of paramount importance in determining whether an instrument is a covenant not to sue or a release, and where there is any reasonable basis for a court to determine that the document is a covenant rather than a release it will do so.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > Procedural Matters > Settlements > General Overview

HN6[] **Types of Contracts, Releases**

A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document.

Civil Procedure > Settlements > Releases From Liability > General Releases

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Civil Procedure > Settlements > Releases From Liability > General Overview

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN7[] **Releases From Liability, General Releases**

A release of one tortfeasor need not release all others jointly liable if the release expressly reserves rights against joint tortfeasors. This rule does not prevent an injured party from reserving rights against one or more joint-tortfeasors while releasing others. It merely requires that he announce his intent, and express that reservation in the release agreement.

Judges: [1]** Simons, Jr., District Judge.

Opinion by: SIMONS

Opinion

[*358] Order

SIMONS, JR., District Judge.

The within captioned actions were commenced in this court on January 13, 1958 by the filing of complaints against the two named defendant exhibitors of motion pictures and also against the personal defendant, Albert Sottile, who was the managing officer and director of the corporate defendant, Pastime Amusement **[*359]** Company. Subsequent to the commencement of the action Mr. Sottile has died and his personal representative was not substituted as a party defendant. Also defendants in the original suit were the following eight producers and distributors of motion picture films:

Paramount Film Distributing Corporation

Loew's, Incorporated (now Metro-Goldwyn-Mayer, Inc.)
Twentieth Century Fox Film Corporation
Warner Bros. Pictures Distributing Corporation
R.K.O. Teleradio Pictures, Inc., (now R.K.O. General, Inc.)
United Artists Corporation
Universal Film Exchanges, Inc.
Columbia Pictures Corporation

The causes of action are tort suits founded upon an alleged conspiracy among the defendant exhibitors and distributors in violation of the **[**2]** Sherman Antitrust Act, Title *15, U.S.C., Sections 1*, *2*, and *7*, and the Clayton Antitrust Act, Title *15, U.S.C., Sections 12*, *15*, *16*, and *22*.

Since the commencement of the actions almost nine years ago, the original parties have engaged in exhaustive discovery. Many depositions have been taken, and hundreds of exhibits introduced at the taking of said depositions. These cases have also been before the court on numerous motions.

During the latter portion of 1963 and the early part of 1964 plaintiffs and the eight defendant distributors entered into settlement negotiations which resulted in a compromise settlement of these causes of action against said distributors, upon the payment by them to plaintiffs of the sum of $42,500 and the execution of a "Covenant Not to Sue" dated March 11, 1964 by plaintiffs as covenantors in favor of the distributors and Paramount Pictures Corporation, Warner Bros. Picture Distributing Corporation, and Universal Pictures Corporation (the last three apparently being subsidiary corporations of some of the distributor corporations) as covenantees. Pursuant and subsequent to the execution of the "Covenant Not To Sue" on March 11, 1964 the defendant distributors **[**3]** paid this sum of $42,500 to plaintiff's counsel on April 6, 1964, in escrow until orders of dismissal were obtained from the court dismissing the eight distributors from the action. Upon motion of plaintiffs' counsel and by order of this court dated April 9, 1964, the within actions were dismissed against the defendant distributors "and as to those defendants only, with prejudice and without costs".

Thereafter, the sole remaining defendants, Pastime Amusement Company and Consolidated Theatres, Inc., moved for summary judgments upon the ground that plaintiffs' causes of action were unitary and indivisible tort actions, and that the purported covenant not to sue was in legal effect a general release "so that the execution of the settlement documents, when coupled with the dismissal of the actions with prejudice as to the defendant distributors leads to a like dismissal with prejudice" as to the two defendant exhibitors.

Both parties also moved for leave to file third-party complaints against and to bring back into these causes of action the eight defendant distributors who had heretofore purchased their peace from plaintiffs upon the ground that there was no wrongdoing on the part **[**4]** of the two defendant exhibitors, and that any verdicts or judgments which plaintiffs may recover against Pastime and Consolidated would necessarily be based exclusively upon the actions of the third-party defendants (the eight defendant distributors) who conspired among themselves substantially in the manner alleged in the original complaint, and that any acts done by the two defendant exhibitors were done innocently and with no intent to engage in, or with any knowledge of, the alleged wrongful conspiracy among the proposed third-party defendant distributors.

These motions were heard by the court on July 27, 1966, at which time counsel **[*360]** for plaintiffs and Pastime and Consolidated filed written briefs setting forth their positions and the court heard extensive oral arguments. Subsequent to the hearing counsel for the parties have also filed written reply briefs.

At the hearing the court denied defendants' motions to file third-party complaints in these causes of action against the eight defendant distributors. Thus, the sole motions now before the court are those of defendants for summary judgment.

In determining these motions the controlling questions are as follows: **[**5]** (1) Do principles of federal or state law apply to the issues? (2) Is the instrument dated March 11, 1964, executed by plaintiffs as covenantors in favor of the defendant distributors and others as covenantees, a covenant not to sue, or a release? (3) If such instrument is found by the court to be a release, does such release of some of the alleged joint tort-feasors constitute a release of all joint tort-feasors, so that these actions may not now be maintained against the two defendant exhibitors?

Factually there is no dispute of any substantial facts. The court has considered the contents of the purported covenant and the written negotiations between counsel for plaintiffs and the distributors which culminated in the settlement of these cases on the basis of the "covenant not to sue". The court finds that it was the intention of the parties to the instrument that it constitute a covenant not to sue and that plaintiffs did not accept the $42,500 settlement as payment in full of all of its alleged injuries and damages resulting from the wrongful conduct of all the parties defendant to the original actions. Furthermore, the instrument involved was entitled "Covenant Not To Sue" **[**6]** and in the body of the instrument itself, plaintiffs jointly and severally, and for their executors, administrators, successors and assigns covenanted not to sue the defendant distributors, their predecessors, affiliates, subsidiaries, etc., upon any and all causes of action "whatsoever from the beginning of the world to the date of these presents."

In the instrument plaintiffs also specifically reserved all causes of action they may have against all other persons, firms or corporations, other than the covenantees specifically named therein. [1]

[7]** The question of whether federal or state law should apply in determining whether the instrument here is a covenant not to sue or a release is moot inasmuch as the South Carolina Supreme Court has never apparently had occasion to consider such question. Fundamentally, however, the South Carolina rule is in keeping with the old common law principle that ***HN1***[] the release of one joint tort-feasor discharges all other joint tort-feasors. See *Pendleton v. Columbia Railway, 133 S.C. 326, 131 S.E. 265*, and *National Bank of Savannah v. Southern Railway, 107 S.C. 28, 91 S.E. 972*. Although the South Carolina Supreme Court has never had occasion to express itself concerning the validity of a covenant not to sue, such instruments have been recognized as valid in this state since the opinion of my late lamented colleague District Judge C.C. Wyche in *McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (W.D.S.C. 1941)*, in which he held: ***HN2***[] "A settlement with and a release of one tortfeasor in which the right is expressly reserved against the other tortfeasors is not technically a release *but a covenant not to sue*".

[*361] The court recognizes that ***HN3***[] there is a divergence of opinion among some of the **[**8]** state and federal courts as to whether a release of one joint tort-feasor, with a reservation of rights against other joint tort-feasors accompanied by a dismissal with prejudice of the action against the released joint tort-feasors by operation of law releases all joint tort-feasors. The cases which have been brought to the court's attention supporting the principle that the release of one joint tort-feasor under such circumstances releases all joint tort-feasors are *Simpson v. Plyler, 258 N.C. 390, 128 S.E.2d 843*, and the numerous cases cited therein; *Byrd v. Crowder, 166 Tenn. 215, 60 S.W.2d 171*; *Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941)*, and *Elliott v. Paramount Film Distributing Corporation, 27 F.R.D. 495 (E.D. Pa. 1961)*. It is noted that in *Eberle* the court was applying state not federal law.

After a careful consideration of the pertinent authorities the court is convinced that principles of federal and not state law must govern the issues here since plaintiffs' causes of action arise and are predicated upon federal antitrust statutes.

Although the precise issue before the court has apparently never been directly considered by the United States **[**9]** Supreme Court or the Fourth Circuit Court of Appeals, closely parallel situations have been considered by the United States Supreme Court. In *Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952)*, the Court had before it the question of whether in a state court action under the Federal

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[1] The reservation contained in the last paragraph of the Covenant Not To Sue dated March 11, 1964 is as follows:

> "This Covenant Not To Sue and all other Covenants, representations, and warranties by the Covenantors, and each of them, herein contained, shall not apply to any claim, cause of action, right of action, or claim for relief which Covenantors, or either of them, may ever have had or which they, or either of them, may now have against any persons, firms or corporations other than the Covenantees, all of which claims, causes of actions, rights of action, or claims for relief, are hereby expressly reserved by and to the Covenantors."

Employers' Liability Act the validity of a release granted to the railroad by the injured employee was to be determined by federal or state law. The Court, at page 361, stated:

> "*First*. We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in *§ 1* of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what **[**10]** defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."

In *Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239, 87 L. Ed. 239, 63 S. Ct. 246 (1942)*, the Court held that in a suit by a seaman in a state court proceeding for damages under Section 33 of the Merchant Marine Act and for maintenance and cure the rights of the parties are measured by the federal statute and Admiralty principles of law, rather than by state court principles. Other persuasive federal court decisions enunciate the principle that ***HN4***[] federal rather than state law controls suits involving alleged violations of the federal antitrust laws. In Twentieth Century-Fox Film Corp. v. Winchester Drive-In *Theatre, 351 F.2d 925 (9th Cir. 1965)*, the court, at page 928, stated: "State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory schemes of the antitrust laws. We affirm the lower court's determination that a federal rule should apply." The court in that case held that a release which "contained **[**11]** no express reservations of any kind" released all joint tort-feasors in the cause of action. The Ninth Circuit indicated, however, that its decision would have been different if there had been an express reservation of rights against joint tort-feasors not included in the release. See also *Dale Hilton, Inc. v. Triangle Publications, Inc., 198 F. Supp. 638 (E.D. Pa. 1961)*; *Stella v. Kaiser, 221 F.2d 115* ***[*362]*** *(2d Cir. 1955)*, cert. den. *350 U.S. 835, 100 L. Ed. 745, 76 S. Ct. 71*.

In keeping with the federal law and the better reasoned decisions the court concludes that the instrument executed by plaintiffs in favor of the defendant distributors was in fact a covenant not to sue, and was not a release; therefore, it did not by operation of law release the two defendant exhibitors herein. See *Clapper v. Original Tractor Cab Co., 165 F. Supp. 565 (S.D. Ind. 1958)*; *Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955)*; *Rector v. Warner Bros. Pictures, 102 F. Supp. 263 (S.D. Cal. 1952)*; *McKenna v. Austin, 77 U.S. App. D.C. 228, 134 F.2d 659* (D.C. Ct. of App. 1943). ***HN5***[] The intention of the parties in executing the instrument is of paramount importance in determining whether **[**12]** an instrument is a covenant not to sue or a release, and where there is any reasonable basis for a court to determine that the document is a covenant rather than a release it will do so. *Dale Hilton, Inc. v. Triangle Publications, Inc., supra*; *Lysfjord v. Flintkote Co., supra*; *Restatement Contracts, Section 120*.

Even if the document herein be found to be a general release rather than a covenant not to sue, it would not operate to discharge defendants Pastime and Consolidated since in the instrument plaintiffs expressly reserved their rights and causes of action against all except the covenantees therein. The most recent pronouncement of the American Law Institute in the *Restatement, Torts, § 885* (1939), expresses the modern and better reasoned view as follows:

> ***HN6***[] "(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document." [2]

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[2] Comment "d" of the Restatement in reference to the above quoted Section 885(1) states as follows:

> "d. *Limits and effect of rule*. A covenant not to sue clearly indicates by its form that it is not intended to discharge the liability of other tortfeasors jointly liable. On the other hand, a document in the usual form of a release given to one of them is construed as intended to discharge all claims for the tort and operates to discharge others also liable for the same harm. If, however, there is language in the release which manifests that the releasor intended to preserve his rights against the

The United States Supreme Court in its recent decision of *Aro Mfg. Co. v. Convertible **[**13]** Top Replacement Co., Inc., 377 U.S. 476, 12 L. Ed. 2d 457, 84 S. Ct. 1526 (1964)*, added its concurrence to this view when it stated at page 501:

> "It is also true that under the old common-law rule, a release given to one joint-tortfeasor necessarily released another, even though it expressly stated that it would have no such effect. See Prosser, Torts (2d ed. 1955), at 243-244. Under this rule Aro's argument on this point would prevail, since the agreement did release Ford's purchasers for their infringing use of the top-structures before the agreement date, and that was the use to which Aro contributed. See *Schiff v. Hammond Clock Co., 69 F.2d 742, 746 (C.A. 7th Cir. 1934)*, reversed for dismissal as moot, *293 U.S. 529, 55 S. Ct. 146, 79 L. Ed. 639*. But the rule is not applicable. Even in the area of nonpatent torts, it has been repudiated by statute or decision in many if not most States, see Prosser, supra, at 245, and by the overwhelming weight of scholarly authority. E.g., American Law Institute, Restatement of Torts (1939), § 885(1) and Comments b - d."

See also Twentieth Century-Fox Film Corp. v. Winchester Drive-In *Theatre, **[*363]** Inc., 351 F.2d at **[**14]** page 930*, wherein the court stated:

> ***HN7***[] "Thus the position expressed by the Restatement and the vast majority of the recent case law is that a release of one tortfeasor need not release all others jointly liable if the release expressly reserves rights against joint tortfeasors . . .
> "Numerous other trial courts have reenforced proposition that the present Restatement position is an accurate expression of the current status of the law of general releases.
> "Nor do we find the Restatement position to be so unsupportable in reason as appellees would have us believe. The Restatement rule does not prevent an injured party from reserving rights against one or more joint-tortfeasors while releasing others. It merely requires that he announce his intent, and express that reservation in the release agreement."

[15]** In accordance with the foregoing it is ORDERED that the motions for summary judgment on behalf of defendants Pastime and Consolidated be, and the same hereby are denied.

Counsel for the parties have advised the court that all discovery has been completed and the within order completes the disposition of all pending motions. The case is now ready for trial before a jury upon its merit. Counsel estimates that trial time will require between three and four weeks.

In accordance with *Section 1292(b) of 28 U.S.C.A.*, the court hereby certifies that it is of the opinion that the within order involves controlling questions of law as to which there are substantial differences of opinion among the recorded cases, and one of first impression in this court; that an immediate appeal from the within order denying defendants' motion to dismiss plaintiff's action may materially advance the ultimate termination of the litigation; and that defendants should have the opportunity to apply to the Court of Appeals for the Fourth Circuit for permission to take an appeal from such order, if they should so desire. Should application for an appeal be made by defendants and such permission be granted by **[**16]** the Court of Appeals, then further proceedings in this case shall be stayed until a determination of the appeal.

And it is so ordered.

End of Document

> others, effect is given to this manifestation. If such a manifestation does not appear upon the document containing the release, a rule analogous to the parol evidence rule prevents giving effect to the intention of the parties that the other tortfeasor shall not be discharged. Where the discharge is by an oral agreement, the manifested intent of the parties controls."

United States v. Crocker-Anglo Nat'l Bank

United States District Court for the Northern District of California, Southern Division

October 6, 1966

Civil No. 41808

Reporter

263 F. Supp. 125 *; 1966 U.S. Dist. LEXIS 8349 **; 1966 Trade Cas. (CCH) P71,898

United States, Plaintiff v. Crocker-Anglo National Bank, Citizens National Bank, and Transamerica Corporation, Defendants

Core Terms

merger, convenience, effects, cases, public interest, banks, anti-competitive, de novo, anti trust law, bank merger, proposed merger, agencies, courts, substantive rule, probable effect, outweighed, words, proceedings, district court, provisions, plainly, judicial proceedings, lessen competition, trial de novo, confronted, approve

LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Federal Acts > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN1[] **Commercial Banks, Mergers & Consolidations**

Section [§ 2(c)] of the Bank Merger Act provides that any court having pending before it on or after the date of enactment of the Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in § 18(c)(5) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Mergers > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Bank Creations & Reorganizations

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN2[] **Commercial Banks, Mergers & Consolidations**

Section 18(c)(5) of the Federal Deposit Insurance Act provides as follows: The responsible agency shall not approve (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN3[] **Antitrust Statutes, Clayton Act**

Section 18(c)(7)(B) of the Federal Deposit Insurance Act provides as follows: In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than *§ 2* of the Act of July 2, 1890, *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

HN4[] **Standards of Review, De Novo Review**

After providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, *§ 18(c)(7)(A)* of the Federal Deposit Insurance Act stipulates: In any such action, the court shall review de novo the issues presented.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Financial Institutions, Bank Mergers**

Under § 5 of the Bank Merger Act, the Comptroller is charged with ascertaining two sets of facts. The first is whether the effect of the proposed merger transaction in any section of the country may be substantially to lessen competition and the second, whether, having found that there would be anti-competitive effects in the proposed transaction, those effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > Commercial Banks > Bank Expansions > General Overview

HN6[] **Financial Institutions, Bank Mergers**

The problem of reviewing the second determination under § 5 of the Bank Merger Act, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which the United States District Court for the Northern District of California, Southern Division, as a constitutional court, is prohibited from deciding.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Constitutional Law > The Judiciary > General Overview

Constitutional Law > The Judiciary > Congressional Limits

HN7[] **Separation of Powers, Jurisdiction**

The jurisdiction of a United States District Court is limited to cases and controversies as that term is used in U.S. Const. Art. III. Legislative or administrative jurisdiction cannot be conferred on a federal district court. A federal district court, as well as the United States Supreme Court, is brought into being by the judiciary article of the Constitution, and is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot exercise or participate in the exercise of functions which are essentially legislative or administrative.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN8[] **Reviewability, Factual Determinations**

A review of an administrative order of an agency or commission is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, a court follows their plain meaning. When the plain meaning of a statute leads to absurd or futile results, the court looks beyond the words to the purpose of the act. Frequently, however, even when the plain meaning does not produce absurd results but merely an unreasonable ones plainly at variance with the policy of the legislation as a whole, the court follows that purpose, rather than the literal words.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN10[] **Standards of Review, De Novo Review**

When a statute is subject to two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature is presumed to have intended a meaning consistent with the constitutionality of its enactment.

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

It is a court's duty, of two possible constructions, to adopt the one which will save and not destroy.

Judges: [1]** Pope, Circuit Judge, Sweigert and Zirpoli, District Judges.

Opinion by: POPE

Opinion

[*127] Opinion and Order

POPE, Circuit Judge.

On May 13, 1963, some 34 days prior to the decision of the United States Supreme Court in *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715*, (June 17, 1963), the Crocker-Anglo National Bank of San Francisco and Citizens National Bank of Los Angeles applied to the Comptroller of the Currency for permission to merge, under the charter of the former, with the title "Crocker-Citizens National Bank ". After notice and public hearing held July 30 and 31, 1963, and receipt of some 1605 pages of testimony and exhibits, the Comptroller, on September 30, 1963, made a decision approving the proposed merger, subject to certain named conditions, based on his findings including the finding that the proposed merger would promote the public interest. The approval was to be effective on or after November 1, 1963. On October 8, 1963, this suit was filed attacking the proposed merger as unlawful under § 7 of the Clayton Act, (*15 USC § 18*) and *§ 1* of the Sherman Act, (*15 USC § 1*). A certificate under the Expediting Act (*15 USC §* **[**2]** *28*) was filed and pursuant thereto a three-judge court was named and assembled for the purpose of hearing the cause. The Government's application for a preliminary injunction was denied (*United States v. Crocker-Anglo Nat. Bank, 223 F. Supp. 849*) and after completion of extensive pretrial proceedings and the making of a pretrial order the cause came on for trial on the merits. The trial began June 1, 1965, and the taking of testimony was concluded on June 18, 1965, with orders fixing the time for filing of briefs and proposed findings by the parties.

While the court was thus in the process of hearing testimony, on June 11, 1965, the Senate passed, with no opposing vote, its S. 1698, a bill under whose provisions, if enacted, this case would have become moot, for, as stated in the report accompanying the bill, the bill "would free the banks involved in such suits from further proceedings under the antitrust laws." Whether it was because of their knowledge of the pendency of this legislation or otherwise, counsel by stipulation postponed the final filing of briefs and proposed findings until shortly before the passage of this proposed legislation, as amended in the House on February **[**3]** 9, 1966. The enactment, designated Public Law 89-356, 80 Stat. 7, was signed by the President on February 21, 1966.

The court was thus confronted with a somewhat extraordinary situation in which the law applicable to the case was changed after the testimony had been received and the cause submitted for decision. The measure, as finally enacted, made specific reference to this and other **[*128]** cases similarly situated in *§ 2(c)* thereof which provides as follows: ***HN1***[] "Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in *section 18(c)(5)* of the Federal Deposit Insurance Act, as amended by this Act." [1] The so-called "substantive rule of law set forth in *§ 18(c)(5)*" is stated in the Act as follows: ***HN2***[] "(5) The responsible agency shall not approve -

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination **[**4]** or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

That language refers to the tests to be applied, in a case of this type, by the Comptroller of the Currency in passing upon an application for approval of a proposed bank merger. Not only did *§ 2(c)*, quoted above, specifically direct that this court, in respect to this case, "shall apply the substantive rule of law set forth in *§ 18(c)(5)* " but *§ 18(c)(7)(B)* provided as follows: **[**5]** ***HN3***[] "In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than *§ 2* of the Act of July 2, 1890 (*§ 2* of the Sherman Antitrust Act, *15 U.S.C. 2*), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

After a special hearing conducted for that purpose **[**6]** evidence was received and the parties were granted time within which to file further briefs and memoranda expounding their views as to the action which the court should take in the light of the entire testimony and in view of the new enactment.

It is the Government's view that the new statute made no substantial change in the law or standards to be applied in passing upon the issues here presented. The Government puts it thus: "It is, of course, the essential position of the Government . . . that the 1966 amendment to the Bank Merger Act (P.L. 89-356; 80 Stat. 7) has not resulted in substantial change in substantive ***antitrust law*** or in the standards used by the courts in determining the legality of bank mergers."

The new enactment does pose some difficult questions which we shall note hereafter. But we find no difficulty in concluding that the new enactment **[*129]** made substantial changes in the substantive law and in the standards to be applied in this case. Not only the language of the enactment but its legislative history is very compelling on this point. As we have noted, both *§ 2(c)* and *§ 18(c)* 7(B), quoted above, specifically direct the court in this situation to **[**7]** apply the new standards of this Act. (The latter refers to the standards "directed to apply under paragraph 5" and *§ 2(c)* and refers to these as "the substantive rule of law," set forth in that section.) It would be a bit startling to assume that in making this enactment, over which the congressional committees struggled long and hard, the

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[1] It was noted in the congressional debates that this section referred to three so-called "post Philadelphia cases - in Nashville, San Francisco and St. Louis - where mergers were consummated after that [Philadelphia] decision." This is the San Francisco case there referred to. The Philadelphia case referred to is *United States v. Philadelphia National Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715*. In that connection reference was also made to *United States v. First Nat. Bank of Lexington, 376 U.S. 665, 12 L. Ed. 2d 1, 84 S. Ct. 1033*.

Congress had turned up with nothing of substance, or had accomplished no change in respect to the law applicable for testing the validity of bank mergers.

The legislative history of the Act most emphatically contradicts the position now taken by the Government. The Senate Committee report, which accompanied the introduction of the bill in the Senate, took note of what Congress had contemplated would be the result of the Bank Merger Act of 1960. The Committee stated: "At that time it was clearly expected that the decision of the responsible Federal banking authority, based on its own investigation and on reports on competitive factors from the other two banking agencies and from the Department of Justice, would be final and conclusive. The Attorney General's report was expected to be advisory only." The report states that the uncertainty created **[**8]** by the situation resulting from the Philadelphia and the Lexington bank cases (supra, note 1) "is harmful to the banking industry and to its customers. . . . There was unanimous agreement by all the witnesses that the present situation was undesirable and should be changed." The House Committee report states clearly the intent to make changes in the law as follows: "The intended legal effect of the bill is to modify the foregoing provision in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (*sec. 2*) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws - that substantially anticompetitive mergers are prohibited - applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served - recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served - that it would be in the public interest to permit it.

[9]** Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies."

The most complete exposition of the congressional view in the process of this enactment is to be found in the remarks of Senator Robertson at the time the bill, as amended to conform to the House Committee report, came back to the Senate. At that time Senator Robertson, who was Chairman of the Senate Committee which had charge of the bill and who originally introduced the bill in the Senate, was recommending that the Senate accept the House amendment. No member of Congress had remained in closer touch with the bill's progress through both Houses than Senator Robertson. As he put it: "I have lived with this problem day and night for months. I am convinced that we have a good bill." What he then had to say expounded at considerable length the ideas which had been expressed by various House members during consideration of the bill in the House. [2]

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[2] Representative Ashley, one of the members principally in charge of the bill in the House, stated (Cong. Rec. Feb. 8, 1966, p. 2339): "The bill would require the court to use the new standards of the bill in all . . . 'post Philadelphia' cases now pending in court. . . . The courts have repeatedly held that under the antitrust laws the social or economic benefits of a given merger cannot even be considered." The Congressman then quoted from the statement to that effect in the Philadelphia case: "It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community . . . . [The] merger must be shown to be sufficiently beneficial in meeting the needs of the community to be served that, on balance, it may properly be regarded as in the public interest." During the same discussion Rep. Stanton, a member of the committee in charge of the bill, (Cong. Rec. Feb. 8, 1966, p. 2343) stated: "[It] was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position. These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advisory roles.

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

[10]** **[*130]** Senator Robertson said unequivocally that the purpose of the bill was to "reverse a decision of the Supreme Court." He said (Cong. Rec. Feb. 9, 1966, p. 2538): "The bill will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in the Philadelphia and Lexington cases and the district court decision in the New York case which followed those precedents. It will do this by establishing a uniform rule for the bank supervisory agencies and the courts to follow in bank merger cases: a rule which takes into account both the competitive factors on which the antitrust laws are based - for banks these were written into the Bank Merger Act of 1960 - and the convenience and needs of the public to be served by the proposed merged bank." Referring to the pendency of the suit now before us, he said: "It would permit the continuance of proceedings against the three 'post-Philadelphia' cases - in Nashville, San Francisco, and St. Louis - where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down **[**11]** in the statute for all mergers to be considered in the future." And in a prepared statement which he incorporated in the record as a part of his remarks he said of the bill: "It will strike the Philadelphia, Lexington, and New York decisions and opinions from the books." [3]

[12]** **[*131]** Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court said in the Philadelphia case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *Section 18(c)(5)*, quoted above, expressly requires a consideration of similar factors thus rejected in Philadelphia.

This statute makes a further alteration in the nature of the proceeding now before us. ***HN4***[] After providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, *§ 18(c)(7)(A)* stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of *§ 2(c)*, requiring this court to "apply the substantive rule of law set forth in *§ 18(c)(5)*", and to *§ 18(c)(7)(B)*, reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph **[**13]** 5," it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure."

[3] In an effort to find some legislative history to bolster its position that this Act made no changes in the law, the Government has inserted in its brief some quotations from the remarks of individual Congressmen during floor debate. Taken out of context, as they are, they prove nothing. It is true that the wording of *§ 18(c) (5)* emphasized and restated the requirement that the Comptroller, and the reviewing courts, take into consideration the antitrust laws. This was noted in debate, but it was also noted that this Act definitely and positively added a new standard. As stated in the House Report of supplemental views of Congressman Ottinger who helped draft the bill: "It also assures that banking services available to meet the convenience and needs of a community are considered in all cases and will prevail where they clearly outweigh nonmonopolistic anti-competitive effects of a merger."

Counsel's quotations from the debate ignore the rule stated in *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-475, 65 L. Ed. 349, 41 S. Ct. 172*, as follows: "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. . . . And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage." Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.

To what extent that review can be "*de novo*", we shall have occasion to discuss hereafter. The immediate difficulty now presented is that the prior decision of the Comptroller of September 30, 1963, was not made under or in the light of the new Bank Merger Act of 1966.

It is true that the Comptroller then found that the proposed merger "will promote the public interest", using the language of the 1960 Act, but his determination did not contain findings covering the precise issues required to be determined by him under the language of *§ 18(c)(5)* quoted above. Under that section it would be incumbent upon the Comptroller to determine whether any anti-competitive effects of the proposed merger were "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." We apprehend that an appropriate finding would specify in what respect the transaction would meet the convenience and needs of the community to be served.

There is another respect in which the earlier **[**14]** finding of the Comptroller may be inadequate and out-dated. His decision of September 30, 1963, antedated the decisions of the Supreme Court in *United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044*, decided April 6, 1964, and *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 12 L. Ed. 2d 775, 84 S. Ct. 1710*, decided June 22, 1964. In those cases the Supreme Court developed, to an extent not previously announced, the doctrine that § 7 of the Clayton Act is designed to preserve not merely present but potential competition in the market in question. This is the doctrine of the application of § 7 to potential competition. The principal argument made by **[*132]** the Government here relates to alleged elimination by the merger of *substantial potential competition* in the State of California.

The Act requires this court to proceed in this case in the same manner in which it would have to deal with some future proposed merger. Before we can perform the required function of reviewing the action of the Comptroller, the matter must be remanded for the consideration of the Comptroller under the provisions of the 1966 Act, a proposition we shall **[**15]** discuss hereafter.

Plainly enough the Act is designed to set up precise rules under which the validity of proposed bank mergers may be ascertained and determined. The first required step is the application to the Comptroller of the Currency [4] for written approval of the proposed merger. Upon hearing on such an application the Comptroller is directed to act upon the considerations set forth in *§ 18(c)(5)* above referred to. Then, as indicated, if an action be brought attacking the merger transaction, it must be brought within a limited time and in any such action "the court shall review *de novo* the issues presented." Thus the Act contemplates initial action by the Comptroller followed by a review at the instance of the Department of Justice.

[16]** When we face the task of complying with these requirements we are confronted with a difficulty arising out of the fact that the Act provides that this review shall be " de novo".

It will be noted that ***HN5***[] under § 5 the Comptroller is charged with ascertaining two sets of facts. The first is whether the effect of the proposed merger transaction "in any section of the country may be substantially to lessen competition" and the second, whether, having found that there would be anti-competitive effects in the proposed transaction, those effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But ***HN6***[] the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a

[4] It is this officer who must act if the acquiring, assuming or resulting bank is to be a national bank. Where a state bank is to be the resulting one, the decision is to be made by the Board of Governors of the Federal Reserve System. In other cases, the Federal Deposit Insurance Corporation is to make the decision.

legislative or administrative determination [5] of **[**17]** a type which **[*133]** this court, as a constitutional court, is prohibited from deciding.

[18]** ***HN7***[] The jurisdiction of this court is limited to cases and controversies as that term is used in Article III of the Constitution. As stated in *Keller v. Potomac Electric Power Co., 261 U.S. 428, 444, 67 L. Ed. 731, 43 S. Ct. 445*, "legislative or administrative jurisdiction . . . cannot be conferred" on a court such as this. This court, as well as the Supreme Court, "was brought into being by the judiciary article of the Constitution, is invested with judicial power only, and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot . . . exercise or participate in the exercise of functions which are essentially legislative or administrative." *Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 469, 74 L. Ed. 969, 50 S. Ct. 389*. See also *F.P.C. v. Idaho Power Co., 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85*, where it was held that the authority of the Court of Appeals to affirm, modify or set aside an order of the Federal Power Commission did not include the power to exercise an essentially administrative function by determining what conditions should attach to a power license. We find an expression of the views **[**19]** of the Supreme Court on the precise question here involved in *United States v. Philadelphia Nat. Bank, supra, 374 U.S. at page 371*. This view is to be found in the words which we have italicized in the following quotation: "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the ordinary limits of judicial competence*, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy."

This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such ***HN8***[] a review is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence. *Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 275* to 276, *77 L. Ed. 1166, 53 S. Ct. 627*. As stated in *Seaboard Air Line R. Co. v. U.S., 382 U.S. 154, **[**20]** 157, 15 L. Ed. 2d 223, 86 S. Ct. 277*, the question to be decided is "Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence . . . ."

Since it is plain that this court cannot be invested with power to make an original and independent determination as to whether anti-competitive effects are "outweighed in the public interest" or what are the "convenience and needs of the community to be served" we are confronted with the question whether this Act's provision for a review *de novo* must be held null and void and therefore wholly disregarded.

We do not think so. There are certain general principles relating to construction of statutes which should aid us here. In *U.S. v. Amer. Trucking Ass'ns, 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L. Ed. 1345*, the Court said: ***HN9***[] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led **[**21]** to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable

[5] It will be noticed that the standards of § 5 are to be applied in granting or refusing leave to merge in the future. The contemplated action "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to . . . some part of those subject to power," as fully as the establishment of railroad rates in *Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67*. It involves a determination and establishment of a public policy.

See Finfrock, "Trial de Novo - Panacea?" in 14 Baylor Law Review, 135, where the Texas cases are discussed: "This criterion in essence classifies as administrative and non-judicial decisional functions which courts are not particularly equipped to decide while leaving to the courts that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisitorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the courtroom." (p. 160) one 'plainly at variance with the policy of the legislation as a **[*134]** whole' this Court has followed that purpose, rather than the literal words."

In the case before us the use of the words "de novo", as we have noted, may have full significance in respect to this court's review of the Comptroller's determination of the existence or nonexistence of anti-competitive effects by the merger. But the language of the Act would lead to absurd and futile results if it were construed as requiring this Court to substitute its judgment for the findings of the Comptroller dealing with the public interest and the convenience and needs of the community. This court cannot validly be invested with power to make such a decision which, as we have noted, is plainly legislative or administrative in character. If we look to the purpose beyond the statute and to the policy of the legislation as a whole we must conclude that Congress has framed an Act which contemplates, as an important **[**22]** part thereof, provisions for review of the Comptroller's action.

Other courts have had occasion to deal with an identical problem arising from the use of the words "de novo" in state statutes providing for court reviews of administrative or legislative determinations. In those cases the courts have been confronted with difficulties comparable to those present here, some of them stemming from their constitutional provisions for separation of powers. Thus in *Household Finance Corp. v. State, 40 Wash.2d 451, 244 P.2d 260, 264*, the court, after holding invalid an attempt to vest a non-judicial power in a constitutionally created court, said: "We recognize that there is a wealth of authority to support respondent's position that where the only review of an administrative order that is constitutionally possible is on the question of whether the administrative body or officer acted arbitrarily, capriciously, or in violation of law, it will be held that a provision for a trial *de novo* means only that the appellate or reviewing court will be limited to a consideration of that particular question on the trial *de novo*. The basis for such holdings is the rule that ***HN10***[] when a statute is **[**23]** subject to two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment." (*244 P.2d at 264*)

A like decision was made by the Supreme Court of Indiana in *State Board of Medical Registration and Examination v. Scherer, 221 Ind. 92, 46 N.E.2d 602, 604*, where the court said: "It is true that the statute here in question seems to contemplate a de novo proceeding before the court, and a finding of 'guilty' or 'not guilty ', but, regardless of what may seem a legislative intention to the contrary, this court has consistently construed similar statutes as vesting in the courts only such jurisdiction as the Constitution permits."

The same problem confronted the Supreme Court of Texas in *Jones v. Marsh, 148 Tex. 362, 224 S.W.2d 198*. In that case the court was called upon to review an order made upon an application for a license to sell beer. The statute provided for an appeal and that such proceeding on appeal "shall be *de novo* under the same rules as ordinary civil suits." The court said (p. 201): "The statute does not expressly provide **[**24]** that there shall be in district court a full retrial of the facts as if there had been no findings made by the county judge, nor does the statute specify what issue or issues shall be tried in the district court. It may, therefore, reasonably be concluded, in view of the subject matter involved and the nature of the order to be reviewed, that only a limited review is intended, and that in so far as the facts which are the basis for the order of the county judge are concerned the question or issue to be determined in the district court is whether or not the findings of the county judge are reasonably supported by substantial evidence. Such a trial is one kind of a trial de novo, and the somewhat limited trial can be held, as the statute requires, under the rules applicable to ordinary civil suits." In other words, the sort of trial which the **[*135]** court could validly hold on review of an administrative order was held to be "one kind of a trial de novo." [6]

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[6] A like problem was solved in a similar manner in *De Mond v. Liquor Control Commission, 129 Conn. 642, 30 A.2d 547, 549*, where the court said: "Upon these appeals the court hears and considers all pertinent matters for the purpose of reaching an intelligent conclusion as to the legal propriety of the action of the commissioners. In this qualified sense, but in no other, is its hearing one de novo." Another approach to a similar problem was made in *American Beauty Homes Corp. v. Louisville, etc., Ky., 379 S.W.2d 450*, where the court held that "the statute was invalid with respect to the trial 'de novo' but still permitted an aggrieved party to appeal. This also was the ruling in *California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120*, heretofore cited. We think the 'de novo' provision of *KRS 100.057* is clearly severable from the rest of this statute."

[25]** It seems reasonable to say that there may be a special kind of review *de novo* involved here, namely, a review involving a greater exercise of our judgment in respect to the question of anti-competitive effects, and a review, more limited under the so-called substantial evidence rule, of the Comptroller's determination of weight of public interest and of the character of the needs and convenience of the community.

Another general principle may therefore be applied here. Since the language of the Act could properly be construed to intend the special kind of *de novo* review just referred to, we can "apply the familiar canon which makes ***HN11***[] it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the *Fifth Amendment* or 'even to come so near to doing so as to raise a serious question of constitutional law.'" *Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351, 352, 81 L. Ed. 1143, 57 S. Ct. 816*. See also *National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893*, and *Ex parte Mitsuye Endo, 323 U.S. 283, 299, 89 L. Ed. 243, 65 S. Ct. 208*..[7]

[26]** It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term "de novo" does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Railroad Co. v. United States, 382 U.S. 154, 15 L. Ed. 2d 223, 86 S. Ct. 277*. [8] In that case the three-judge district court had set aside a commission's order approving a railroad merger on **[*136]** the ground that the commission had not adequately determined whether the merger violated § 7 of the Clayton Act. The Court said: "By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition." The Court referred to its decision in *Minneapolis & St. Louis R. Co. v. United States, 361 U.S. **[**27]** 173, 187, 4 L. Ed. 2d 223, 80 S. Ct. 229*, where the Court described the impact of congressional legislation by saying "Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest . . . . It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. 'Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.'" The Court continued "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong.Rec. **[**28]** 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed [acquisition] is "consistent with the public interest." . . . .'"

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[7] In *United States v. Philadelphia Nat. Bank, supra*, the Court was confronted with a difficulty arising out of the language of § 7 of the Clayton Act. The Court recognized merit in the contention of the appellees that the merger there involved an assets acquisition and hence that § 7 had no application since the Federal Trade Commission had no jurisdiction over banks. The Court said (*374 U.S. at p. 337*): "Since the literal terms of § 7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute." The Court's final conclusion was based upon what it found to be a "plain congressional purpose."

[8] During the debate in the House Congressman Moorehead, one of the members of the committee most actively in charge of the bill, cited and quoted from the Seaboard Air Line case, and also from *McLean Trucking Co. v. U.S., 321 U.S. 67, 87, 88 L. Ed. 544, 64 S. Ct. 370*, as appropriate precedents for his point: "In the banking industry the public interest is represented and protected by a regulating body. In mergers in such a situation the custom is that the validity of a merger should be determined not exclusively by the competitive factors, but that the regulating body should also consider the public interest." Cong. Rec. February 8, 1966, p. 2340.

The action of the Supreme Court in those cases dealing with the right of the Interstate Commerce Commission to approve a merger notwithstanding its anticompetitive effects, and particularly **[**29]** the language above quoted from the Seaboard Air Line case, would seem to make negative another argument of the Government. This is that the language of *§ 18(c)(5)* referring to the "convenience and needs of the community to be served" is but a reiteration of the "failing company doctrine" long recognized as "an integral part of settled ***antitrust law***." No such limiting suggestion was ever made in Seaboard Air Line and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the "failing company doctrine". There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act. During the debate on the bill, the question of the situation of the failing bank was mentioned, and in a colloquy between Congressman Weltner, who opposed the bill, and Congressman Multer, who supported it, it was made plain that the language referred to was not limited to the failing bank situation. [9]

[30]** **[*137]** The careful and precise description of this portion of the bill, made by Senator Robertson to the Senate as the latter body prepared to accept the House version, would clearly negative any suggestion that it was limited to the failing company situation. [10]

[31]** A final answer to the Government's "failing company" theory is found in the House Report's indication as to the limited extent of the use of financial resources of the affected banks. That report states (U.S. Code, Cong. and Administrative News, 89th Cong.2d Session, p. 337): "However, only the convenience and needs of the community to be served can be weighed against anticompetitive effects, with financial and managerial resources being considered only as they throw light on the capacity of the existing and proposed institutions to serve the community."

One problem which we confront in this particular case is how we shall apply the rules which are prescribed in the Act. In the case of future mergers the method of procedure and the application of the statutory requirements is quite simple. First, the banks seeking to merge will make their application for approval to "the responsible agency" in a case of this kind, the Comptroller of the Currency. The agency will then hold the hearings and make the determination contemplated by *§ 18(c)(5)* of the Act which, as we have indicated, calls for two determinations - whether the merger will have a tendency substantially to lessen competition **[**32]** and whether the anti-

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[9] After Congressman Multer had given an illustration of how this language would apply in a case not involving a failing bank, the following colloquy occurred:

"Mr. Weltner. This is a case of a failing bank, which has long been recognized by the court. It has nothing to do with this legislation. I am sure the gentleman from Wisconsin will agree with me, that we do not have to pass any bill to permit the approving agency to merge a failing bank in order to save it from insolvency. I am certain that the gentlemen from New York, indeed, would say, as a well-educated lawyer, that the failing bank doctrine exists independently of any statutes which has been passed in the last 20 or 30 years. I yield to the gentleman for the purpose of responding to the correctness of that proposition.

Mr. Multer: The gentleman is correct as far as he goes, but I have gone beyond the failing bank theory. There are many instances where we are not concerned with the failing bank, where there is an absolute and complete diminution of competition, yet under all the circumstances and all of the factors the courts should approve that merger just as the regulatory agencies may approve the merger." Cong. Rec. Feb. 8, 1966, p. 2346.

[10] He said: " . . . this bill, should convince the courts that the Congress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries." (Cong. Rec. Feb. 9, 1966, p. 2541.) In short, something apart from the older antitrust considerations, (including the failing company rule) are imported here. He also said (p. 2542): "The courts will no longer be able to say - in the case of a merger which does not reach to the point of creating a monopoly - that proof that a merger will have demonstrable benefits or will be benign is irrelevant. On the contrary, the question whether there are or are not demonstrable benefits - whether the merger is benign or malignant - will be the heart of the issue." Again he said (p. 2542): "The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved, and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life."

competitive effects, if found, are clearly outweighed in the public interest by the probable effect of the transaction in meeting the needs and convenience of the community to be served.

The Act then provides that any action brought under the antitrust laws arising out of this merger transaction shall be commenced within a short period following the Comptroller's approval and in this judicial proceeding "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph 5." Also, in any such action, the court is required to review in the manner we have mentioned, the issues presented. The Act, making reference to this, and other cases initiated after June 16, 1963, with respect to a merger consummated after that date, requires us to apply the same substantive rule of law that we would apply in the case of any future merger.

Here, however, the merger is already accomplished; it was accomplished pursuant to a September 30, 1963, approval by the Comptroller who purported to act under the provisions of the 1960 Bank Merger Act. That Act, as demonstrated by the decision of the Court in *Philadelphia Nat.* ***[**33]*** *Bank, supra*, was without force and effect, and the Comptroller's decision of September 30, **[*138]** 1963, cannot, we think, be the equivalent of a determination by him under the 1966 Bank Merger Act or in accordance with *§ 18(c)(5)* thereof. The question is whether we may now require the Comptroller to proceed under the new Act and to make the determination called for by the last mentioned section preliminary to our further consideration of the same and a review thereof.

We think that the decision in *United States v. Morgan, 307 U.S. 183, 83 L. Ed. 1211, 59 S. Ct. 795*, furnishes a precedent. [11] The Court upheld the right of the Secretary of Agriculture to make an order going beyond fixing rates for the future, stating that he was "now free to determine a reasonable rate for the period antedating any order he may now make," that is to say, during a period following his former invalid order. The Court noted the duty of the administrative agencies and of the courts judicially reviewing their action to coordinate their actions in order to secure the plainly indicated objects of the statute.

[34]** We think that in this case this court cannot as a practical matter apply the substantive rule of law set forth in *§ 18(c)(5)* of the Act unless it has before it for review an order of the Comptroller made pursuant to the requirements of that section. Not only because we are here required to review an administrative order as a part of our consideration of this case, but also because the Comptroller has made himself a party to this proceeding and subject to our orders, we shall now remand the cause to the Comptroller with directions to proceed to make the determinations called for by the Bank Merger Act of 1966. This we think to be appropriate in view of the requirements of the Act notwithstanding the actual merger has been completed.

This remand is predicated upon the assumption that after a new order has been made by the Comptroller, we will be able to review the same. As we have indicated, our power to review any determination as to the anti-competitive effects will allow a greater exercise of our own judgment, than our power to review a determination as to whether the anti-competitive effects, if any, are clearly outweighed in the public interest and as to the effect of the **[**35]** transaction in meeting the needs and convenience of the community to be served. In making his determination the Comptroller should make specific findings as to the competitive situation as to which the merger may have operative effects and particularly whether the merger will have a probable tendency to lessen or do away with potential competition.

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[11] In that case the Secretary of Agriculture made an order reducing stockyards rates. After those rates had gone into effect the Supreme Court set aside the order of the Secretary because of procedural defects and the cause was remanded to the district court for further proceedings. The Court stated that it would not attempt to forecast what further proceedings the Secretary might see fit to take. The district court which had entered a temporary restraining order enjoining the enforcement of the Secretary's order had required the excess charges collected by the stockyards over and above the amount prescribed by the Secretary to be deposited with the court pending final determination of the case. The Secretary then reopened the original proceedings and pending these proceedings the district court granted the appellees' motion to distribute the fund mentioned among them. This decision was based upon a ruling that the Secretary did not have authority to make an order prescribing rates and charges effective as of the date of his original order.

In passing upon the question of the probable effect of the transaction in meeting the needs and convenience of the community to be served, the Comptroller should specify particularly what he finds to be the convenience and needs of the community, what he considers will be the effect of the merger thereon, and how and by what means he weighs these effects as against the anti-competitive effects of the transaction. Furthermore, in order to avoid any possible necessity for further remand following our review of the Comptroller's order, he is directed to make a finding as to whether, assuming that the merger has the effect upon **[*139]** potential competition which the Government claims, that effect would be outweighed in the public interest by the probable effect of the transaction in meeting the interest and convenience of the community **[**36]** to be served. [12]

In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review and simply decide the case on the evidence now before us, applying directly the standards set forth in *§ 18(c)(5)*. Such, we think would not be consonant with the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available in determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the "probable effect of the transaction in meeting the convenience and needs of the community to be served," but we lack the informed **[**37]** experience properly to apply such tests.

To deny the banks involved in these three "post-Philadelphia" actions the benefits of these banking-economic tests by specialized agencies would run counter to what the legislative history of the Act indicates was the attitude of Congress toward these three mergers. As the bill first came from the Senate it would have provided that this merger "shall be exempt from the antitrust laws." In its final form the bill exempted only the pre-Philadelphia mergers. But the bill would, as Senator Robertson stated, "permit the continuance of proceedings against the three post-Philadelphia cases - in Nashville, San Francisco, and St. Louis - where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute for all mergers to be considered in the future." Surely Congress was not swinging from a most favorable treatment of this merger to an opposite extreme of denying it the expertise contemplated for all mergers in the future.

Another holding, in the alternative, would be that since this court cannot validly entertain a question as to "the probable effect **[**38]** of the transaction in meeting the convenience and needs of the community to be served," the requirement that we "shall apply the substantive rule of law set forth in *§ 18(c)(5)*" must be held inoperative and disregarded, and therefore this action must proceed as if the Act had not been passed. Such an unnecessary and uncalled for disregard of the obvious purpose and intent of the Act is unthinkable.

We anticipate that the defendant banks will suggest that we should simplify this whole matter by finding now, once and for all, that the claimed adverse effect upon competition has not been established and that the merger will not have the effect either substantially to lessen competition, whether actual or potential, or to tend to create a monopoly or operate in restraint of trade. But, as indicated in *Seaboard Air Line R. Co., supra*, that is not the ultimate question to be determined in this litigation, and we shall not invite a repetition of the error corrected in that case.

It is therefore ordered that further proceedings herein shall be stayed pending the further consideration by the Comptroller, in the manner hereinabove indicated, of the questions required to be passed upon under **[**39]** *§ 18(c)(5)*. In reaching his determination the Comptroller will, of course, give the notices and provide the opportunity for hearing contemplated by the Act. We assume the parties will assist in shortening the proceedings by agreeing that the Comptroller may consider the evidence adduced at our last hearing, as well as that **[*140]** at his first hearing, particularly in view of the rule that administrative agencies have never been restricted by the rigid rules of

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[12] Note the usefulness of findings based on assumptions made by the district court in *United States v. Philadelphia Nat. Bank, supra, at p. 335* of 374 U.S.

evidence. *Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793*; cf. Davis, Administrative Law, vol. 2, § 14.08.

Upon certification to this court of the proceedings of the Comptroller, this court shall proceed in such manner as may be called for by the Comptroller's decision.

It is so ordered.

This opinion contains the court's findings and conclusions.

United States v. Provident Nat'l Bank

United States District Court for the Eastern District of Pennsylvania

October 13, 1966

Civil Action No. 40032

Reporter

259 F. Supp. 373 *; 1966 U.S. Dist. LEXIS 10212 **; 10 Fed. R. Serv. 2d (Callaghan) 108; 1966 Trade Cas. (CCH) P71,931

United States of America, Plaintiff v. Provident National Bank, and Central-Penn National Bank of Philadelphia, Defendants; and James J. Saxon, Comptroller of the Currency, Intervenor

Core Terms

Banks, merger, deposits, four-county, motion to dismiss, antitrust, notice, proposed merger

Judges: [1]** Clary, Ch. J.

Opinion by: CLARY

Opinion

[*374] Opinion and Order

CLARY, Ch. J..

On December 6, 1965 the Central-Penn National Bank of Philadelphia and the Provident National Bank of Philadelphia applied to the office of the Comptroller of the Currency for permission to merge under the charter of the Central-Penn National Bank and with the title of Provident National Bank. The report by the Board of Governors of the Federal Reserve System to the Comptroller of the Currency under *Section 18(c)* of the Federal Deposit Insurance Act on the competitive factors involved in the proposed merger dated January 7, 1966, was that "the overall effect of the proposed merger on competition would be significantly adverse." On the same day, the Attorney General of the United States reported, "There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market . . . the anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." The Federal Deposit Insurance Corporation filed no comment.

On March 4, 1966 the Comptroller of the Currency approved **[**2]** the merger, and on March 31, 1966, filed his written decision in respect thereof. In that decision the Comptroller noted that this application to merge was the first filed by banks of significant size to be acted upon by his office since the passage of the 1966 Amendment to the Bank Merger Act. He stated, "The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank, et al., 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* and *U.S. v. Lexington, 376 U.S. 665, 84 S. Ct. 1033, 12 L. Ed. 2d 1 (1964)* recognizes that traditional antitrust concepts cannot be applied to banking without substantial modification." His findings then followed sustaining the merger.

On April 1, 1966 the present action brought by the United States of America against Provident National Bank and Central-Penn National Bank of Philadelphia, defendants, was filed to enjoin the merger. On April 7, 1966 James J.

Saxon, Comptroller of the Currency, intervened and thus is a party to the action, as provided by *Section 1828(c)(7)(D) of Title 12 United States Code*. Since under the provisions of the aforequoted *Section 1828* of Title 12 a novel situation has been **[**3]** brought about wherein two departments of the Executive Branch of the Government are litigating one against the other, with the approval of the Congress of the United States, it will be necessary to delineate in this Opinion to which branch of Government is being referred. Consequently, for the purposes of this Opinion, the plaintiff hereafter will be referred to as "Department of Justice" or "Justice"; the defendant Provident National Bank as "Provident"; the defendant Central-Penn National Bank of Philadelphia as "Central"; the joint defendants as "Banks"; the Comptroller of the Currency as "Comptroller" or "Intervenor", and the Bank Merger Act, Public Law 89-356, 80 Stat. 7, 64 Stat. 892, will be referred to as "BMA-66". The stated purpose of the aforesaid Act, as set forth in the slip sheet publication reads as follows:

> "To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

[*375] The pertinent pleadings to date which are essential to a decision on the present motions consist of a complaint filed by Justice, a joint answer filed by the Banks, the order permitting **[**4]** intervention of James J. Saxon, Comptroller of the Currency, answer of the Comptroller, motion of the Comptroller to dismiss, and motion of the Banks to dismiss. The basis for each of the motions to dismiss is that the complaint "fails to state a claim upon which relief can be granted."

There is no question that a law suit was started by Justice to enjoin the merger before the thirtieth calendar day after the date of approval by the agency (March 4, 1966). Thus, Justice has met the fundamental requirement of BMA-66, Title 12, *Section 1828 (c)(7)(A)*, which prohibits any litigation challenging the merger after the thirtieth calendar day following approval. Justice has met the statutory limitation of action in that regard. A reading of the complaint leaves no doubt that Justice intended to plead, and did plead, a case of antitrust violation strictly in accordance with Section 7 of the Clayton Act (*15 U.S.C., Section 18*) and has attempted to ignore completely BMA-66. There are too many pointed references in the complaint challenging all alleged violations of ***antitrust law*** as contravening Section 7 of the Clayton Act only. Justice bottoms its case on the decision of the Supreme Court **[**5]** in *U.S. v. Philadelphia National Bank, et al., 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. It is this specific pleading of Justice charging a violation of Section 7 which is relied upon by the Banks and the intervening Comptroller in their motions to dismiss. The Banks and Comptroller insist that a Section 7 action is no longer available to Justice in a merger or consolidation of the type involved in the instant case, and that any actions must be grounded in BMA-66 and no other statute in the light of the wording of BMA-66. The Banks and Comptroller urge that since Justice has failed to ground its action in a challenge under BMA-66 within the thirty day period, and that since such failure is substantive rather than procedural, the limitations contained in BMA-66 are applicable, that the Court is thus without jurisdiction, and the action must be dismissed. In plain language they insist that Justice has deliberately sought to avoid any requirements contained in BMA-66 which deletes "line of commerce" and adds another facet to the standards governing bank mergers, i.e. if anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by **[**6]** the probable effect of the transaction in meeting the convenience and needs of the community to be served, the agency in question is authorized to approve a proposed merger. This intransigence of Justice, they contend, is substantive, not procedural, and thus fatal to the position of Justice.

The weakness of the contentions of the Banks and of the Comptroller lies in the fact that we are now only at the notice pleading stage. The complaint specifically charges that the history of commercial banking in the four-county area of Philadelphia has been one of consolidations, mergers and acquisitions, with a heavy concentration of the business of commercial banking within a relatively few banks; that Provident controlled 9% of the total assets, 9% of the total loans, 9% of the total IPC deposits, 10% of the total IPC demand deposits, and 9% of the banking offices doing business in the four-county area; that Central-Penn, the sixth largest commercial bank in the four-county area, controlled 5% of the total assets, 5% of the total loans, 5% of the total IPC deposits, 5% of the total IPC demand deposits, and 6% of the banking offices doing business in the four-county area; that Provident **[**7]** is the product of seven mergers or consolidations since 1947, and Central-Penn is the product of six such mergers or consolidations since 1949; that the proposed merged bank would be the fourth largest bank in the area, controlling 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits, and 15% of the banking offices of 36 **[*376]** banks doing business in the four-county area. Also, Justice contends that after the proposed merger, the five largest banks in the area would control 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits, and 63% of the banking offices of 36 banks doing business in the area; that it would destroy competition between each other and other banks, and that it would substantially lessen competition or tend to create a monopoly. It also charges that competition generally in the commercial banks in the four-county area will be substantially and unreasonably lessened, and that concentration in commercial banking in the four-county area will be substantially and unreasonably increased.

It cannot be gainsaid that if Justice had seen fit **[**8]** to plead generally and without reference to any particular statute, instead of specifically proceeding under Section 7 of the Clayton Act, and these factors pleaded might result in a violation of antitrust laws, the Court would of necessity have to hear the case. The only question for decision then is, does the reference solely to Section 7 invalidate the cause of action filed by Justice? For reasons hereafter set forth, this Court decides that it does not.

The purpose of notice pleading is merely to inform opposing parties what such opposing parties have to meet and defend. Justice charges a violation of antitrust laws, despite its insistence upon Section 7. Thus, suit is brought under antitrust laws of the United States.

The reference to a statute as being the basic ground upon which an action is brought, even if completely incorrect, is no ground for the dismissal of an action where there is a statute in existence which would warrant a valid cause of action for which relief could be granted upon the facts as pleaded. *Missouri K. & T.R. Co. v. Wulf, 226 U.S. 570, 57 L. Ed. 355, 33 S. Ct. 135 (1913)*. This case involved a complaint based upon a state statute which had been repealed **[**9]** by the enactment of a federal statute not mentioned in the complaint. Mr. Justice Pitney, writing for the Court, held that the Court was presumed to be cognizant of the enactment and that the pleader was not required to refer to the federal act. He further stated that reference to the state statute no more vitiated the pleading than a reference to any other repealed statute would have done. It was only important that there were sufficient allegations to support an action under the new federal act.

The modern theory of notice pleading is one of even greater liberality, thus bolstering the decision reached in *Missouri K. & T. Co. v. Wulf, supra.* Today, the basic principle is that pleadings are no longer to be held to the rigid standards of the common law and neither absolute clarity nor absolute precision is required. *United States v. Crown Zellerbach Corporation, 141 F. Supp. 118 (N.D. Ill. 1956)*. It is enough to sustain a pleading against a motion to dismiss that a defendant is informed with reasonable particularity of a legally cognizable claim against him. If the plaintiff could recover on any state of facts, which it might prove in support of its allegations as laid, a motion **[**10]** to dismiss will be denied. *Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Melo-Sonics Corporation v. Cropp, 342 F.2d 856* (3 Cir. 1965); *Fuller v. Highway Truck Drivers & Helpers Local 107, 233 F. Supp. 115 (E.D. Pa. 1964)*; *Miller v. Bargain City, U.S.A. Inc., 229 F. Supp. 33 (E.D. Pa. 1964)*.

Therefore, today the legal averments of a pleading are not so important as long as there are allegations which, if proved most favorably to plaintiff, would permit recovery under the laws of the United States. If, in such a complaint, there also appears a reference to an irrelevant statute, or if no statute is mentioned, the Court need only take judicial notice of the relevant statute. As stated in *Buell v. Sears, Roebuck & Co., 321 F.2d 468* (10 Cir. 1963), it is not necessary to plead what may be judicially noticed. And, it is hornbook law **[*377]** that federal acts are a proper subject for judicial notice.

There is a further principle of pleading which has been recognized in federal procedure since *United States v. Morris, 23 U.S. (10 Wheat.) 246, 6 L. Ed. 314 (1825)*, that a subsequent pleading of an adversary, if not thereafter denied, may cure a defect in a prior **[**11]** pleading. *Cole v. Ralph, 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920)*; *Albertson v. Federal Communications System, 87 U.S.App.D.C. 39, 182 F.2d 397 (1950)*; *Bullen v. DeBretteville,, 9th Cir., 239 F.2d 824 (1956)*. This principle applies to substantive as well as procedural omissions.

In the first defense of their answer, defendants claim that any action lies only under BMA-66. In their second defense, the defendant Banks put into controversy the question as to whether all right of Justice to enjoin the merger is vested in BMA-66. The answer of the Comptroller likewise puts into controversy the Bank Merger Act of 1966 by its prayer for relief.

We have long passed the stage peculiar to common law pleading that a failure in form of pleading vitiates the entire proceeding. This is an important case to all and is not a private quarrel between two branches of the Executive Department. The Congress of the United States has, for the first time, permitted two co-ordinate branches of the same department of Government to litigate opposite views in a judicial proceeding, thus affording one department of the Executive Branch, aggrieved by an alleged arbitrary position of the Department **[**12]** of Justice, to properly present for the first time before the judicial side of the Government its contention when it is in violent disagreement with the Department of Justice. While quite novel, in view of increasing differences between departments of Government, the provision is undoubtedly necessary.

In denying the motions to dismiss at this time, the Court does not sustain the position of Justice that it is entitled to sue under Section 7 of the Clayton Act. The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66. It is not necessary at this time to decide the question of burden of proof, whether on Justice or on the Comptroller and Banks. That will be ruled upon in later pre-trial procedures.

Order

AND NOW, to wit, this 13th day of October, 1966, for the reasons set forth in the foregoing Opinion, it is Ordered, Adjudged and Decreed that defendants' Motion to Dismiss and intervenor's Motion to Dismiss be and they are hereby Denied.

[Peelers Co. v. Wendt](#)

United States District Court for the Western District of Washington, Southern Division

October 29, 1966

Civil Action Nos. 2350, 2797

Reporter

260 F. Supp. 193 *; 1966 U.S. Dist. LEXIS 10448 **; 151 U.S.P.Q. (BNA) 378 ***; 1966 Trade Cas. (CCH) P71,921

The Peelers Company, a Partnership, and Laitram Corporation, a Louisiana corporation v. Ivar Wendt, Pacific Pearl Frozen Foods, Inc., Richard (Dick) Sutterlin, Washington Fish & Oyster Co., Inc., Zachar Bay Fisheries, Inc., Mark A. Jensen. Civil Action No. 2350. Crown Packers, Inc., a Washington corporation; Harbor Seafoods, Inc., a Washington corporation; Halibut Producers Cooperative, a Washington corporation; Mrs. Jessie Marchand, d/b/a Seaside Clam Co.; Edwin A. Kaakinen, doing business as Kaakinen Fish Company; Pacific Shrimp, Inc., an Oregon corporation; Ben Engdal and Harry Sundburg, co-partners d/b/a Harbor Seafoods of Wrangell; Alaska Marine Foods, Inc., an Alaska corporation; William F. Smith, a sole proprietor, d/b/a William F. Smith Company; pany; and Harbor Seafoods, Inc., an Alaska corporation v. Emile M. Lapeyre, Emile M. Lapeyre, Jr., Fernand S. Lapeyre, individually, as co-partners trading and doing business as the Peelers Company; and Grand Caillou Packing Company Inc., a Louisiana corporation, and a commendam partner in the Peelers Company. Civil Action No. 2797

Core Terms

instructions, claimants, patent, Sherman Act, monopolization, defendants', machinery, monopoly, shrimp, discriminatory, lease rate, present case, processing, damages, requested instruction, decisions, rates, new trial, Packers, misuse, violation of section, anti trust law, circumstances, competitors, antitrust, rights, films, attempt to monopolize, special verdict, pretrial order

LexisNexis® Headnotes

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

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

Civil Procedure > ... > Jury Trials > Verdicts > General Verdicts

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1[] **Jury Trials, Jury Instructions**

It would be especially misleading and unfair both to the jury and to the court to review any post-verdict contention apart from the pre-verdict situation or to consider any particular statement in the instructions separate from and unrelated to all other statements contained in the charge. Also, it is essential that the special and general verdicts be considered in relation to each other and that all the verdicts be interpreted in the light of the entire instructions upon which the verdicts were determined by the jury.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Monopolies & Monopolization, Actual Monopolization

See Sherman Act § 2.

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN3[] Monopolies & Monopolization, Attempts to Monopolize

Monopolizing is the acquisition or retention of power to control prices, or to exclude competitors in interstate commerce in commodities sold or distributed in the same market. The power to monopolize does not necessarily require that entire control of pricing or competition be acquired of the market in a particular commodity. The Sherman Act prohibits the monopolizing, in excess of lawful patent monopoly, of any part of the market for any product in interstate trade or commerce.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN4[] Scope, Exemptions

Possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Robinson-Patman Act, Claims**

There is no intimation in the Robinson Patman Amendment to the Clayton Act that it is the sole and exclusive ***antitrust law*** applicable to price discrimination, or is intended to be a limitation on the Sherman Act, or that it removes any antitrust conduct from the scope of the Sherman Act. The Robinson Patman Amendment prohibits initial-stage price discrimination which, if continued or extended, may become a Sherman Act violation.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] **Robinson-Patman Act, Coverage**

Even though a particular price discrimination may not fall within the specific prohibitions of the Robinson Patman Amendment to the Clayton Act, that circumstance neither directly nor by reasonable inference precludes price or lease rate discrimination from being a cause of a Sherman Act violation when all other elements of such violation are established.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Sherman Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN8[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

See *Fed. R. Civ. P. 17(a)*.

Civil Procedure > Attorneys > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

HN9[] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 51 provides for submission of requested instructions stating the views of counsel as to the law on fact issues which are supported by evidence and which counsel deem of particular importance to the contentions they expect to present to the court and jury. The court has a right to expect such assistance from counsel in the preparation of instructions.

Judges: [1]** Boldt, District Judge.

Opinion by: BOLDT

Opinion

[*379] [*195]** Memorandum Decision

BOLDT, District Judge

Eleven claims for treble damages, all grounded on the same alleged Sherman Act violations, were asserted in these cases. The claims were made by the several plaintiffs in Cause #2797 and, as a counterclaim in Cause #2350, by the defendants Wendt and Sutterlin, co-partners. All of the claims in Cause #2797 were asserted against Peelers Company, a partnership, and its individual members. In Cause #2350 Laitram Corporation, successor in interest to the Peelers partnership, was named, duly served with process and participated in the proceedings as a party. In the jury instructions, for brevity, the parties asserting the claims were called claimants, and the adverse parties were called defendants. The same designations will be used herein.

The claims were presented for consolidated jury trial on the contentions of the parties and the issues specified in the final pretrial order. Upon the stated contentions and issues recovery by any one or more of the claimants was possible under any one of the following bases of recovery: (1) restraint of trade by a combination of defendants in violation **[**2]** of Section 1 of the Act; (2) monopolizing in violation of Section 2 of the Act by a combination of defendants; (3) monopolizing by a single defendant; (4) attempting to monopolize by a single defendant; (5) attempting to monopolize by a combination of defendants.

There was substantial evidence from which the jury might reasonably have found facts sufficient to sustain recovery by one or more of the claimants on any of the above grounds asserted by claimants. Therefore, it was required that all of the several alternative bases of recovery be submitted to the jury under instructions stating claimants' contentions and the essential elements of each alleged basis of recovery. Unless these circumstances are constantly kept in mind the contentions raised by defendants' motions for judgment n.o.v. and for new trial cannot be correctly understood and fairly determined. Early in the charge the jury were instructed:

> "The instructions are prepared as an inter-related whole, that is, everything stated in one part or phase of the instructions is stated in the light of and to be considered with all other statements or parts or phases of the instructions. This means that no juror should **[**3]** take some particular part or **[*196]** phase of the instructions, isolate it and consider or apply it apart from all else stated in the instructions. The point is that not all that is to be said on any subject can be said in a single sentence or paragraph or even page, perhaps, and if each particular matter were to be repeated each time it was applicable, the instructions would go on interminably.
>
> "Therefore, each particular principle applicable to the case is stated for the most part once; sometimes it may be necessary to repeat to some extent or by reference. Every statement in the instructions is made on the assumption that the jury will apply that particular statement in the light of all other statements made in the instructions. This is a vital and essential assumption, and if the jury do not do that, but take some particular statement in the instructions and fail to consider it in connection with the other applicable principles stated in the instructions, the jury will, of course, be defeating the object of the instructions, which is to state the whole law of the case and to be applied by the jury as the whole law of the case."

The substance of this admonition was again **[**4]** stated at the end of the charge. The directions thus given the jury are equally applicable in examining defendants' post-verdict motions and would be violated by an out-of-context consideration of any of the questions now presented.

[*380]** Because of the variety of possible bases of recovery and of fact issues, much time and effort were expended by the court in the preparation of instructions covering, without unnecessary repetition, all subject matter required to be included in the charge. To assist the jury in understanding and applying the instructions and in considering the evidence as related to the several Sherman Act violations asserted by claimants, a copy of the entire charge, captioned and indexed by subject matter, was in the jury-room for reference and study by the jury throughout their deliberations.

In the recited circumstances ***HN1***[] it would be especially misleading and unfair both to the jury and to the court, to review any post-verdict contention apart from the pre-verdict situation or to consider any particular statement in the instructions separate from and unrelated to all other statements contained in the charge. Also, it is essential that the special and general verdicts **[**5]** be considered in relation to each other and that all the verdicts be interpreted in the light of the entire instructions upon which the verdicts were determined by the jury.

From the special verdicts it is clear that the recoveries awarded by the general verdicts were based solely on a finding by the jury that defendants had violated Section 2 of the Sherman Act by single-firm monopolization in excess of patent monopoly. This ground of recovery was clearly within claimants' contentions in the pretrial order although not emphasized by isolation from the several other asserted grounds of recovery now eliminated by the special verdicts. Since approval and entry of the final pretrial order the court has always considered single-firm monopolization to be within the issues for trial and has never understood any counsel to assert otherwise until such contention was urged in the briefs on the post-verdict motions.

HN2[] Section 2 of the Sherman Act expressly condemns monopolizing by a single individual or firm:

> "Every person who shall monopolize . . . any part of [interstate] trade or commerce shall be [in violation of this act]."

Monopolizing was defined in the jury instructions **[**6]** as follows:

> "Monopolizing ***HN3***[] is the acquisition or retention of power to control prices, or to exclude competitors in interstate commerce in commodities sold or distributed in the same market. The power to monopolize does not necessarily require that entire control of pricing or competition be acquired of the market in a particular commodity. The Sherman Act prohibits the monopolizing, in excess of lawful patent monopoly, **[*197]** of any part of the market for any product in interstate trade or commerce."

The quoted definition, at least for the purposes of this particular litigation, is fully supported by numerous decisions of which the following are typical: *United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994*; *American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125*.

Repeatedly it has been held that monopoly rights granted by a patent are not absolute but are limited by the Sherman Act and by other laws not now pertinent.

> " . . ***HN4***[] . [Possession] of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United **[**7]** States v. Line Material Co., 333 U.S. 287, 308, 92 L. Ed. 701, 68 S. Ct. 550*.

> "The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act and supplementary legislation." *Standard Oil v. United States, 283 U.S. 163, 169, 75 L. Ed. 926, 51 S. Ct. 421*.

> " . . . the patent monopoly may not be used to disregard the antitrust laws . . ." *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 11 L. Ed. 2d 661, 84 S. Ct. 784*.

> " . . . Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained." *Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49, 57 L. Ed. 107, 33 S. Ct. 9*. *Hartford-Empire Co. v. United States, 323 U.S. 386, 406, 89 L. Ed. 322, 65 S. Ct. 373*.

A basic purpose of the Sherman Act in condemning monopoly was to protect competition and prevent unreasonable impairment thereof.

> "In the Sherman . . . Act, Congress was dealing with competition, which it sought to protect, and monopoly, which **[**8]** it sought to prevent." *Standard Oil Co. v. Trade Comm'n, 340 U.S. 231, 248, 95 L. Ed. 239, 71 S. Ct. 240*.

> "[The] basic and underlying purposes of the antitrust laws [are] to preserve competition and to protect **[***381]** the consumer." *Conference of Studio Unions v. Loew's, Inc., 9 Cir., 193 F.2d 51, 55*.

Many other decisions are to the same effect.

Food packers who are required by a patentee owner of processing machinery to pay substantially higher lease rates for use of such machinery than are paid for the use of identical machinery by their competitors selling food processed by the machinery in the same relevant market, necessarily have greater expense for machinery rental than their competitors and in that particular the ability of the disfavored food packer lessees to compete in the relevant market may be diminished. The jury in the present cases might reasonably have found the following facts proved by a preponderance of the evidence: (1) the defendants had no reasonable business necessity or justification for imposing unequal lease rates for the use of their machinery; (2) in all particulars relevant to equal rates claimants and their competitors were similarly situated; **[**9]** (3) the lease rates were an important expense factor in the production costs of claimants and their competitors; and (4) the rates imposed by defendants were unequal and caused substantial impairment of competition by claimants in the sale of food processed on defendants' machinery.

That all of the facts as above stated were found by the jury is established by the special and general verdicts. That such facts were reasonably found and warranted by the evidence appears beyond question since essentially the same facts were found from substantially the **[*198]** same evidence by the Federal Trade Commission (In re Grand Caillou Packing Co., et al., F.T.C. #7887, June 4, 1964) and by the Fifth Circuit in affirming the Commission findings and decision (*LaPeyre v. Federal Trade Commission, Fifth Circuit, 366 F.2d 117*, Sept. 13, 1966). Whatever other effect or authority might be given those decisions in the present case, they amply demonstrate the sufficiency of the evidence to support the facts found by the jury.

From such facts the jury might reasonably have reached the conclusion implicit in their verdicts that the defendants unlawfully exceeded the limits of their patent monopoly **[**10]** rights by unreasonably and substantially suppressing competition, thereby causing monopolization in violation of Section 2 of the Sherman Act.

While no decision can be cited as direct authority for the ultimate conclusion just stated, there is no decision cited or found which specifically or by necessary inference is authority to the contrary. The stated conclusion reasonably follows from the facts on which it is based and is in harmony with the philosophy of ***antitrust law*** and the trend of decisions interpreting that law. [1]

[11]** All contentions urged by defendants in support of their motions for judgment n.o.v. and for new trial have been fully and closely considered. In this memorandum decision only those contentions will be discussed which appear to warrant specific comment.

Defendants contend that because price discrimination is the specific subject of the Robinson Patman Amendment to the Clayton Act, *15 U.S.C. § 13*, such conduct is not covered by the Sherman Act. Also it is argued that the Amendment does not apply to lease rates and therefore a discriminatory lease rate cannot be a violation of either the Clayton Act or the Sherman Act. ***HN5***[] There is no intimation in Robinson Patman that it is the sole and exclusive ***antitrust law*** applicable to price discrimination, or is intended to be a limitation on the Sherman Act, or that it removes any antitrust conduct from the scope of the Sherman Act. Robinson Patman prohibits initial-stage price discrimination which, if continued or extended, may become a Sherman Act violation. ***HN6***[] Even though a particular price discrimination may not fall within the specific prohibitions of Robinson Patman, that circumstance neither directly nor by reasonable inference precludes **[**12]** price or lease rate discrimination from being a cause of a Sherman Act violation when all other elements of such violation are established.

The damages sought by claimants were related to lease rates but recovery solely because of the lease rates, even if found discriminatory, was not permitted under the instructions. The jury was instructed to consider all activities of defendants disclosed by the evidence in determining whether in **[***382]** fact a Section 2 Sherman Act violation had been established. The instructions specifically stated and in several contexts emphasized to the jury that

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[1] ***United States v. E. I. DuPont DeNemours & Co., 118 F. Supp. 41, 214-217 (D. Del. 1953)***, aff'd *351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Lorain Journal v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*; *Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*; *American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)*; *United States v. Crescent Amusement Co., 323 U.S. 173, 89 L. Ed. 160, 65 S. Ct. 254 (1944)*; *Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268 (1944)*; *United States v. Masonite Corp., 316 U.S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070 (1942)*; *Fashion Originators' Guild v. Trade Comm'n., 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*; *Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 515, 61 L. Ed. 871, 37 S. Ct. 416 (1917)*; *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*; United States v. 20th *Century Fox Film Corp., 137 F. Supp. 78 (S.D. Cal. 1956)*.

recovery could not be based merely upon a **[*199]** finding of discriminatory lease rates. Also, the essential elements of recovery were several times reiterated in the instructions, including particularly the necessity of proof of an *unreasonable* impairment or suppression of competition as a basis of recovery under Section 2 of the Sherman Act.

Defendants also assert that discriminatory practices by a single firm not acting in concert with others does not constitute a Sherman Act violation, citing language in the opinion in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 287* ***[**13]*** *(M.D. Pa. 1965)*. The precise question raised by defendants' contention was not directly presented in the cited case and the language of the District Court opinion on which defendants rely was not necessary to the decision in that case.

Defendants rely upon two Ninth Circuit decisions as indicating that single-firm discriminatory practices cannot effect a violation of Section 2 of the Sherman Act: *Chorak v. RKO Radio Pictures, 196 F.2d 225 (1952)*, cert. den. *344 U.S. 887, 97 L. Ed. 686, 73 S. Ct. 186*; and *Fanchon & Marco, Inc. v. Paramount Pictures, 215 F.2d 167 (1954)*, cert. den. *348 U.S. 912, 99 L. Ed. 715, 75 S. Ct. 293*. Both of those cases involved alleged discrimination by a producer or distributor of motion pictures in granting preferential release of films ("clearances") to particular exhibitors. As *Chorak* emphasizes, it is a practical impossibility for distributors to release identical films to all exhibitors at the same time. This is the crucial factor which clearly and vitally distinguishes the film distribution cases from the present case in which such factor is not present in any manner or to any degree. The practical business necessities of producers and distributors **[**14]** in the particular referred to is the basis for holding *reasonable* preference (discrimination) among exhibitors legally justifiable in the distribution of films. In the present case there was no evidence of any reasonable business necessity for defendants' discriminatory rates and by the verdicts the jury so found. Everything stated in the *Chorak* and *Fanchon & Marco* opinions is said in the light of and directed to the particular situation applicable to the distribution of films. In so far as the question under consideration is concerned there is no statement or intimation in any of the film distribution opinions that they are applicable beyond that particular type of case.

There is no clear authority to support, and the philosophy of recent antitrust decisions is against, defendants' contention that single-firm violation of Section 2 of the Sherman Act cannot be based on unreasonably discriminatory lease rates when all other requirements in proof of such a violation are fulfilled.

Defendants say they only manufacture, sell and lease shrimp processing machinery and are not engaged in the business of either processing shrimp or distributing canned shrimp in the market **[**15]** for that commodity. Because of these circumstances defendants contend the processing machinery market is the only market "relevant" to a Sherman Act recovery against defendants and therefore claimants cannot recover in this litigation for any damages sustained because of the suppression or restriction of claimants' ability to compete in the market for canned shrimp. In effect, defendants argue that claimants cannot recover even if defendants violated the Sherman Act in the leasing of their processing machinery and such violation proximately caused injury and damage to claimants by reason of suppressing claimants' ability to compete in the market for canned shrimp. The decisions cited in support of this contention are noted below. [2] None of the **[*200]** opinions purports to rule directly and specifically as contended for by defendants. Some of the opinions contain language which lend inferential support to defendants' contention if considered apart from the particular circumstances of the case in which the language was used and out of the context in which defendants' contention is made in the present case. Otherwise, this court does not consider defendants' contention supported **[**16]** by any of the cited cases or by all taken together. On the other hand, a recent (April, 1966) decision of the *Fourth Circuit, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414*, expresses views as to proximate **[***383]** cause which this court considers applicable to

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[2] *United States v. E. I. DuPont DeNemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 247 F.2d 343* (2 Cir., 1957), cert. den. ***355 U.S. 952, 2 L. Ed. 2d 529, 78 S. Ct. 537 (1958)***; *Dictograph Products, Inc. v. Federal Trade Comm'n, 217 F.2d 821 (2nd Cir. 1954)*; *United States v. Aluminum Co. of America, 148 F.2d 416* (2nd Cir., 1945); ***Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D. Pa. 1965)***; *United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953)*, aff'd per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*; *United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

the question posed by defendants' contention in this case. The essence of that decision on the present point is stated:

> "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4 . . .
>
> "'The ***HN7***[] statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these . . . 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 . . .'"

[17]** Other language in the same opinion and the below-noted decisions [3] support the holding of this court that recovery by claimants against defendants may be had upon the finding by the jury that defendants' violation of Section 2 of the Sherman Act in the leasing of processing machinery proximately caused injury and damage to claimants in preventing or restricting them in competing in the market for processed and canned shrimp.

Defendants contend that judgment n.o.v. must be granted against Crown Packers since that claimant was merely working as a processor on a cost-plus basis and did not itself engage in the marketing of shrimp and **[**18]** therefore suffered no damage. ***HN8***[] *Rule 17(a)* Civ. R.P. provides that " . . . a party with whom or in whose name a contract has been made for the benefit of another . . . may sue in his own name without joining with him the party for whose benefit the action is brought." It is clear Crown Packers comes within the rule and that, although acting on a cost-plus basis, its contracts with defendants for machinery rental were made for the benefit of Crown Packers.

Defendants' contention that judgment for claimant Halibut Producers Cooperative should be limited to damages based on machinery rental charges paid to defendants for the peeling of shrimp sold in the canned shrimp market is also without merit. Halibut Producers Cooperative claimed it was required to discontinue canning shrimp because of defendants' discriminatory lease rates and at the suggestion of defendants entered the frozen shrimp market in an attempt to stay in the shrimp processing business. There was substantial evidence in the case to support this contention (Tr. 3673-3677) which raised a fact issue resolved against defendants by the jury verdict in favor of Halibut Producers Cooperative.

Defendants also contend there **[**19]** is an inconsistency in the answers to questions **[*201]** #3 and #4 of the special verdict in that the jury found monopolization in excess of lawful patent monopoly in answer to question #3, but found there was no intent to monopolize in answer to question #4. When the several essential issues submitted to the jury as to each possible basis of recovery by claimants and all of the instructions under which those issues were determined by the jury are fully considered and kept in mind, it is perfectly clear that question #4 referred only to the element of specific intent essential to establish an attempt to monopolize, one of the several possible bases of recovery by claimants.

The court remarked during argument on the post-verdict motions, " . . . it seems incredible to me that anyone could have understood interrogatory #4 to be related to anything excepting an attempt as defined in the court's instructions."

The jury were instructed:

> "*Attempt to monopolize*, as related to this case includes two essential elements: (1) a specific intention or purpose to acquire monopoly power in excess of lawful patent monopoly; and (2) the adoption of one or more alleged methods substantially **[**20]** furthering that specific purpose. To establish that a person had specific

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[3] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)*; *Socony-Vacuum Oil Co., Inc. v. United States, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55*, (9th Cir. 1951); See also at p. 363, *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)*.

> purpose and intention to monopolize, it must be shown by a preponderance of evidence that such person had actual knowledge that actions taken by him would tend to cause monopolization and that such person by such actions consciously desired to accomplish such monopolization."
>
> . . .
>
> "*Purpose* and *intention*, as used in defining and discussing attempt to monopolize, means that a person alleged to have made such attempt must be proven to have taken actions with the specific objective of monopolizing in mind and with the conscious desire that his actions will enable him to monopolize.
>
> **[***384]** "Other than as just stated, if a person voluntarily takes actions which in fact result in a violation of the antitrust laws, such person is chargeable with antitrust violation as to civil claims for damages of the type asserted in the present case, whether or not such person had either purpose, intention, intent or knowledge that his actions would result in violation of the antitrust laws."

Although counsel were given drafts of the instructions and the verdict forms and invited to submit suggestions as to their form, **[**21]** language and substance, the court received little assistance from counsel in that respect. The special verdicts required the jury to report its findings as to the essential facts pertaining to each of the several possible bases of recovery asserted by claimants. The several parts of the special verdict form and the general verdict forms were prepared as an interrelated series of questions to be determined by the jury. When the answers of the jury to those questions are read in their relation to each other and to the instructions on which they were based, there can be no reasonable doubt that the question concerning intent in special interrogatory #4 dealt only with whether defendants had specifically intended an attempt to monopolize. The answer to that question had no necessary bearing on whether, specifically intended or not, defendants actually accomplished monopolization which was the question presented in interrogatory #3. Fair analysis of all of the verdicts makes it certain the jury: (1) found there was no combination, thus precluding either a Section 1 violation or a Section 2 violation based on combination; (2) found no specific intent to monopolize, thus precluding a **[**22]** violation based on attempt to monopolize; and (3) found a general intent by defendants to voluntarily and knowingly do those things which were found to result in monopolization in excess of patent monopoly.

Although defendants urge a variety of contentions in support of their motion for new trial, the basic question presented by that motion is whether the following instruction is erroneous:

> "Lawful patent monopoly does not include the right to charge discriminatory **[*202]** rates as previously defined in these instructions or to attach conditions to the use of patented machinery which have the purpose or effect of unreasonably or unlawfully permitting a combination to restrain interstate trade or commerce in a product processed or manufactured by the patented machinery."

Defendants' claim of error pertains to the first part of the quoted sentence, i.e., "Lawful patent monopoly does not include the right to charge discriminatory rates *as previously defined in these instructions* . . ." In their argument defendants fail to give effect to the very definition specifically referred to as *underscored* above. A part of that definition stated:

> "Therefore, if you find **[**23]** from the evidence and under the court's instructions the rate was not discriminatory, or if discriminatory, neither the cause nor the result of an antitrust violation, your verdict must be for the defendants as to all claims."

When the clause objected to is read in context with the sentence in which it appears and with all other instructions, it is clear beyond question that the jury was instructed that recovery for any claimant could only be allowed if defendants' lease rate was found in fact to be discriminatory *and* caused by or the result of an antitrust violation. In the balance of the sentence following the phrase defendants object to, the jury was told a patent monopoly could not be used *by a combination* to restrain trade or commerce in products manufactured on the patented machinery. The underscored words make it plain that this portion of the instruction referred to conduct by a combination. Since the jury found there was no combination, even if the phrase complained of was incorrect defendants could not have been harmed by it.

HN9[] Fed. Civ. R. #51 provides for submission of requested instructions stating the views of counsel as to the law on fact issues which are **[**24]** supported by evidence and which counsel deem of particular importance to the contentions they expect to present to the court and jury. The court has a right to expect such assistance from counsel in the preparation of instructions. In the present case few, if any, of the numerous requested instructions submitted by counsel contained complete, correct and fair statements of the law applicable to the numerous principles of law on which the jury obviously had to be instructed. The failure of exceptionally able and experienced counsel to present their conception of the law as to the principal issues by well stated requested instructions should not be viewed with favor in cases involving such extraordinarily complicated and unusual fact and law issues as were involved **[***385]** in this litigation. If by hindsight, it might now appear that a phase of an issue mentioned in a requested instruction was not covered in the given instructions as specifically or emphatically as might seem desirable, this is more fairly chargeable to counsel than to the court. In any event it would not require new trial unless the claimed error was clearly prejudicial. It does not appear defendants were or could have **[**25]** been prejudiced by any asserted error urged in support of defendants' motion for new trial.

Refusal of only one instruction requested by defendants is claimed as error, which indicates all other requests of defendants were covered to their satisfaction in the instructions given to the jury. The refused request reads:

> "INSTRUCTION NO. B 1
>
> "You are instructed that you cannot find that either monopolization or restraint of trade constituting an antitrust violation were committed by the Laitram Corporation or The Peelers Company or Grand Caillou Packing Company, Inc., if you find that the lease rate utilized for the defendants' patented shrimp peeling machinery from 1956 to May 1, 1963, was equal to a numerical expresion of a single, uniform charge for each shrimp peeled on the machinery, regardless of the size of each shrimp."

[*203] If considered as an abstract statement unrelated to the evidence in the case, this requested instruction is far from being clear, uncomplicated and understandable. However, there was no categorical credible evidence in the record to sustain a finding that the yield for each Gulf packer was 50% of the yield for each Northwest packer. Also, **[**26]** the request fails to take into account the fact the jury was entitled to consider all circumstances shown by evidence which were involved in setting the rates. The subject matter of the requested instruction, so far as supported by evidence, was fully covered in the instructions given the jury and defendants' counsel were not precluded from arguing to the jury the contention stated in their requested instruction.

Defendants complain of the supplemental instruction given during the deliberations of the jury in response to request of the jury therefor. The appropriateness and the perception of the jury's inquiry indicate discriminating care in considering and applying the instructions. Promptly upon receipt of the inquiry it was reported to counsel who thereupon met in lengthy conference with the court. Counsel were given every opportunity to participate in preparation of a response to the jury and to state their views concerning the form and content of the response. Defendants' counsel were particularly invited to suggest any particulars which should be included in the response but they did not then seek inclusion of those items the omission of which they now assert as error. **[**27]** The conference was not reported and the taking of exceptions was not required. However, the conference did occur and in the presence of counsel a proposed supplemental instruction in response to the jury's request was discussed in detail, drafted and finally redrafted in the form given to the jury.

Defendants' final asserted ground for new trial pertains to a comment by claimants' counsel during final argument to the jury. Assuming the comment was improper, it could not have improperly influenced the jury to the prejudice of claimants.

The court instructed the jury:

> "The statements of attorneys in the case made during the trial and in their arguments are not evidence nor proof of any fact in issue, and should be disregarded by you unless the statements are based on your own recollection of what the evidence is, and in accord with your own judgment as to the credibility, value and significance of the evidence."

Also:

> "Your verdict must be based exclusively upon the evidence presented and received during the course of the trial . . . You must not discuss or consider anything but such evidence."

Also as to the subject matter of the comment asserted as **[**28]** prejudicial argument, the court instructed the jury:

> "The fact that the Northwest lease charges were reduced as of May, 1963, in and of itself, is not to be taken as any evidence or proof that the previous lease rate was discriminatory or unlawful in any respect."

The jury was constantly alert and attentive during an involved and lengthy trial and its perceptive request for further instruction and the discernment indicated in finding facts as directed in the special verdict indicate the jury deliberated on the case with utmost care and faithful adherence to the instructions of the court. The court has not the slightest doubt the jury scrupulously followed the above-quoted **[***386]** instructions as well as all others. If so, the asserted improper comment of counsel could not have had the slightest prejudicial effect. The court is confident such was the fact of the matter.

On full consideration of all contentions by defendants in support of their motions for judgment n.o.v. and for new trial each and both are found without substantial merit and are hereby denied.

Claimants' motion that the judgment upon the verdicts in Cause #2797 **[*204]** be applicable to and run against Laitram **[**29]** Corporation has been fully considered on the briefs upon which it was submitted.

It is undisputed that Laitram Corporation is the successor to the rights and liabilities of the Peelers Company. Laitram is a named party in Cause #2350 (Pretrial Order Admitted Fact #5), and as such was fully and properly before the court in Cause #2350. That cause and Cause #2797 were consolidated for trial with the same jury; thus Laitram was a direct participant in the litigation of claims, contentions and issues in Cause #2797 identical to those in Cause #2350. The ownership of Peelers and Laitram is substantially the same. The principal owners of Laitram testified as witnesses and were present in person throughout all or most of the trial proceedings. Peelers and Laitram were represented by the same counsel who vigorously participated in all proceedings in both Cause #2350 and Cause #2797.

In these circumstances, to now require service of process and further proceedings as to Laitram would give unreasonable and unnecessary obeisance to formality. In a substantially similar situation such formality was held essentially useless and therefore unnecessary in *Hirsch v. Bruchhausen, 284 F.2d 783* ***[**30]*** *(2nd Cir. 1960)*. That decision fully supports the granting of claimants' motion in the present case. Accordingly, it is hereby so ordered.

In Cause #2350 plaintiff seeks relief for alleged infringment by the defendants in that action of certain patents on shrimp peeling machinery owned by plaintiff. Defendants' challenge to the validity of the patents previously has been tried in this court and determined in favor of plaintiff. *Kaakinen v. Peelers Company, 301 F.2d 170*. The sole issue now presented is whether defendants' affirmative defense of patent misuse has been sustained on the evidence and record before the court. Nonjury determination of that issue has been stipulated.

Plaintiff in Cause #2350 may be estopped to deny misuse of the patents because the same issue has been determined against plaintiff by the United States District Court for the District of Alaska in *Laitram Corporation v. King Crab, Inc., 244 F. Supp. 9, 245 F. Supp. 1019*. In that case, after extended trial, the court held the patents had been misused in the identical particulars at issue in the present case. In the cited case it was held that the patent holder had purged itself of the misuse and a permanent **[**31]** injunction against further misuse was granted but recovery of damages was denied.

On the record in the present case it is found in fact and law that the charging by plaintiff of rates unreasonably and unfairly discriminating between lessees of the patented machinery constituted a patent misuse during the period such rates were applied. Accordingly, no damages sustained during such period may be recovered by plaintiff. Incidentally, it should be noted that while damages are discussed in plaintiff's brief no demand for damages was stated in the complaint or in the pretrial order.

The evidence shows plaintiff discontinued its discriminatory rate practices in May, 1963. Having purged itself of misuse as of that date, plaintiff is entitled to an injunction restraining defendants from infringement of plaintiff's patents after May 31, 1963 continuing in effect until further order of this court.

It is so ordered. Findings of Fact, Conclusions of Law and a Decree in accordance with this ruling may be presented at the convenience of counsel.

Allowance of attorneys' fees pursuant to Section 7 of the Sherman Act has been submitted for determination by the court upon affidavits and memoranda.

[32]** Upon careful review of all circumstances of the present case relating to the several factors proper to be considered in fixing attorneys' fees in this type of case, the court has concluded and hereby finds the sum of $150,000 is a fair and reasonable amount to be allowed as attorneys' fees and awarded claimants as recoverable costs of suit. It is so ordered.

Otto Milk Co. v. United Dairy Farmers Cooperative Asso.

United States District Court for the Western District of Pennsylvania

November 10, 1966

Civil Action No. 66-705

Reporter

261 F. Supp. 381 *; 1966 U.S. Dist. LEXIS 10214 **; 1966 Trade Cas. (CCH) P71,935

Otto Milk Company, Plaintiff, v. United Dairy Farmers Cooperative Association, United Dairy Farmers, Ernest Hayes, J. D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, Defendant

Core Terms

milk, picketing, Farmers, products, Dairy, purchases, defendants', interstate commerce, farms, retail store, boycott, raw milk, cooperative association, dairy product, monopolize, Antitrust, induce, Sherman Act, conspiracy, enjoined, customers, restrain, front, sales, sells, restraint of trade, injunction, processed, dairymen, bottled

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Jurisdiction**

The Sherman Act, *15 U.S.C.S. §§ 1*, *2* extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially affect interstate commerce. The source and application of the restraint upon trade may be intrastate, but that does not matter if it is interstate commerce that is affected.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

In determining whether a defendant's activities have an effect on interstate commerce for purposes of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, a court need not be concerned with the exact dollars and cents effect, so long as the volume of trade involved is "not insubstantial."

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 17*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN6[] **Exemptions & Immunities, Collectives & Cooperatives**

See *7 U.S.C.S. § 291*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN7[] **Collectives & Cooperatives, Capper-Volstead Act**

The Clayton Act, *15 U.S.C.S. § 17*, and the Capper-Volstead Act, *7 U.S.C.S. § 291*, do not give agricultural cooperatives a blanket exemption from the antitrust laws that allows them to engage in predatory practices or conspire with others to monopolize or otherwise restrain trade in violation of the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN8[] Horizontal Refusals to Deal, Boycotts

Group boycotts to be unlawful in and of themselves under the Sherman Act, *15 U.S.C.S. § 1*, *2*.

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

International Trade Law > General Overview

HN9[] Monopolies & Monopolization, Attempts to Monopolize

An attempt to monopolize local business by restraining interstate commerce through the means of a boycott is a direct violation of the Sherman Act, *15 U.S.C.S. § 2*. When one suppresses competition, he necessarily restrains trade. The fact that a monopolization of the market has not yet been achieved does not excuse a defendant's conduct. It is sufficient that there is a tendency toward monopoly or that there is a reasonable likelihood of a substantial lessening of competition. It is practices which tend to create a monopoly which are forbidden; the law need not await the accomplishment of the objective.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN10[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Under the Sherman Act, *15 U.S.C.S. § 1*, simultaneous or express agreement between parties is not necessary to the formation of a conspiracy. It is sufficient if there is acquiescence in an illegal scheme. Even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN11[] Antitrust & Trade Law, Sherman Act

Picketing employed as an integral part of conduct in violation of a valid statute is not entitled to the immunity granted other forms of expression. The enjoining of picketing, the sole purpose of which is in conflict with a valid statute, is not inconsistent with the U.S. Const. am. I guarantee of freedom of speech.

Judges: [1]** Miller, D.J.

Opinion by: MILLER

Opinion

[*382] MILLER, D.J.:

Plaintiff, Otto Milk Company (Otto), filed a complaint alleging violations of *Sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, [1] by defendants **[*383]** and asking that defendants be enjoined from further violations of said Act and that plaintiff be paid treble damages because of such violations. Testimony was taken and oral argument held by the Court. At the oral argument, plaintiff waived its claim for damages and the Court now has before it only plaintiff's petition for an injunction.

[2]** Plaintiff, a Pennsylvania corporation with its principal office and plant in Pittsburgh, is engaged in the purchasing of raw milk which it processes and bottles, and in the manufacture of general dairy products, including bottled milk, which it sells to numerous retail stores in Pennsylvania, Ohio and West Virginia. While the raw milk purchased by plaintiff is produced on farms in Western Pennsylvania, it purchases materials for milk containers, dairy products containers, milk cases and ingredients for its processed dairy products from other states, spending more than one million dollars annually for such out-of-state purchases.

The defendants are United Dairy Farmers Cooperative Association, an incorporated association whose members operate dairy farms in Pennsylvania; United Dairy Farmers, an unincorporated association of dairy farm operators; and Ernest Hayes, J.D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, all of whom are officers of the United Dairy Farmers Cooperative Association (Association) and the United Dairy Farmers (UDF).

The complaint alleges that defendants conspired among themselves and with others to boycott and to induce others to boycott the products **[**3]** of plaintiff, to raise, fix and affect the price of raw milk and to eliminate competition between the Association and UDF and their competitor, Dairymen's Cooperative Sales Association (DCSA), the milk marketing organization through which Otto purchases raw milk. It is also alleged that defendants have conspired and attempted to monopolize the sale of raw milk in Western Pennsylvania, and that defendants' conduct constituted an intentional interference with long-standing business relationships between Otto and its customers.

There is ample evidence in the record to establish that on or about May 26, 1966, members of the defendants, Association and UDF, began marching in front of retail stores which sell Otto products in various communities in Armstrong, Butler, Fayette, Washington and Westmoreland Counties. They were carrying signs bearing various statements, such as "Otto Milk refuses to pay farmers fair prices for milk," "Otto Milk Company refuses to pay fair prices to farmers," and "Otto Milk is unfair to the farmer." [2] These members of defendant organizations told the managers of the stores in front of which they marched that they would leave if the store stopped selling Otto's **[**4]** products. In some instances they also asked the store managers to substitute Beverly Farms' products for Otto's. When store managers acquiesced by discontinuing purchases of Otto's products, the pickets were removed. While picketing in front of these stores, defendant organizations' members also distributed handbills signed by United Dairy Farmers Cooperative association and urging the consumers to purchase Beverly Farms milk.

We are satisfied from the evidence that these pickets have been associated with and their activities authorized by defendants. The signs used by them either referred to the UDF or were similar to a sign exhibited in Court which

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[1] "Every ***HN1***[] 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: . . ." (*§ 1*)

"Every ***HN2***[] 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 misdemeanor, ..." (*§ 2*)

[2] It is undisputed that Otto paid milk producers the price required by the Pennsylvania Milk Control Commission.

bore the name of the UDF. Furthermore, several of the pickets identified themselves as members of UDF or were found to be connected with members of UDF.

Defendants contend that this Court lacks jurisdiction of this action under the Sherman Antitrust **[**5]** Act because their alleged actions are purely intrastate activities. The Sherman Act, however, is not to be construed so narrowly. **[*384]** ***HN3***[] It "extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially *affect* interstate commerce." *Las Vegas Merchant Plumbers Association v. United States, 210 F.2d 732, 739* (9 Cir. 1954). The source and application of the restraint upon trade may be intrastate, as defendants' activities are here, but that does not matter if it is interstate commerce that is affected. As Justice Jackson stated in *United States v. Women's Sportswear Manufacturers Association, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949)*, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

We believe that plaintiff has demonstrated that ***HN4***[] defendants' activities would have an effect on interstate commerce. We need not be concerned with the exact dollars and cents effect, so long as the volume of trade involved is "not insubstantial." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*; *Evening **[**6]** News Publishing Co. v. Allied Newspaper Carriers of New Jersey, 263 F.2d 715* (3 Cir. 1959), cert. den. *360 U.S. 929, 3 L. Ed. 2d 1544, 79 S. Ct. 1449 (1959)*. Defendants' activities resulted in a loss of business to plaintiff amounting to approximately $3,600.00 per week. Otto sells products in states other than Pennsylvania, the volume of these sales at times exceeding $200,000.00 annually. Otto also purchases from other states materials which it uses in its business. The volume of these purchases is well over one million dollars per year. It is obvious that a decline in Otto's business would have an effect on interstate commerce that is "not insubstantial."

Defendants also contend that they are exempted from the provisions of the Sherman Antitrust Act by virtue of Section 6 of the Clayton Act, *15 U.S.C. § 17* [3] and the Capper-Volstead Act, *7 U.S.C. § 291*. [4] The Clayton Act, however, extends its exemption to agricultural organizations only for the purpose of "lawfully carrying out the legitimate objects thereof," and the Capper-Volstead Act permits dairymen to act in associations in "collectively processing, preparing for market, handling and marketing in interstate and foreign **[**7]** commerce" their products.

[8]** It was the purpose of Congress in passing these Acts to provide that farmers or dairymen might act together in cooperative associations without the associations as such being construed to be illegal combinations or conspiracies in restraint of trade as they otherwise might have been. *Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*; *North Texas Producers Association v. Metzger Dairies, Inc., 348 F.2d 189* (5 Cir. 1965). It was never intended, however, that ***HN7***[] agricultural cooperatives be given a blanket exemption from the antitrust laws that would allow them to engage in predatory practices or conspire with others to monopolize or otherwise restrain trade in violation of the antitrust **[*385]** laws. *Maryland and Virginia Milk Producers Association v. United States, supra*; *North Texas Producers Association v. Metzger Dairies, Inc., supra.*

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[3] " . . . ***HN5***[] Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[4] "Persons ***HN6***[] engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: . . ."

Defendants, by picketing retail grocery dealers and by asking them to remove Otto's products from their stores and to substitute Beverly Farms' products therefor, have engaged in an operation amounting to a boycott of Otto and DCSA. These activities were designed ultimately to **[**9]** exclude DCSA from competition in the milk market in this area and to corner that market for the Association and UDF. The Supreme Court has declared such ***HN8***[] group boycotts to be unlawful in and of themselves. *Northern Pacific Railway Co. v. United States, supra*; *Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey, supra*; *Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*.

This ***HN9***[] attempt to monopolize local business by restraining interstate commerce through the means of a boycott is a direct violation of *Section 2* of the *Sherman Act. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)*. When one suppresses competition, he necessarily restrains trade. *Wm. Goldman Theatres v. Loew's, Inc., 150 F.2d 738* (3 Cir. 1945). The fact that a monopolization of the market has not yet been achieved does not excuse defendants' conduct. It is sufficient that there is a tendency toward monopoly or that there is a reasonable likelihood of a substantial lessening of competition. *United States v. Penn-Olin **[**10]** Co., 378 U.S. 158, 12 L. Ed. 2d 775, 84 S. Ct. 1710 (1964)*. It is practices which tend to create a monopoly which are forbidden; the law need not await the accomplishment of the objective. *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. If allowed to continue and if successful, defendants could eventually exclude DCSA from the milk market in southwestern Pennsylvania.

Likewise defendants' activities constitute a conspiracy in restraint of trade in violation of *Section 1* of the Sherman Act. There was, in effect, a conspiracy between defendants and the owners of the retail stores which they picketed to boycott Otto and thus restrain competition between UDF and DCSA. The fact that the agreement of the storekeepers was obtained by coercion does not detract from the existence of a conspiracy. ***HN10***[] Simultaneous or express agreement between parties is not necessary to the formation of a conspiracy. *Interstate Circuit v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. It is sufficient if there is acquiescence in an illegal scheme. *United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*. Indeed, **[**11]** even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator. *Flintkote Co. v. Lysfjord, 246 F.2d 368* (9 Cir. 1957).

The case at bar is quite similar to the case of *Giboney v. Empire Storage Co., 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684 (1949)*. In that case the Supreme Court upheld a state court judgment enjoining officers and members of a union of ice peddlers from picketing an ice company's place of business because it found that the sole purpose of the picketing was to induce the ice company to agree not to sell ice to non-union peddlers. Here the sole purpose of defendants' picketing has been to induce or force certain retail store operators to agree not to purchase dairy products from Otto because Otto buys milk through DCSA rather than UDF. Just as the picketing in the *Giboney* case was a violation of the state anti-trade-restraint law, the picketing here is a violation of the Sherman Antitrust Act.

The case at bar is also similar to the case of *Milk Producers Association v. United States, supra*, wherein the Supreme **[*386]** Court held that an agricultural marketing association composed **[**12]** of dairy farmers had violated the Sherman Antitrust Act in attempting to get dealers to purchase milk from the association. The dairymen employed a boycott and exerted other economic pressure on dealers to attain their goal. This activity the Court held to be outside the legitimate objects of a cooperative and to constitute a violation of the Sherman Act.

As a violation of that Act, it matters not that the means employed were those of peaceful persuasion. *Paramount Pictures v. United Motion Picture Theatre Owners, 93 F.2d 714* (3 Cir. 1937). Merely because defendants' picketing involved the use of speech or was viewed by them as "telling their story" to the public, their activities are not necessarily entitled to the protection of the *First Amendment*. Picketing is more than speech; it is speech mixed with particular conduct. *Building Service Employees International Union Local 262 v. Gazzam, 339 U.S. 532, 94 L. Ed. 1045, 70 S. Ct. 784 (1950)*; *Cox v. Louisiana, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965)*. A picket line has potential for inducing action beyond the message the pickets convey. The very purpose of picketing is to exert influences and produce results different **[**13]** from the usual means of communication. *Hughes v. Superior Court, 339 U.S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950)*.

Indeed, the purpose of the picketing here was to induce the retail store operators to agree to stop handling Otto's products and in many instances it was successful. The pickets wanted not only to tell their story to the public, they wanted also to stop the customers from shopping at the stores and in turn stop the stores from dealing with Otto. To put it another way, the objective of the picketing was to achieve a result contrary to the provisions of the Sherman Act. The Supreme Court has made it clear that ***HN11***[] picketing employed as an integral part of conduct in violation of a valid statute is not entitled to the immunity granted other forms of expression. *Giboney v. Empire Storage Co., supra.* The enjoining of picketing, the sole purpose of which is in conflict with a valid statute, is not inconsistent with Constitutional guarantees of freedom of speech. *Local Union No. 10, United Association of Journeymen Plumbers and Steamfitters v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946 (1953)*; *International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284, 1 L. **[**14]** Ed. 2d 1347, 77 S. Ct. 1166 (1957)*.

Plaintiff has satisfactorily established that defendants were engaged in activities which constitute a boycott designed to restrain and monopolize interstate commerce in violation of the Sherman ***Antitrust law***. For this reason, plaintiff's prayer for a permanent injunction of these activities by defendants must be granted. Therefore, counsel for plaintiff is directed to file suggested findings of fact and conclusions of law and a form of decree in accordance with this Opinion.

Findings of Fact, Conclusions of Law and Decree

Findings of Fact

1. Plaintiff, Otto Milk Company ("Otto"), a Pennsylvania corporation with its principal office and plant in Pittsburgh, Pennsylvania, is engaged in the purchasing of raw milk which it processes and bottles, and in the manufacturing of dairy products, including bottled milk, which it sells to numerous retail stores in Pennsylvania, Ohio and West Virginia.

2. Defendants are the United Dairy Farmers Cooperative Association ("Association"), an incorporated association, whose members operate dairy farms in Pennsylvania; United Dairy Farmers ("UDF"), an unincorporated association of dairy farm operators; and **[**15]** Ernest Hayes, J.D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, all of whom are officers of the United Dairy Farmers Cooperative Association and the United Dairy Farmers.

3. Otto purchases raw milk requirements through the Dairymen's Cooperative Sales Association ("DCSA"), a milk marketing organization, which is in competition with the Association and UDF. In such purchases Otto pays for milk the full prices required by the Pennsylvania Milk Control Commission.

4. While raw milk purchased by plaintiff is produced on farms in Western Pennsylvania, it purchases material for milk containers, dairy products containers, milk cases, and ingredients for its processed dairy products from other states, spending more than one million dollars annually for such out of state purchases.

5. Plaintiff sells products in states other than Pennsylvania, the volume of these sales at times exceeding $200,000.00 annually.

6.Beginning on or about May 26, 1966, members of the defendants, Association and UDF, marched in front of retail stores which sell Otto products in various communities in Armstrong, Butler, Fayette, Washington and Westmoreland Counties. They carried signs bearing various **[**16]** statements, such as "Otto Milk refuses to pay fair prices for milk"; "Otto Milk Company refuses to pay fair prices to farmers"; and "Otto Milk is unfair to the farmer".

7. These members of defendant organizations told the managers of the stores in front of which they marched that they would leave, if the stores stopped selling Otto's products. In some instances, they also asked store managers to substitute Beverly Farms' (a competitor of Otto) products for Otto's. When store managers acquiesced by discontinuing purchases of Otto's products, the pickets were removed.

8. While picketing in front of these stores, defendant organizations' members also distributed handbills signed by United Dairy Farmers Cooperative Association, and urging the consumers to purchase Beverly Farms milk.

9. The evidence establishes that these pickets were associated with, and their activities were authorized by, defendants.

10. The foregoing activities of defendants adversely affected plaintiff's good will, and resulted in a loss of business to plaintiff amounting to approximately $3600.00 per week, which losses would continue and mount if defendants' conduct were not enjoined by this Court.

11. **[**17]** If the said conduct of defendants continued, it would further result in the reduction of purchases by Otto of materials from other states.

12. Plaintiff has suffered and, if defendants are not enjoined, will continue to suffer, irreparable injury, for which there is no adequate remedy of law.

13. The purchases and sales of the retail food stores against which defendants' activities were directed are in interstate commerce and the activities of defendants reduced the sale of all items in the stores, in addition to sales of Otto's products.

14. The activities of defendants were designed ultimately to exclude DCSA from competition in the milk market in the area involved, and to corner that market for the Association and UDF.

15. In addition to Pennsylvania farmers, many Ohio and West Virginia farmers market their milk through DCSA.

16. Defendants' activities, if continued, would have an effect on interstate commerce which would not be insubstantial.

17. Defendants, by picketing retail grocery dealers and by asking them to remove Otto's products from their stores, have engaged in an operation amounting to a boycott of Otto and DCSA, designed to restrain and monopolize interstate **[**18]** commerce.

18. Such action constitutes an attempt by defendants to monopolize the sale of raw milk in the southwestern Pennsylvania market area, which constitutes a separate and distinct geographic market for such milk. There is a reasonable likelihood that this attempt, if allowed to continue, will substantially lessen competition.

19. If defendants were permitted to continue the activities complained of and were successful, they could eventually exclude DCSA from the milk market in southwestern Pennsylvania.

20. Defendants' activities constitute a conspiracy between them and the owners of the retail stores which they picketed to boycott Otto and thus restrain competition between UDF and DCSA, even though the agreement of the storekeepers was obtained by coercion.

21. The purpose of defendants' activities was to induce the retail store operators to agree to stop handling Otto's products and, in many instances, it was successful. The pickets wanted not only to tell their story to the public, but they also wanted to stop customers from shopping at the stores and, in turn, stop the stores from dealing with Otto.

22. The activities of defendants interfered with, and if not **[**19]** enjoined would continue to interfere with, the advantageous business relationship between Otto and its customers.

23. Plaintiff has waived its claim for damages, including treble damages, and for counsel fees, and plaintiff and defendants have stipulated that the hearings held on plaintiff's motion for a preliminary injunction shall be considered as the final hearings in this case for the purpose of determining whether a permanent injunction shall issue.

Conclusions of Law

1. This Court has jurisdiction of the matters complained of in Counts I and II of the complaint in this action under *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*).

2. This Court has pendent jurisdiction of the matters complained of in Count III of the complaint in this action.

3. The activities of defendants, and others coerced by them, constitute an unlawful conspiracy in restraint of trade in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*).

4. The activities of defendants constitute an attempt to monopolize in violation of *Section 2* of the Sherman Act (*15 U.S.C. § 2*).

5. The activities of defendants constitute a tortious interference with plaintiff's advantageous business relationship **[**20]** with its customers.

6. The activities of defendants are not exempted from the provisions of the Sherman Act by virtue of either Section 6 of the Clayton Act (*15 U.S.C. § 17*), or the provisions of the Capper-Volstead Act (*7 U.S.C. § 291*).

7. Plaintiff is entitled to relief in the form of a permanent injunction against the actions of defendants complained of.

Decree

Based upon the evidence, the opinion of the Court heretofore filed, and the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered and Decreed that defendants, United Dairy Farmers Cooperative Association, United Dairy Farmers, Ernest Hayes, J.D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, and each of them, and any person or persons acting on their behalf, under their direction, or in concert or participation with them, are hereby permanently enjoined and restrained from inducing or attempting to induce, directly or indirectly, any present or potential customer of plaintiff to refuse to purchase products from plaintiff and, in connection therewith, from picketing or demonstrating, or threatening to picket or demonstrate, before or about any retail store in and around Western Pennsylvania, **[**21]** or in any other place which is, or may become, a purchaser of the bottled milk or dairy products of plaintiff.

Costs to be paid by defendants.

End of Document

Case-Swayne Co. v. Sunkist Growers, Inc.

United States Court of Appeals for the Ninth Circuit

November 21, 1966

No. 20,070

Reporter

369 F.2d 449 *; 1966 U.S. App. LEXIS 4319 **; 1966 Trade Cas. (CCH) P71,944

Case-Swayne Company, Inc., a corporation, Appellant, v. Sunkist Growers, Inc., a corporation, Appellee

Core Terms

oranges, fruit, growers, cooperative, geographic, products, processing, Sherman Act, associations, relevant market, agricultural, exemption, marketing, juice, Capper-Volstead Act, producers, monopoly power, monopolize, district court, Clayton Act, processors, citrus, monopoly, prices, cases, orange juice, conspiracy, contracts, submarket, commerce

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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 > Sherman Act > Remedies > General Overview

HN1[] **Remedies, Damages**

See 15 U.S.C.S. § 15.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. §§ 1-2*.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] **Dismissal, Involuntary Dismissals**

See *F. R. Civ. P. 41(b)*.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[] **Trials, Judgment as Matter of Law**

See *F. R. Civ. P. 50(a)*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN5[] **Exemptions & Immunities, Collectives & Cooperatives**

See *7 U.S.C.S. § 291*.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] **Judgment as Matter of Law, Directed Verdicts**

In ruling on a motion for a directed verdict, the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify. This is true even though contrary inferences might reasonably be drawn.

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

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The cases uniformly hold that a party has monopoly power if it has over any part of the trade or commerce among the several states, a power of controlling prices or unreasonably restricting competition.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

In determining whether a party has monopoly power it is first essential to define the "relevant market."

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Courts > Judicial Precedent

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

HN9[] **Antitrust & Trade Law, Clayton Act**

Determination of the relevant market, both as respects products and as concerns geographical area, is a necessary step precedent to determining whether within that market there was a probability of violation of § 7 of the Clayton Act. It is clear that the same determination must be made regarding the relevant market in actions for violation of the Sherman Act, *15 U.S.C.S. § 2*.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Under § 7 of the Clayton Act, the relevant question is whether the effect of a merger "in any line of commerce" may be substantially to lessen competition. The United States Supreme Court sees no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part" of commerce for purposes of the Sherman Act.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Monopolies & Monopolization, Actual Monopolization

In determining the "relevant market" with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, it seems advisable first to analyze separately the factors involved in both the relevant product market and the relevant geographic market.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

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

HN12[] Antitrust & Trade Law, Sherman Act

In determining the "relevant market" with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, the rule of "reasonable interchangeability" has been refined and modified. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive effects are to be appraised, i.e. a relevant submarket may constitute the product market for antitrust purposes.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Monopolies & Monopolization, Actual Monopolization

In determining the "relevant market" with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, the "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, 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.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Monopolies & Monopolization, Actual Monopolization

In *§ 2* cases under the Sherman Act, *15 U.S.C.S. § 2*, as in § 7 cases under the Clayton Act, there may be submarkets that are separate economic entities.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

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

HN16[] Relevant Market, Geographic Market Definition

The United States Supreme Court set forth criteria to be used in determination of the geographic market with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*: The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. Moreover, just as a product submarket may have significance under § 7 of the Clayton Act as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.

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

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Monopolies & Monopolization, Actual Monopolization**

Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. The area may be limited by differences in costs of production and transportation. A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market.

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

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Monopolies & Monopolization, Actual Monopolization**

It seems clear from the decided cases that while the outer limits of the market may be determined by the competition of interchangeable products, there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which must correspond to the commercial realities of the industry, is affected by price disadvantages due to transportation costs, is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, is determined in part with relation to the parties affected in the suit, and is a question of fact in the particular case.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Monopolies & Monopolization, Actual Monopolization**

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. The court sees no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear that even as to the processed product, the relevant market may at the same time be national, regional, and statewide in area.

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Monopolies & Monopolization, Actual Monopolization**

In determining the relevant geographic market with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, a proper test is the geographic structure of supplier-customer relations. The relevant market is determined in part by the market area to which the purchaser can practicably turn for supplies.

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Monopolies & Monopolization, Actual Monopolization**

In determining the relevant geographic market with respect to alleged monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, the central issue is where does a potential buyer look for potential suppliers of the service -- what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.

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

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopoly under the Sherman Act, *15 U.S.C.S. § 2*, has two elements: 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.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] Monopolies & Monopolization, Actual Monopolization

Monopoly power is the power to control prices or exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market. For example, over two-thirds of the entire domestic field of cigarettes and over 80 per cent of the field of comparable cigarettes constitutes a substantial monopoly.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN25[] Antitrust & Trade Law, Sherman Act

Size alone does not constitute an offense under the Sherman Act (Act), *15 U.S.C.S. § 2*; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by *§ 2* of the Act.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] Monopolies & Monopolization, Actual Monopolization

The ultimate consideration in determining whether an alleged monopolist violates the Sherman Act (Act), *15 U.S.C.S. § 2*, is whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing. It is not always necessary to find a specific intent to find that an ***antitrust law*** has been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. To require a greater showing would cripple the Act. No monopolist monopolizes unconscious of what he is doing. Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] Monopolies & Monopolization, Actual Monopolization

In determining the issues of monopolization and intent to monopolize, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture," weigh the contradictory evidence and inferences, and draw the ultimate conclusion as to the facts.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] Collectives & Cooperatives, Capper-Volstead Act

Having held erroneous one theory of liability upon which the general verdict may have rested, it is unnecessary to explore the legality of the other theories.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN29[] Exemptions & Immunities, Collectives & Cooperatives

Under *§ 1* of the Capper-Volstead Act, 12,000 orange growers are in practical and legal effect one "organization" or "association" even though formally organized into three separate legal entities.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Cooperatives > Member Duties & Liabilities

Business & Corporate Law > Cooperatives > General Overview

HN30[] Exemptions & Immunities, Collectives & Cooperatives

The language of the Capper-Volstead Act (Act) is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. A cooperative of orange growers numbering 11,000 members is a type of cooperative that would find "definite legalization" under the legislation.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN31[] Exemptions & Immunities, Collectives & Cooperatives

That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not preclude 12,000 orange growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN32[] Exemptions & Immunities, Collectives & Cooperatives

For purposes of the Capper-Volstead Act, it is immaterial whether every member of the association is a natural person or a corporation. For example, the owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Governments > Legislation > Interpretation

HN33[] Exemptions & Immunities, Collectives & Cooperatives

1 U.S.C.S. § 1 provides that in determining the meaning of any Act of Congress, unless the context indicates otherwise, the words "person" and "whoever" includes corporations as well as individuals.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Governments > Legislation > Interpretation

HN34[] Exemptions & Immunities, Collectives & Cooperatives

Nothing in the context of the Capper-Volstead Act (Act) indicates that a corporation would not be considered a person within the meaning of the Act.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN35[] Exemptions & Immunities, Collectives & Cooperatives

Associations organized under the Capper-Volstead Act (Act), *7 U.S.C.S. § 291*, may make the necessary contracts and agreements to effect the purposes of the Act, i. e., collectively processing, preparing for market, handling, and marketing their products.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN36[] Exemptions & Immunities, Collectives & Cooperatives

Agricultural producers may unite in preparing for market and in marketing their products, and may make the contracts which are necessary for that collaboration, but they are not authorized to conspire with others in restraint of trade.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > 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 > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN37[] Sherman Act, Claims

If the allegations of the complaint charge anticompetitive activities which are so far outside the "legitimate objects" of a cooperative (e.g., the object of the conspiracy or combination was to eliminate a competitor), then, if proved, they would constitute clear violations of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN38[] **Collectives & Cooperatives, Capper-Volstead Act**

If independent contracts with agency associations are for the legitimate objects of processing and marketing, then the defendant cooperative could have entered into these contracts with separate organizations. The mere fact that agency associations constitute a "class" of membership does not change the effect of the agency agreements or destroy the exempt status of the entire association under the Capper-Volstead Act.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN39[] **Pleadings, Amendment of Pleadings**

Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifies other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings.

Judges: [1]** Jertberg and Ely, Circuit Judges, and Jameson, District Judge. Ely, Circuit Judge, dissenting in part.

Opinion by: JAMESON

Opinion

[*451] JAMESON, District Judge:

This is an action seeking treble damages under section 4 of the Clayton Act ***HN1***[] (*15 U.S.C. § 15*) [1] **[**2]** for alleged monopoly and attempt to monopolize in violation of *sections 1* and *2* of the Sherman Act ***HN2***[] (*15*

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[1] *15 U.S.C. § 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."

U.S.C. §§ 1, 2). [2] The district court granted the defendant's motion for a directed verdict at the close of the plaintiff's case. [3]

[3]** Plaintiff (appellant), Case-Swayne, Inc., is engaged in the manufacture of single strength juices (canned orange juice and blends of orange juice with other fruit juice) as an independent operator. Defendant (appellee), Sunkist Growers, Inc., is an association of citrus producers. [4] It has as its base 12,000 citrus growers in Southern California and Arizona. The growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges and representatives from the exchanges make up the governing board of Sunkist. The Sunkist organization handles its members' fruit in effect from tree to store.

[4]** Appellant contends that the district court erred (1) in granting the defendant's motion for a directed verdict; and (2) in ruling that Sunkist was organized in conformance with section 1 of the Capper-Volstead Act [5] **[**5]** and therefore could not be held in violation of section 1 of the Sherman Act for conspiracy to restrain and monopolize trade in product oranges. If Sunkist Growers, Inc., was in fact organized as an agricultural cooperative association pursuant to the Capper-Volstead Act, as the district court found, any interorganizational dealings among the various agricultural cooperative associations are immune from the conspiracy provisions of section **[*452]** 1 of the Sherman Act; [6] but Sunkist may still be found liable under section 2 of the Sherman Act for wrongful use of monopoly power and attempt to monopolize. [7] The question presented under the first specification in error is whether the evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power or attempted to monopolize trade in product oranges.

HN6[] In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. "On appeal, likewise, the appellate court must consider

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[2] 15 U.S.C. § 1 provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"
>
> * * *

Section 2 provides in part:

> "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 misdemeanor * * *."

[3] At the close of plaintiff's case, the defendant moved for dismissal under Rule **HN3**[] 41(b) F.R. Civ. P. or for a directed verdict under Rule **HN4**[] 50(a). The court first indicated that it would dismiss pursuant to Rule 41(b), but later concluded that the motion for dismissal was improper and granted defendant's motion for a directed verdict under Rule 50(a).

[4] In addition to Sunkist Growers, Inc., the complaint named Exchange Orange Products Company and Exchange Lemon Products Company as defendants. Subsequently Exchange Orange and Exchange Lemon merged into Sunkist Growers, Inc., which assumed all of the obligations of the merged corporations, and the action was dismissed as to Exchange Orange and Exchange Lemon.

[5] Section 1 of the Capper-Volstead Act **HN5**[] (7 U.S.C. § 291) provides that, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: * * *"

[6] See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 1962, 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305.

[7] See Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 1960, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra.

the evidence in its strongest light in favor of the party against whom the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify". 5 Moore's Federal Practice 2316 (2d ed. 1951). This is true "even though contrary inferences might reasonably be drawn". *Continental Ore Co. v. Union Carbide, 1962, 370 U.S. 690, 696, 82 S. Ct. 1404, 8 L. Ed. 2d 777*. **[**6]**

Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product use. Product or "excess" oranges are those not sold as fresh fruit. They are used to make various orange products and are the only kind used by plaintiff in its business. On a national basis Sunkist controlled 6 to 7% of the total production.

Other small cooperatives controlled for their own use approximately 18% of the oranges grown in Southern California and Arizona. The balance of the oranges, approximately 12%, represented those grown by independent growers and available to independent manufacturers.

Additional facts set forth in the order granting defendant's motion for directed verdict include the following: [8]

(1) Prior to the development of the citrus juice industry there was no market for fruit not required by the fresh fruit market, and the remainder of the fruit, then called "culls", was destroyed by the packing houses. With the development of the citrus juice industry, the demand for culls, now designated "excess fruit", could be sold to processors to convert into juice and other by-products.

(2) At the beginning **[**7]** of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. When it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable, Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

(3) Fruit not so processed was sold to independent processors, including plaintiff. Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit. For several years Sunkist sold its excess fruit to independent processors by a bid system. All independent processors, including plaintiff, were invited to present bids for fruit to be sold.

(4) As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no Sunkist fruit is sold to independent processors.

[*453] (5) Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only **[**8]** to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

(6) Approximately 12,000 citrus fruit growers annually signed contracts with Sunkist agreeing to sell fruit through the Sunkist organization. The contracts provided that if a grower did not abide by his contract, sanctions might be imposed. Occasionally a grower failed to sell his fruit to Sunkist, and sanctions were imposed by the Sunkist organization.

(7) Sunkist trade-mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade-mark or trade name.

(8) Sunkist employees observed operations of member growers to make certain that the growers handled their crops through the Sunkist organization and if it was discovered that a member grower sold fruit contrary to his contract, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

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[8] All of the facts are substantially in the language of the district court, although they do not appear in the court's order in the same sequence.

(9) The Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice. One year Sunkist bid but did not receive the contract and another **[**9]** year, Sunkist bid and was awarded the contract.

(10) Sunkist made a large profit from sale of citrus fruit.

(11) The great majority of citrus grown in Southern California and Arizona goes into the fresh fruit market. The greater amount of oranges grown in Florida goes into the citrus products market. Fresh fruit from California, Arizona and Florida compete on the eastern and foreign markets.

(12) It was possible for processors in Florida to make single strength orange juice, can and ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

(13) The price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

(14) There is also competition between single strength orange juice and orange **[**10]** juice concentrates. Neither of the parties is a producer of concentrated or frozen juice.

The alleged violations of the Sherman Act arise out of "Sunkist's dominant control of oranges grown in Arizona and California together with its vertical integration and dual distribution with respect to oranges designated for product use . . .". More particularly, plaintiff complains that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida. [9]

The district court's **[**11]** granting of the directed verdict was premised upon the conclusion that the "relevant market" was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly. [10]

[*454] The cases uniformly hold that "a party has monopoly power if it has over 'any part of the trade or commerce among the several states', a power of controlling prices or unreasonably restricting competition". United States v. du *Pont de Nemours & Co., 1956, 351 U.S. 377, 389, 76 S. Ct. 994, 100 L. Ed. 1264*. **[**12]** ***HN8***[] In determining whether a party has monopoly power it is first essential to define the "relevant market".

This court has held that ***HN9***[] determination of the relevant market, "both as respects products and as concerns geographical area" is a "necessary step precedent to determining whether within that market there was a probability" of violation of section 7 of the Clayton Act. Crown Zellerbach Corporation v. F.T.C., 9th *Cir. 1961, 296 F.2d 800, 804*, (cert. denied (1962)) *370 U.S. 937, 82 S. Ct. 1581, 8 L. Ed. 2d 807*. While Crown Zellerbach involved a violation of the Clayton Act with respect to corporate acquisitions, it is clear that the same determination must be made regarding the relevant market in actions for violation of *section 2* of the Sherman Act. United States v. du *Pont & Co., supra.*

[9] This is not a complete statement of the alleged monopolistic acts of Sunkist, but it is the act upon which plaintiff places the most emphasis.

[10] The district court initially was of the opinion that the relevant market was Southern California and Arizona, but concluded, when all of the evidence was presented, that the relevant market for product oranges was a national market, "and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida."

HN7[]

In the recent case of *United States v. Grinnell Corp., 1966, 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698*, a civil suit for alleged violations of *section 2* of the Sherman **[**13]** Act, the Court said in part:

> "* * * That * * * case arose ***HN10***[] under § 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." (*384 U.S. at 573*).

HN11[] In determining the "relevant market" applicable in this case, it seems advisable first to analyze separately the factors involved in both the relevant *product* market and the relevant *geographic* market.

Relevant Product Market

United States v. du *Pont de Nemours & Co., supra*, relied upon by the district court in granting Sunkist's motion for a directed verdict, promulgated the test of "reasonable interchangeability" to determine the relevant product market. The Government contended that cellophane was the relevant product market. The Court assumed that **[**14]** if this were true, du Pont would have monopoly power over that market. The Court found, however, that cellophane was "reasonably interchangeable" with other flexible wrappings, and that the relevant product market accordingly was "flexible packaging materials" rather than cellophane alone.

HN12[] The rule of "reasonable interchangeability" has been refined and modified in subsequent cases. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive effects are to be appraised, i.e. a relevant submarket may constitute the product market for antitrust purposes.

In *Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510*, involving a merger found to be in violation of section 7 of the Clayton Act, the Court said in part:

> "The ***HN13***[] 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the **[**15]** country').
>
> "The Product Market.
>
> "The ***HN14***[] outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (citation) 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, **[*455]** the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (*370 U.S. at 324-5*.)

The rule of Brown Shoe was expressly applied to cases arising under *section 2* of the Sherman Act in the recent case of *United States v. Grinnell Corporation, supra*, where the Court said:

> "In § ***HN15***[] 2 cases under **[**16]** the Sherman Act, as in § 7 cases under the *Clayton Act, Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510*, there may be submarkets that are separate economic entities." (*384 U.S. at 573*.)

Relevant Geographic Market

In *Brown Shoe, supra*, ***HN16***[] the Court also set forth criteria to be used in determination of the geographic market:

> "The Geographic Market.

> "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S. Rep. No. 1775, 81st Cong. 2d Sess. 5-6; *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 1 L. Ed. 2d 1057, 77 S. Ct. 872*. Moreover, just as a product submarket may have § 7 significance as the proper 'line of commerce, ' so may a geographic submarket be considered the appropriate 'section of the country.' Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market **[**17]** selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." (*370 U.S. at 336-7*).

In the recent case of *United States v. Pabst Brewing Company, et al., 1966, 384 U.S. 546, 552, 16 L. Ed. 2d 765, 86 S. Ct. 1665*, involving the acquisition in 1958 by Pabst Brewing Company of Blatz's Brewing Company, the Court held that the "evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area (Wisconsin, Illinois and Michigan), and in the entire country was amply sufficient to show a violation of § 7 (of the Clayton Act as amended by the Celler-Kefauver Anti-Merger Amendment) [11] in each and all of these three areas". In 1957, prior to the merger, the two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area, and 4.49% of the sales throughout the country.

[18]** The Court was unanimous in holding that the district court erred in dismissing the complaint. Mr. Justice Harlan (joined by Mr. Justice Stewart) in a concurring opinion agreed with the district court that viewing the entire continental United States as a relevant market, the evidence did not sustain the Government's contention that the acquisition might substantially lessen competition. They agreed with the majority opinion, however, as did Mr. Justice Fortas, that the Government's evidence was sufficient to establish prima facie that Wisconsin and the tri-state area were proper "sections of the country" in which to measure the probable effects of the acquisition.

In his concurring opinion, Mr. Justice Harlan said in pertinent part:

> "The ***HN17***[] appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors. **[*456]** * * *" (*384 U.S. at 556-7*).

[19]** ***HN18***[] Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. *United States v. Columbia Pictures Corporation, S.D.N.Y., 1960, 189 F. Supp. 153, 192*. The area may be limited by differences in costs of production and transportation. *Erie Sand & Gravel Co. v. F.T.C., 3 Cir. 1961, 291 F.2d 279, 281*. "A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market ". *United States v. Penn-Olin Chemical Company, D. Del., 1963, 217 F. Supp. 110, 120*; *American Crystal Sugar Co. v. Cuban-American Sugar Co., S.D.N.Y., 1957, 152 F. Supp. 387, 398*, *Aff'd, 2 Cir. 1958, 259 F.2d 524*.

HN19[] It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond **[**20]** to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case.

We come now to an application of the criteria for determining both relevant product market and relevant geographic market to the facts in this case. In advance of trial it was the position of the trial court, as set forth in its pretrial order, that the relevant product market was product oranges and the relevant geographic market Southern California and Arizona. At the close of plaintiff's case, the court was persuaded that the relevant product market

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[11] 38 Stat. 731, as amended, 64 Stat. 1125, *15 U.S.C. § 18 (1964 ed.)*.

included orange juices and concentrates and that the relevant geographic market was national rather than limited to Southern California and Arizona. [12]

[21]** It is clear from the evidence that *orange products* (single strength juice and frozen concentrates) were sold in a national market. Oranges could be processed in Florida, and the juice shipped to California and sold competitively with juice processed in California from California **[*457]** oranges. Sunkist held a relatively small part of this national market and controlled neither quantity nor price.

On the other hand, it is equally clear that it was uneconomical for producers of orange products to buy their *product oranges* in Florida or elsewhere than in the Southern California-Arizona area. Sunkist controlled 70% of all oranges grown in this area and 67% of the product oranges. A substantial portion of the remaining product was unavailable to Case-Swayne.

Appellee does not question these facts, but contends that the relevant geographic market for product oranges was national on the theory that the product orange supply is tied irrevocably to orange product price. Appellee argues that product oranges "have value only because they can be converted into a product which has value," and that "the value of product oranges cannot exceed that which will permit them to be **[**22]** processed into products and then compete in a national products market dominated by Florida."

HN20[] While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear from the recent case of *United States v. Pabst Brewing Company, supra*, that even as to the processed product, the relevant market may at the same time be national, regional, and statewide in area. [13]

[23]** While Sunkist could not control the supply or price of canned juices because of competition from Florida in these products, there was substantial evidence that it did control the supply of product oranges from which juice was made in California and Arizona. ***HN21***[] In determining the relevant geographic market, a proper test is the "

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[12] In ruling on defendant's motion for dismissal or a directed verdict, following argument by counsel, the court said:

> "I was of the opinion that Florida was not a part of the market; that it was to be limited to Southern California and Arizona. I was of the opinion and still am of the opinion that it would certainly be uneconomical to try to ship fresh fruit from Florida or from Texas to California for the purpose of being converted into orange juice. So I have to look first to what is the competition in this case, what are the competitive factors?
>
> "Well, if we include Florida as part of the market, then of course Sunkist does not have a dominant place in this picture at all. It is a very minor part of the conversion of fresh fruit into orange juice, if we consider Florida as a part of the market.
>
> "Then I thought we were talking about product oranges, the monopoly of product oranges. But it seems to me that we now are talking about product oranges, but also about the juice squeezed from the product oranges. I don't know how you can say that there is a monopoly on product oranges without saying there is a monopoly on the juice that is squeezed from product oranges." (Rep. Tr. 1378:1-20).
>
> "So it seems to me that when we talk about competition, we are going to talk about competition not only of the fruit before it is squeezed, but the product after the squeezing, that is the orange juice.
>
> "Well, if you consider it in that light, then there is lots of competition on the shelves of Southern California, because the testimony is that the Florida producers, the Florida producers of orange juice, that is, those who squeeze the oranges to make orange juice in Florida, can ship it to Los Angeles, pay the shipping charges, and undersell the California product.
>
> "So from these two standpoints, that is talking about competition, what is competition -- competition is the competition in the open marketplace." (Rep. Tr. 1379:9-22).

[13] We concluded in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F.2d 1*, that the relevant market area for oranges and by-products, including fruits and juices, was the California-Arizona area, although it does not appear that the parties in that case argued or the court considered the distinction between product oranges and orange products or any contention that the market was national.

geographic structure of supplier-customer relations. " *United States v. Philadelphia National Bank, et al., 1963, 374 U.S. 321, 357, 83 S. Ct. 1715, 10 L. Ed. 2d 915*. The relevant market is determined in part by the market area "to which the purchaser can practicably turn for supplies." *Tampa Electric Co. v. National Coal Co., 1961, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580*. [14] There is no question that Case-Swayne and other users of product oranges could not as a practical matter obtain product oranges from suppliers outside California and Arizona.

[24]** Moreover, even though the price of product oranges in Florida would influence the price of product oranges in California, there was evidence from which the jury might find that Sunkist by reason of its control of the supply also as a practical matter controlled the price. [15] That is particularly true if it **[*458]** should be found that Sunkist refused to sell to plaintiff and other independent buyers at any price.

[25]** As Mr. Justice Fortas said in his dissenting opinion [16] in the recent case of *United States v. Grinnell Corporation, supra*, "The ***HN22***[] central issue is where does a potential buyer look for potential suppliers of the service -- what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." (*384 U.S. at 589*).

We conclude that there was evidence from which the jury might properly find that the relevant product market was product oranges and the **[**26]** relevant geographic market Southern California-Arizona.

Evidence of Wrongful Use of Monopoly Power and Attempt to Monopolize

If the jury should find that Southern California and Arizona was the relevant market, there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by *section 2* of the Sherman Act.

As the Court said in *United States v. Grinnell Corp., supra*:

> "The ***HN23***[] 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."
> * * *
>
> "In United States v. du *Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994*, we defined ***HN24***[] monopoly power as 'the power to control prices or exclude competition. **[**27]** ' The existence of

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[14] See also *Standard Oil Co. of California v. United States, 1945 [1949], 337 U.S. 293, 299* note 5, *93 L. Ed. 1371, 69 S. Ct. 1051*.

[15] Morgan Ward, who handled the oranges of most of the independent growers, testified in pertinent part:

> "Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges have more effect on the price of product oranges in California than any one factor?
>
> "A. They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers. Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (Rep. Tr. 392:1-14).

[16] Justices Fortas, Stewart and Harlan would have remanded for a "new determination" of the basic issue of "the definition of the relevant market".

> such power ordinarily may be inferred from the predominant share of the market. In *American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125*, we said that 'over two-thirds of the entire domestic field of cigarettes and . . .; over 80 per cent of the field of comparable cigarettes' constituted 'a substantial monopoly.'" (*384 U.S. at 570-1*).

It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area.

It is true, as appellee contends, that ***HN25***[] size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by *section 2* of the Act.

However, ***HN26***[] the ultimate consideration in determining whether an alleged monopolist violates *section 2* of the Sherman Act is "whether the defendants control the price and competition **[**28]** in the market for such part of trade or commerce as they are charged with monopolizing ". United States v. du *Pont de Nemours & Co., supra, 351 U.S. at 380*. It is not always necessary to find a specific intent to find that an ***antitrust law*** has been violated. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct **[*459]** or business arrangements (citing cases). To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2nd Cir. 1945)*, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." *United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S. Ct. 941, 92 L. Ed. 1236*.

Appellant contends that Sunkist wrongfully exercised its monopoly power through (1) boycotting appellant by refusing to sell appellant product oranges while selling to other processors; (2) preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; (3) controlling orange prices; **[**29]** and (4) eliminating competitors (or as with appellant, limiting their profits) by maintaining high prices for oranges or reducing supply.

The same acts are relied upon in support of appellant's contention that Sunkist intentionally attempted to monopolize the trade in product oranges in the relevant market. Appellant relies upon additional evidence of such intent in Sunkist's (1) admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; (2) preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; (3) policing the Sunkist system to punish violators of the Sunkist "restrictive tying contracts"; (4) wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; (5) use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture.

Appellee recognizes in its brief that "the key determination by the trial court was that the appellant's evidence * * * established the fact that the relevant market for product oranges **[**30]** is a national market", but contends further that "under each of the tests which the courts have applied to determine whether or not a monopoly exists, the appellant's evidence conclusively established that there was no monopoly", and that with respect to each of the acts and incidents upon which appellant relies, Sunkist's conduct was "legitimate, cooperative activity and not undertaken in an unlawful manner or for an unlawful purpose". There is substantial evidence to support appellee's denial of each of the alleged acts of monopoly.

HN27[] In determining the issues of monopolization and intent to monopolize, however, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture", weigh the contradictory evidence and inferences and draw the "ultimate conclusion as to the facts". See *Continental Ore Co. v. Union Carbide and Carbon Corp., supra, 370 U.S. at 699-701*, and cases there cited.

As noted supra, in ruling on the directed **[**31]** verdict this court must give appellant "the advantage of every fair and reasonable intendment that the evidence can justify", and this is true "even though contrary inferences might reasonably be drawn". From a review of the record we conclude that there was sufficient evidence to submit to the jury the question of whether Sunkist wrongfully exercised its monopoly power and intentionally attempted to monopolize the trade in product oranges. We do not find that appellant has established any of the alleged acts of monopoly -- only that viewing the evidence as a whole, it has made a prima facie case for the jury. [17]

[32]** **[*460]** *Section 1* *of the Capper-Volstead Act*

Appellant contends that Sunkist is not a person "engaged in the production of agricultural products" under *Section 1* of the Capper-Volstead Act because only 80.12% of its members are associations composed of fruit growers, while 4.97% are corporate growers, and 14.91% are private profit-making corporations, individuals and partnerships which market through Sunkist the oranges they have purchased from growers. [18]

[33]** The district court concluded, and we think correctly, that under the decision of the Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Co., supra*, Sunkist Growers, Inc., is a cooperative organized in compliance with *Section 1* of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail. This was prior to the merger with Exchange Orange and Exchange Lemon, but the Court concluded that ***HN29***[] the 12,000 growers were "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though * * * formally organized * * * into three separate legal entities". *370 U.S. at 29*. The Court also said in pertinent part:

> "The ***HN30***[] language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative **[**34]** history of the Acts reveals several references to the Sunkist organization -- then called the California Fruit Growers Exchange and numbering 11,000 members -- including a suggestion by Senator Capper that this was a type of cooperative that would find 'definite legalization' under the legislation. * * *
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> "* * * ***HN31***[] That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts." *370 U.S. at 28-29*

With respect to appellant's contention that Sunkist is not a qualified cooperative under Capper-Volstead by reason of its "corporate growers", this **[*461]** question was raised in the district court in *United States v. Maryland & Virginia Milk Producers Ass'n, D.D.C. 1958, 167 F. Supp. 45*, aff'd in part, reversed in part on other grounds, *362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880*. In **[**35]** that case the Government urged that the words "dairymen" and

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[17] In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra*, the plaintiff relied upon some of the acts of monopoly here alleged. We upheld the submission of the case to the jury and the instructions given by the trial court. The Supreme Court granted certiorari limited to the issue of the immunity of interorganizational dealings among the three cooperatives from the conspiracy provisions of the ***antitrust law***, and held that as a Capper-Volstead cooperative Sunkist was immune and that the case was erroneously submitted to the jury on the theory of a conspiracy under *section 1* of the Act. ***HN28***[] Having held "erroneous one theory of liability upon which the general verdict may have rested * * * it is unnecessary * * * to explore the legality of the other theories". The Court said further that its decision "in no way detracts from earlier cases holding agricultural cooperatives liable for * * * monopolization", citing *Maryland & Virginia Milk Producers Ass'n v. United States, supra.* *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. at 20-30*.

[18] A stipulation of the parties defining "association" in the Sunkist system recites that the members are classified into three major groups: (1) cooperative associations (80.12% by number and 82.34% by volume), (2) corporate growers (4.97% by number and 4.72% by volume), and (3) agency associations (14.91% by number and 12.94% by volume). The stipulation reads in part: "The Agency Association is normally a private corporation which owns and operates packing house facilities * * *. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under *section 1* of the Capper-Volstead Act. * * * The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled".

"farmers" should be restricted to natural persons. The district court held that ***HN32***[] it was immaterial "whether every member of the association is a natural person or a corporation." [19]

The Supreme Court did not comment on this portion of the district court's opinion, although it considered at length the scope of the immunity granted by Capper-Volstead. It is clear from the district court's opinion that the cooperative included corporate growers. It seems likely that this fact would have been considered by the Supreme **[**36]** Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers.

HN33[] *1 U.S.C. § 1* provides that in "determining the meaning of any Act * * * of Congress, unless the context indicates otherwise * * * the words 'person' and 'whoever' includes corporations * * * as well as individuals * * *".

We find ***HN34***[] nothing in the context of the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

Does the fact that the so-called agency associations (comprising 14.91% by number and 12.94% by volume) constitute a "class" of membership prevent Sunkist from being a "person engaged in the production of agricultural products" under *section 1* of the Act? It will be noted from the stipulation of the parties (note 18) that the agency associations furnish their facilities and services on an independent contract basis, and that they do not participate in either gain **[**37]** or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies.

HN35[] Associations organized under the Capper-Volstead Act "may make the necessary contracts and agreements to effect" the purposes of the Act, i. e., "collectively processing, preparing for market, handling, and marketing" their products. (*7 U.S.C. § 291*). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the "packing is done by local associations * * * and the processing by separate organizations" does not preclude the growers from being considered one association for purposes of the *Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra.*

This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing. See e.g. *United States v. Borden Co., 1939, 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181*. The Court there recognized that **[**38]** ***HN36***[] agricultural producers "may unite in preparing for market and in marketing their products", and may "make the contracts which are necessary for that collaboration", but they are not authorized to conspire with others in restraint of trade. The Court said in part:

> "In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and noncompetitive prices to be paid to all producers for all fluid milk produced in Illinois * * * and also to **[*462]** control 'the supply of fluid milk permitted to be brought to Chicago'." *308 U.S. at 205*.

In *Maryland & Virginia Milk Producers Association v. United States, supra*, the court pointed out that ***HN37***[] the object of the conspiracy or combination was to eliminate a competitor and that the "allegations of the complaint * **[**39]** * * charge *anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative* that, if proved, they would constitute clear violations of *§ 2* of the Sherman Act * * *." *362 U.S. at 468*. The Court said further:

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[19] The court said further:

> "* * * The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. * * *." *167 F. Supp. at 49*.

> "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that *their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act*. * * * The contract of purchase here, viewed in the context of all the evidence and findings, *was not one made merely to advance the Association's own permissible processing and marketing business*; it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition * * *." *362 U.S. at 471-72*.

HN38[] The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute **[**40]** Sunkist could have entered into these contracts "with separate organizations". The mere fact that the agency associations constitute a "class" of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association.

Request for Leave to File Second Supplemental Complaint

Appellant next contends that the district court abused its discretion in denying plaintiff's motion to file a second supplemental complaint alleging facts occurring after the filing of the original complaint. In our opinion, upon remand of the case, appellant should be permitted to file the supplemental complaint. As the Court said in *Texarkana v. Arkansas Gas Co., 1939, 306 U.S. 188, 59 S. Ct. 448, 83 L. Ed. 598*:

> "Where ***HN39***[] there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifies other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think **[**41]** this procedure is equally applicable after remand for further proceedings." *306 U.S. at 203*.

Alleged Prejudice and Bias of Trial Judge

Finally appellant contends that the trial judge showed such marked prejudice against appellant that this court should order a new trial before another judge. In our opinion, the record does not support our issuance of the requested order. We are confident that the district court, upon remand and in the proper administration of its own functions, will insure that the retrial is conducted in the necessary atmosphere of total impartiality.

It is ordered that the judgment be reversed and the cause remanded to the district court for a new trial.

Dissent by: ELY (In Part)

Dissent

ELY, Circuit Judge (dissenting in part):

I agree with the result reached by the majority, and I concur in its opinion except for that portion in which it is held that Sunkist falls within the exemption of *section 1* of the Capper-Volstead Act, *7 U.S.C. § 291*.

The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 8 L.* ***[*463]*** *Ed. 2d 305, 82 S. Ct. 1130 (1962)*. **[**42]** I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at *284 F.2d 1 (9th Cir. 1960)*, the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court, in granting certiorari, *368 U.S. 813, 82 S. Ct. 56, 7 L. Ed. 2d 22 (1961)*, expressly limited its consideration to a single question, namely,

> "Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (*7 U.S.C.A., sec. 291*) -- is an **[**43]** unlawful conspiracy, combination or agreement established under *Sections 1* and *2* of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?"

Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in "exempt" associations is conferred only upon "persons engaged in the production of agricultural products. . . ." *7 U.S.C. § 291*. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, supra, indicates, it is clear that the composition is no longer the **[**44]** same. In our case, it is conceded that the so-called "agency associations," which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers. [1] The majority, in disregarding the significance of this factor, may have been influenced by the absence of decisions squarely holding that an association must be composed entirely of growers in order to qualify for the exemption. I point out that, while there are no decisions to that effect, there are none to the contrary. The opinions in a number of cases contain language which suggests the conclusion which I see to be plainly required by the statute's terms. Some of this language is as follows:

> "The persons to whom the Capper-Volstead Act applies are defined in *§ 1* as *producers of agricultural products . . . . They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. . . .
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> **[*464]** "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may **[**45]** see fit to devise." *United States v. Borden Co., 308 U.S. 188, 204-205, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*.

> "The chief defense set up by the Association was that, because of its being a cooperative composed *exclusively of dairy farmers*, § 6 of the Clayton Act and *§§ 1* and *2* of the Capper-Volstead Act completely exempted and immunized it . . . . Accordingly the court dismissed the Sherman Act *§ 2* monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton Act § 7 charges *because they involved alleged activities with* the owners of Embassy and other *persons who were not agricultural producers*." *Maryland & Milk Producers Assn. v. United States, 362 U.S. 458, 461-462, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*.

> "Thus, the full effect of § 6 is that a *group of farmers* acting together . . . cannot be restrained . . . .

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[1] In its footnote 18, the majority refers to a portion of a stipulation wherein the parties agreed that the agency associations furnished to Sunkist their "facilities and services on an independent contract basis . . . ." The stipulation does *not* say that the associations were independent contractors. It recites that they were "*members*" of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not "members" of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act is irrelevant to the issue of the propriety of Sunkist's dealings with them. *United States v. Borden Co., supra.*

"The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives . . . The general philosophy of both was simply that *individual farmers* **[**46]** should be given . . . the same unified competitive advantage . . . available to businessmen . . . ." *Id., 362 U.S. at 465-466*.

"Our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, *United States v. Borden Co., 308 U.S. 188, 84 L. Ed. 181, 60 S. Ct. 182* . . . ." *Sunkist Growers, Inc. v. Winckler & Smith Co., 370 U.S. 19, 30, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)*.

"The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws *provided that no other person that is not such an organization or a member of such a group is a part of the combination*." *United States v. Maryland Cooperative Milk Pro., 145 F. Supp. 151, 155 (D.D.C. 1956)*.

"Although the Capper-Volstead Act . . . and the Clayton Act . . . give *some privileges to combinations* of agricultural *producers, a combination of producers and distributors* to eliminate competition and fix prices at successive stages in the marketing of an agricultural product *is not privileged*." *United States v. Maryland & Virginia Milk Pro. Ass'n, 85 U.S. App. D.C. 180, 179 F.2d 426, 428 (1949)*. **[**47]**

"The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. *When they* step outside of their field and *conspire with persons who are not producers of agricultural commodities*, they are *beyond the scope of the exemptions*." *United States v. Maryland & Virginia Milk Pro. Ass'n, 167 F. Supp. 45, 51-52 (D.D.C. 1958)*, modified, *362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*.

[48]** The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with nonproducers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of nonproducers, may yet qualify for the exemption.

United States v. Third Nat'l Bank

United States District Court for the Middle District of Tennessee, Nashville Division

November 22, 1966

Civil Action No. 3849

Reporter

260 F. Supp. 869 *; 1966 U.S. Dist. LEXIS 8222 **; 1966 Trade Cas. (CCH) P71,934

United States v. Third National Bank of Nashville and Nashville Bank and Trust Company, Defendants, and The Comptroller of the Currency, Intervenor

Core Terms

merger, banking, antitrust, trust company, factors, bank merger, deposits, anticompetitive, effects, convenience, courts, agencies, largest, loans, public interest, concentration, cases, anti trust law, consolidation, outweighed, Sherman Act, managerial, statistics, resources, time of a merger, relevant market, market share, present case, Federal Deposit Insurance Act, consummated

LexisNexis® Headnotes

Banking Law > Federal Acts > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] **Banking Law, Federal Acts**

Under § 18c(5)(B) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, 12 U.S.C.S. § 1828(c), the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Federal Acts > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

HN2[] **Financial Institutions, Bank Mergers**

See § 18c(5)(B) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

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Mergers & Acquisitions Law > General Overview

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Mergers & Acquisitions Law > Antitrust > Remedies

HN3[] **Financial Institutions, Bank Mergers**

By *§ 18(c)(7)(B)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, it is provided that the "standards" applied by the courts in antitrust actions attacking bank mergers shall be identical with those that the banking agencies are directed to apply under paragraph (5) and by § 2(c), courts are directed to apply the substantive rule of law set forth in *§ 18(c)(5)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act in all antitrust litigation pending before them on and after the date of enactment of the amendment.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

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Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

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Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] **Financial Institutions, Bank Mergers**

Under *§ 18(c)(7)(B)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, bank mergers must be examined and analyzed by the agencies and by the courts in terms of the antitrust standards prescribed in the amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, as the amendment explicitly provides, there shall be taken into account the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served. The banking industry is thus recognized as occupying a unique place in the national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in the Bank Merger Act, *12 U.S.C.S. § 1828(c)(5)(A)*.

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Federal Acts > General Overview

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

HN5[] **Bank Expansions, Banking Interests**

See the Bank Merger Act, 12 U.S.C.S. § 1828c.

Banking Law > Federal Acts > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

HN6[] **Banking Law, Federal Acts**

Under *§ 18(c)(7)(A)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, courts are directed to "review de novo the issues presented" in actions under the amendment.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN7[] **Standards of Review, Substantial Evidence**

A court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination with respect to it. On the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is plainly and unquestionably a legislative or administrative determination the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. A merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Banking Law > Federal Acts > General Overview

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN8[] **Commercial Banks, Mergers & Consolidations**

Bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the Lexington and Philadelphia cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in *§ 18(c)(5)(B)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*. Not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and courts alike are mandated to take into consideration "in every case" the following special factors: (1) Financial resources of the existing and proposed institution; (2) Their managerial resources; (3) Their future prospects; and (4) The convenience and needs of the community to be served. There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only. The factors embrace the problem of the failing bank as well as that of the "floundering" bank. Possible insolvency is an important consideration, but it may be of equal importance to the economy to eliminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

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Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN9[] **Financial Institutions, Bank Mergers**

Under *§ 18(c)(5)(B)* of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the Columbia Steel criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues. In determining what constitutes unreasonable restraint, the dollar volume is not in itself of compelling significance; the courts look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purposes to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. The courts do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.

Judges: **[**1]** WM. E. Miller, District Judge.

Opinion by: MILLER

Opinion

[*870] WM. E. MILLER, District Judge

This action was instituted August 10, 1964 by the United States, acting through the Department of Justice, under *§ 4* of the Sherman Act, *15 U.S.C.A. § 4*, and *§ 15* of the Clayton Act, *15 U.S.C.A. § 25*, to enjoin the proposed merger of the Third National Bank in Nashville (Third National) and the Nashville Bank & Trust Company (Trust Company). Violations of *§ 1* of the Sherman Act, *15 U.S.C.A. § 1*, and *§ 7* of the Clayton Act, *15 U.S.C.A. § 18*, were charged in the complaint. Acting pursuant to the Bank Merger Act of 1960, *12 U.S.C.A. § 1828(c)*, the Comptroller of the Currency, notwithstanding adverse reports on the competitive factors involved from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance **[*871]** Corporation, approved the merger on August 4, 1964 on the basis of a written opinion and detailed findings of fact. Plaintiff's motion for a preliminary injunction was heard August 14 and 15, 1964; it was denied August 18, 1964; and the merger was consummated the same day. Before trial on the merits and after extensive pre-trial proceedings **[**2]** in this action, Congress enacted Public Law 89-356, 80 Stat. 7, as an amendment to *§ 18(c)* of the Federal Deposit Insurance Act, *12 U.S.C.A. § 1828(c)*. The Amendment, approved February 21, 1966 and referred to as the Bank Merger Act of 1966, effected material changes in the 1960 Bank Merger Act. By § 2(c) the Amendment was made applicable to pending antitrust actions involving bank mergers consummated after June 16, 1963. The significance of that date was that the Supreme Court of the United States then rendered its opinion in *United States v. Philadelphia National Bank et al., 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715*, holding that the Bank Merger Act of 1960 did not, by directing the banking agencies to consider competitive factors before approving bank mergers, immunize mergers approved by them from later judicial challenge under the antitrust laws. Despite prior approval by the Comptroller of the merger of the second and third largest commercial banks in *Philadelphia*, the Court held the proposed merger to be forbidden by *§ 7* of the Clayton Act and such merger was accordingly enjoined. So, absent the 1966 Amendment, the Court's only task in this case would be to **[**3]** determine whether the merger now under scrutiny runs afoul of antitrust laws without regard to any of the banking factors enumerated in the 1960 Act. It is clear, however, that the Amendment introduces new standards to be applied by the banking agencies, by the Department of Justice, and by the courts alike. It reflects the congressional attempt to reconcile the judicial application of antitrust concepts with the standards applied by federal banking agencies in evaluating merger applications under the 1960 Act. By *§ 18(c)(5)(B)* of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, it is provided that ***HN1***[] the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards "unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Amendment then proceeds in the immediately following paragraph: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing **[**4]** and proposed institutions, and the convenience and needs of the community to be served." [1]

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[1] *Sec. 18(c)(5)* of the Federal Deposit Insurance Act as amended by the 1966 Amendment provides:

HN2[] The responsible agency shall not approve -

[5]** ***HN3***[] By *§ 18(c)(7)(B)* it is provided that the "standards" applied by the courts in antitrust actions attacking bank mergers "shall be identical with those that the banking agencies are directed to apply under paragraph (5) " and by § 2(c), courts are directed to "apply the substantive **[*872]** rule of law set forth in *§ 18(c)(5)* of the Federal Deposit Insurance Act, as amended by this Act" in all antitrust litigation pending before them on and after the date of enactment of the 1966 Amendment with respect to all mergers consummated after June 16, 1963, the date of the Supreme Court decision in *Philadelphia*.

Thus from the terms of the Amendment as well as from its legislative history, [2] the basic congressional intent in enacting the 1966 Amendment appears to be clearly mirrored: ***HN4***[] Bank mergers must be examined and analyzed by the agencies and by the courts in terms of the antitrust standards prescribed in the Amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless "clearly outweighed in the public interest by the probable effect of the transaction in meeting **[**6]** the convenience and needs of the community to be served." "In every case," as the Amendment explicitly provides, there shall be taken into account "the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served." The banking industry is thus recognized as occupying a unique place in our national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in § 28(c)(5)(A).

Before adverting to the merits of this case, it becomes necessary to resolve a problem of procedure. This problem arises because the Comptroller formally approved the merger prior to the 1966 Amendment and in the light of the factors of the Bank Merger Act of 1960. While the 1960 Act required him to consider anticompetitive effects, it **[**7]** did not require him to accord this factor any particular weight or to determine antitrust issues per se. [3]

In *United States v. Crocker-Anglo National Bank et al., United* ***[**8]*** *States District Court, Northern District of California, 263 F. Supp. 125*, 35 L.W. 2209, a three-judge court rendered its opinion on October 6, 1966 in one of the three post Philadelphia cases pending at the date of the enactment of the 1966 Amendment in which mergers had been consummated after the *Philadelphia* decision. The other two pending cases were the present case and a case pending in St. Louis. Although mergers consummated before the *Philadelphia* decision were exempted from Sherman *§ 1* and Clayton *§ 7*, the new antitrust standards of the 1966 Amendment were made to apply to all mergers consummated after that decision, including those challenged in the three pending cases, as we have seen. In *Crocker-Anglo*, as in this case, the Comptroller of the Currency had approved the merger prior to the 1966 Amendment by applying the different criteria of the 1960 Bank Merger Act. He had not assessed its validity under

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(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

[2] H.R. Rep. 1221, 89th Cong. 2d Sess. (1966), Bank Merger Act Amendment.

[3] The 1960 Bank Merger Act applied to all banks insured by the Federal Deposit Insurance Corporation and banking agencies in considering merger applications were required to evaluate:

(1) ***HN5***[] The financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter . . . the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. (*12 U.S.C.A. § 1828(c) (1964)*).

the standards of the 1966 Amendment. The California Court, pointing out that ***HN6***[] under *§ 18(c)(7)(A)* courts are directed to "review de novo the **[*873]** issues presented" in actions under the 1966 Amendment, stated:

> No difficulty would be presented here **[**9]** so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

Entertaining this view the Court construed the 1966 Amendment as limiting the Courts' role in pending cases as well as in all future cases to a review of the findings made by the Comptroller pursuant to the 1966 criteria. As there were no such findings by the Comptroller before the court in *Crocker-Anglo*, it was directed that the action be remanded to the Comptroller to update his findings and conclusions under and in the light of the new standards of the 1966 Amendment. It was intimated in the opinion that the court's power to review such findings as to anticompetitive effects would be somewhat broader in scope than its power to review the Comptroller's **[**10]** findings that anticompetitive effects are "clearly outweighed in the public interest," or as to what constitute the " conveniences and needs of the community to be served." As to the latter, the courts would be restricted to a "determination of questions of law and ascertainment of whether findings of fact by the agency are supported by substantial evidence " taking into account not only the evidence before the Comptroller but also any additional evidence made a part of the record at the trial. The *Crocker-Anglo* interpretation of the 1966 Amendment as to the scope of the judicial function in the three cases pending at the time of its enactment is supported by a carefully reasoned opinion, although it must be conceded that the issue of statutory interpretation is not free from difficulty. In any event it is not deemed necessary in this action to follow the example of the California Court in remanding the action to the Comptroller for findings specifically formulated under the new criteria of the 1966 Amendment. In *Crocker-Anglo* the trial occurred before the effective date of the 1966 Amendment, and that court accordingly did not have before it any findings by the Comptroller **[**11]** assessing the merger on the basis of the newly enacted standards. Under such circumstances, it was the court's view that a remand to the Comptroller for updating his findings and conclusions was the proper and expedient course to follow. In contrast, the present action was tried after the 1966 Amendment and the Comptroller's assessment of the present merger under the new criteria and standards of the Amendment has been presented to the Court in various ways. First, having intervened as a party to the action under the provisions of the 1966 Amendment allowing such intervention as of right, (*§ 18(c)(7)(D)* of the Federal Deposit Insurance Act, as amended), he has filed a formal answer setting forth his views that the merger is not substantially anticompetitive when evaluated under the terms of the 1966 Amendment, and that any anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. The same views and opinions have been presented to the Court by the Comptroller, acting through his attorney, at various stages during the trial, including the making of oral arguments, the filing of written briefs, and the filing **[**12]** of suggested findings of fact and conclusions of law to be approved by the Court. Of greater significance, however, is the fact that the Comptroller appeared as a witness at the trial and expressed the same views and opinions in response to numerous questions on direct and cross examination. His testimony convincingly demonstrated that he was entirely familiar not only with the new standards of the 1966 Amendment, but also with the **[*874]** essential and material facts which had been developed at the trial. Like testimony was given by the Regional Comptroller of the Currency. There is no reason to conclude that these steps were not taken by the Comptroller in good faith. Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment, as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

The trial was a protracted one, extending over approximately six weeks and involving some 3,800 pages **[**13]** of transcript. A remand to the Comptroller could only serve the purpose of further delay. It is idle to suppose that any further significant evidence could be unearthed, or that the Comptroller would be likely to come to any different conclusion, or that he could have any better grasp of the controlling facts than he possessed at the trial. Since the purposes of a remand have been substantially accomplished in the manner indicated, and since the Comptroller's findings and opinions are before the Court under both the 1960 Bank Merger Act and the 1966 Amendment, the Court concludes that the remand procedure is not required.

What, then, is the scope of judicial review? Applying the rationale of the *Crocker-Anglo* opinion, ***HN7***[] the Court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination with respect to it. On **[**14]** the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, "plainly and unquestionably a legislative or administrative determination . . .," the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. This view finds strong support in the statement of the Supreme Court in *Philadelphia*, at p. 371:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . .

In seeking to void the merger under investigation the plaintiff relies upon *Section 1* of the Sherman Act as construed in *United States v. First National Bank of Lexington, 376 U.S. 665, 84 S. Ct. 1033, 12 L. Ed. 2d 1 (1964)*, and upon *Section 7* of the Clayton Act as construed in *United States v. Philadelphia National Bank, supra.* As in *Lexington* and *Philadelphia*, the plaintiff's **[**15]** case rests primarily upon inferences derived from statistics and upon the rules of prima facie invalidity enunciated in those cases. It is argued that the merging banks were "major competitive factors" in the relevant Davidson County market, that the merger resulted in the elimination of competition between them, and, consequently, that the case falls squarely within the ambit of the Supreme Court ruling in *Lexington* under *Section 1* of the Sherman Act. A fortiori, it is argued that the merger is forbidden under the less stringent provisions of Clayton *Section 7*. It is further insisted, independently of the Sherman Act, that the merger must fall under Clayton *Section 7* standards as delineated in *Philadelphia*, in that (a) the merger has produced a firm controlling an undue percentage share of the relevant market, and (b) it has resulted in a significant increase in **[*875]** the concentration of firms in that market. It is therefore said that the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In this case the plaintiff **[**16]** says that there is no such countervailing evidence. Plaintiff also relies upon the statement in a footnote of the *Philadelphia* opinion that "if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." Plaintiff would drastically minimize the effect of the 1966 Amendment. Its position as to the impact of the Amendment is thus succinctly stated in its trial brief.

> The 1966 Amendment did not change materially the tests of antitrust legality applicable in bank merger cases. The Act was designed primarily (1) to require the bank supervisory agencies to give more weight than heretofore to the competitive factor in ruling on future merger applications, (2) to remove any impression that the standards of Philadelphia and those of the Bank Merger Act of 1960 differ in fact, and (3) to make it clear that, as suggested in Philadelphia, limited recognition was to be given to the special features of commercial banking in terms of consideration of the "banking factors" - primarily a failing company doctrine with "somewhat larger contours," *Philadelphia National Bank, supra, 374 U.S. at 372 n. 46*.

Taking notice **[**17]** of the suggestions in the *Philadelphia* opinion that the failing company doctrine may have somewhat larger contours in the banking area, the plaintiff would construe the banking factors enumerated in the 1966 Amendment as being concerned primarily with the question of solvency and protection of the community against a failing bank. This is true, as the plaintiff insists, not only with respect to financial and managerial resources, but also with respect to the concept of convenience and needs of the community.

The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text of the Amendment itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing ***antitrust law*** relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States v. Crocker-Anglo National*

Bank et al., supra. After the decision in the *Philadelphia* case, the validity of bank mergers was made to depend in the final analysis, if challenged in the courts, upon the application of traditional **[**18]** antitrust standards. Except for the vague intimation that the failing company doctrine might have somewhat larger contours in bank merger cases, no consideration was to be given in an action challenging bank mergers under antitrust laws to the special banking factors contained in the 1960 Bank Merger Act. Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. The House Report on the 1966 Bank Merger Amendment clearly sustains this view. Under the heading, "What the Bill Would Do," it is stated that it would establish a single set of standards for the consideration of future mergers by the responsible banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws - standards stricter than those in the Bank Merger Act "but which include both the effect on competition and the convenience and needs of the community to be served," a standard clearly different from that of the *Lexington* and *Philadelphia* cases.

It is pointed **[**19]** out under the heading, "The Need for the Legislation," that the committee had heard the contention made that banking is such a unique industry **[*876]** and that the determination of where the public interest lies in a given bank merger situation requires such special expertise that any bank merger which has been approved by the appropriate federal supervisory agency should be absolutely immune from antitrust attack. On the other hand, the committee had heard the contention advanced with equal vigor that any bank merger whose effect would be to lessen competition should on that ground alone be absolutely prohibited, and that neither agencies nor courts should be permitted to examine the question of whether the overall effect of such merger might be in the public interest.

Under the heading "Purpose of the Bill," the floundering bank problem is discussed as follows:

> Under general ***antitrust law*** criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, **[**20]** and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general ***antitrust law*** criteria in a substantial lessening of competition.

As to the intended legal effect of the Bill, the House Report proceeds:

> First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may **[**21]** be approved under any circumstances.
> Second, the bill acknowledges that the general principle of the antitrust laws - that substantially anticompetitive mergers are prohibited - applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served - recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served - that it would be in the public interest to permit it.
> Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.

Turning to the text of the 1966 Amendment, it becomes even clearer that ***HN8***[] bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the *Lexington* and *Philadelphia* cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in § 18(c)(5)(B). **[**22]** By that section, as we have seen, not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and courts alike are mandated to take into consideration "in every case" the following special factors:

(1) Financial resources of the existing and proposed institution;

(2) Their managerial resources;

(3) Their future prospects; and

[*877] (4) The convenience and needs of the community to be served.

There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only, or that they were to be concerned primarily with the question of solvency. It is clear that the factors embrace the problem of the failing bank as well as that of the "floundering" or "stagnating" bank. Certainly possible insolvency is an important consideration, but it may be of equal importance to the economy to eliminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution. Are the cases of floundering banks the "somewhat larger contours of the failing company **[**23]** doctrine" to which plaintiff refers? The answer from legislative history justifies an affirmative answer.

Nor does the language of *Section 18(c)(5)(B)* support the thesis that agencies and courts in considering anticompetitive effects in bank merger cases are to be hamstrung by cold statistics and are not to be allowed to look to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further stated that adherence to the principles enunciated in *United States v. Columbia Steel Co., 334 U.S. 495, 92 L. Ed. 1533, 68 S. Ct. 1107*, [4] "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia*, this accommodation was not effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation **[**24]** to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that ***HN9***[] anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

[25]** The Court's construction of the 1966 Amendment is supported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the standards of *Section 18(c)(5)*, by the requirements that courts shall apply identical standards, and by the provision that the Courts' role shall be limited to reviewing de novo the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* **[*878]** decision that courts must determine the validity of bank mergers on the basis of antitrust considerations alone - primarily derived from statistics - independently of and without regard to the special features of banking recognized by Congress. Whereas under

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[4] These principles were stated in the Columbia Steel opinion as follows:

In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purposes to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. At page 527.

the *Philadelphia* rationale, courts determined anticompetitive effects without **[**26]** regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "de novo" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market, [5] the merger is not violative of the new antitrust standards of the 1966 Amendment.

[27]** The term "arguable case" is used for the reason that there are at least some conspicuous points of difference between the case at bar and *Lexington* and *Philadelphia*, whether or not such differences are of controlling significance. In the *Lexington* case, the Supreme Court held invalid under *Section 1* of the Sherman Act the consolidation of the first and fourth largest commercial banks in Fayette County, Kentucky. Before the consolidation the largest bank, First National, had approximately 40% of the assets, deposits and loans in the relevant market which was determined to be Fayette County. The fourth largest bank, Security Trust, before the consolidation had approximately 12% of the assets, deposits and loans. After the consolidation, the new bank, First Security, had approximately 52% of the assets, deposits and loans. The bank established by the consolidation was larger than all of the remaining banks combined. In addition to these statistics reflecting "bigness," the Court relied upon the testimony from three of the four remaining banks that the consolidation would "seriously affect their ability to compete effectively over the years." It was concluded that the **[**28]** two banks before the consolidation were major competitors and that the elimination of significant competition between them constituted an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act. The statistics of the present case, of course, are not as impressive as those in *Lexington*. Third National, having approximately 33% of assets, deposits and loans before the merger, possessed approximately 38% in these categories after the merger **[*879]** and it retained the same position in the Davidson County market after the merger. The Trust Company's share of assets, deposits and loans before the merger was only approximately 5% as compared with the 12% of the smaller bank in *Lexington*. There is no comparable testimony in the present case from any of the remaining banks in Davidson County that the consolidation will seriously affect their ability to compete effectively. In *Philadelphia* a 30% market share resulting from the merger was regarded as undue, as compared with approximately a 38% market share in the present case; but in *Philadelphia* the merger resulted in a 33% increase in concentration between the two largest banks; whereas the increase **[**29]** in the present case between the three largest banks is approximately 5%. The *Philadelphia* merger formed a bank which became the largest in the market area; whereas, in this case, as pointed out, the new banking institution will continue to occupy second place. In *Philadelphia* neither of the banks involved had antitrust clean hands - the Philadelphia National having acquired nine formerly independent banks and Girard having acquired six, such acquisitions having extended over a long period of time into the recent past. In the case at bar, there is no significant merger history either with respect to the two banks or in the Davidson County commercial banking market.

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[5] The Court rejects the defendant's and intervenor's argument that in assessing the anti-competitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in ***antitrust law***. The Court is of the opinion under the facts of this case that the relevant geographic market is Davidson County. This is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia National Bank, supra, at p. 357*. Also, on the clear preponderance of the evidence in this case the appropriate "line of commerce" by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words "in any line of commerce" from the 1966 Amendment is indicative of a congressional intent to reject "commercial banking" as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established ***antitrust law*** would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenor's position on this point.

Other differences could be pointed out, but it is clear to the Court that whatever the result in this case may have been before, the merger now under consideration does not run afoul of antitrust standards when evaluated in the terms of the 1966 Amendment, as the Court construes it.

The Trust Company was chartered in 1889. Its name was changed in 1956 to Nashville Bank & Trust Company. It opened its only branch in 1959. Prior to the change of ownership in 1964, the controlling interest in the Trust Company **[**30]** had been owned by H. G. Hill, Jr. and his retail grocery chain operating in the Middle Tennessee area. The institution had been operated primarily as a trust company [6] with commercial banking occupying a place of secondary importance. In 1956 it brought in a former railroad executive, W. S. Hackworth, as president and began to emphasize the commercial aspects of its operation. During the period from 1955 to 1964 its assets, deposits and loans more than doubled, and its earnings record was good. This rate of growth, however, leveled off about the year 1960. From that time until the merger with Third National its rate of growth was markedly less than that of any of the other banks in Davidson County. For the period 1956-60 its rate of growth in total assets was 46.55%, a figure which dropped to 20.32% for the period 1960-64. For the same periods the drop in deposits was from 50.58% to 18.77%, and the drop in total loans and discounts was from a percentage gain of 77.57% to 29.86%. Its percentage of total banking business in the market declined from 5.72% on June 30, 1960 to 4.83% on June 30, 1964.

[31]** The evidence demonstrates conclusively that the Trust Company, when considered as a commercial bank, has not been an innovator or an aggressive competitor. Its operations have been dominated by unaggressive and ultra-conservative management policies. At the time of the merger and for many years prior thereto it had a serious lack of **[*880]** managerial resources due primarily to the fact that its salary scale was wholly inadequate and it was without a funded pension plan for its employees. As pointed out by the Comptroller of the Currency in his decision approving the merger on August 4, 1964, "a bank is only as good as its management." At that time the 68 year old bank president was seriously ill and anxious to retire, having an illness which has since caused his death. H. G. Hill, Jr., Chairman of the Board, had sold the controlling stock interest in the Trust Company, owned by his grocery firm, the H. G. Hill Company to William C. Weaver and associates, and resigned from the bank's board of directors. Kirby Primm, the bank's only full time business solicitor, had resigned and taken a position with the First American National Bank, the largest bank in the market area. All **[**32]** three of these men had been key factors in the growth which the bank had enjoyed during Hackworth's tenure as president, and it is no exaggeration to say that so far as the Trust Company's commercial business was concerned they were practically irreplaceable. Much of the new business was brought to the Trust Company due to the formidable influence and personal business connections of Hill and Hackworth. Primm had been exceedingly resourceful in soliciting new business, particularly in capitalizing upon firms which did business with the Hill grocery stores. The decline in the bank's rate of growth is attributable in large measure to the loss of two of these individuals, to Hackworth's declining health, and to the lack of branch banks and other necessary facilities. In addition, both Hackworth and Primm testified that the Trust Company had reached a plateau and that they had gone as far as they could in bringing in new business by soliciting their friends and business connections. Hackworth described the bank's dilemma as follows:

> The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made **[**33]** the expenditures necessary to bring it into a position to compete successfully and substantially in the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related modern banking methods and procedures which have come to be necessary in order to render adequate and modern service to the public, it is certain that its pattern of satisfactory earnings could not be maintained and such earnings might very well disappear.

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[6] The Trust Company had created and maintained what was for the most part a good trust department, an aspect of its operations which need not be discussed in detail herein. Trust departments, as the evidence shows, are operated primarily as a service to bank customers and are not an important lever in obtaining commercial business. While there is some direct competition for trust business in the market area between commercial banks having trust departments, such competition is minimal. The greatest area of direct competition for trust business is not with other banks but with individuals, such as lawyers. The loss of a trust account to a competitor bank is of infrequent occurrence.

The evidence demonstrates that the Trust Company management problem was one of serious proportions which made it practically impossible to attract and hold competent young men. It is significant that during his 17-year tenure at the Trust Company Primm's salary had increased by only 45% above a very low beginning, and that First American offered him an immediate salary increase of 60%.

The Trust Company's lack of dynamism and aggressiveness is demonstrated in many other ways. There had been no change in department heads from 1946 until the merger in 1964, a situation hardly calculated to interest young managerial leadership. Many of its officers and board **[**34]** members were old and the bank was in serious need of qualified young men as replacements. Although the Trust Company, due primarily to the personal business relationships of Hackworth and Hill, was able to grow substantially during the early years of Hackworth's tenure, no substantial or concerted effort was made to improve or modernize its methods, facilities, attitudes or personnel and management policies. For example, it consistently had the lowest loan to asset ratio of any bank in Davidson County, its loans being confined primarily to real estate and secured loans as distinguished from short term commercial loans. It operated without the benefit of credit files or a credit department. It employed no credit specialists. In consequence **[*881]** it was not able to handle indirect consumer loans or the larger, more complicated credit situations. Its loss experience, particularly in recent years, had not been good. Its emphasis was consistently upon profits rather than upon making the expenditures necessary to place itself in a position to be truly and significantly competitive. In addition to inadequate salaries, the lack of a funded pension plan and low fringe benefits, **[**35]** it failed to provide branches, the hallmark of modern banking. It had only one branch as of the date of the merger in the Davidson County market in which there were 52 branch banking offices. Nor did it provide modern equipment, modernized banking quarters, or a continuous audit program. It was not a member of the Federal Reserve system and it had no regular customer call program.

Capital City Bank, on the other hand, which had only begun operations in 1960, and being less than one-fourth the size of the Trust Company, had established three branches. The Comptroller of the Currency was of the opinion that the Trust Company could have established from eight to ten branches in Davidson County if it had so desired. He stated that its failure to branch indicated that it was not disposed to make the needed struggle indicated for growth. Its failure to have any automated or computerized equipment stands in contrast with most other banks of its approximate size in Tennessee. There were many other indicia of negative and unprogressive management policies, including its failure to remedy serious problems in the credit department despite warnings by the FDIC Examiner, its high proportion **[**36]** of criticized loans as reflected in FDIC reports, and its failure to hold any officer staff meetings since 1962.

Considering the Trust Company's problems, deficiencies and weaknesses, it is not difficult to understand the Weaver group's decision to merge with Third National rather than to undertake the formidable task of negotiating another sale, or the even more formidable task of solving the bank's many problems directly. The Weaver group had purchased the controlling stock in the Trust Company in the early part of 1964 as an investment. The members of the group had had no previous banking experience and none of them had planned to become members of the Board of Directors, or to devote their full energies and resources to rebuilding the bank. Fully realizing the extent of the bank's operational problems and difficulties only after the purchase, and realizing that the bank could not be revitalized as a competitive factor in the market without the expenditure of large sums of money, it was their conclusion that the best solution was to take the merger route.

In view of this attitude on the part of the new management, the Comptroller of the Currency correctly concluded in his decision **[**37]** approving the merger that "when a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of the merger." Despite its growth record in Hackworth's early years as President, the future prospects of the bank at the time of the merger may be described as unpromising. While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure to have adequate personnel and management policies, of its overly conservative attitudes, and of its failure to make the necessary expenditures to provide itself with the facilities, procedures and equipment required to maintain a competitive posture.

Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial as one of the strongest and best **[**38]** managed **[*882]** banks in the nation. Of particular significance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquisition of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approximately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to the merger in 1964, it had total deposits of $315,090,000.00 as contrasted with the largest bank, First American National, with deposits of $371,108,000.00, and Commerce Union, the third largest bank, with deposits of $202,624,000.00. At that time the Trust Company had total deposits of $45,471,000.00, occupying fourth place in the market. The fifth largest bank, which had entered the market only four years previously, Capital City, had deposits of $7,266,000.00. The other three banks in the market were the Bank of Goodlettsville with deposits of $6,369,000.00; Citizens Savings with deposits of $3,053,000.00; and Whites Creek Bank with deposits **[**39]** of $2,603,000.00. After the merger all the Davidson County banks continued a substantial growth. As of June 1965, Third National had total deposits of $375,063,000.00; First American National had $393,040,000.00; Commerce Union had $219,514,000.00; and Capital City had $8,954,000.00. The remaining three banks had increased their combined deposits of $12,025,000.00 before the merger to $13,590,000.00.

When the general characteristics of the Davidson County market are considered, the plaintiff's insistence that the market is unduly concentrated appears to be lacking in significance. At the time of the merger all of the eight Davidson County banks had combined assets of slightly less than one billion dollars. In such a relatively small banking market it does not appear unreasonable that there should be a concentration of approximately 93% of combined assets in three banking institutions, this figure being approximately 97% after the merger of the Trust Company and Third National. The record contains figures for comparable southeastern markets competitive with Nashville and having three major banks holding between 90 and 100% of the loan and deposit business. For example, Chattanooga **[**40]** has concentration among three banks of 100%; Mobile, Alabama, 98%; Birmingham, Alabama, 93%; Jackson, Mississippi, 98%; Memphis, 91 to 92%. The three largest cities in Tennessee - Memphis, Nashville and Knoxville - are now served by only seven banks, the largest number for any Tennessee city.

A meaningful fact in this case is that the Davidson County banks have attained their present market shares and size through internal growth and not through acquisition, a fact which is in marked contrast with the situation which prevailed in the *Philadelphia* case, as already pointed out. Another distinctive characteristic of the Davidson County market is that it is highly competitive at all levels, a fact which is clearly established by the preponderant testimony of competent and knowledgeable expert witnesses and by objective evidence of low service charges. Rivalry for business has always been exceptionally keen. The ease of entry is clearly indicated by the case of Capital City Bank which entered the market in 1960 and has had a substantial and continued success. There is no evidence of oligopolistic behavior in the relevant market. On the contrary, that the Nashville banks are keenly **[**41]** competitive with respect to service charges, the solicitation of business, and in making changes and innovations is the only fair and reasonable conclusion which can be drawn from the record.

If the *Columbia Steel* factors, relegated to a place of relative unimportance in the *Lexington* case, are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment, and the Court is convinced that they were, and if the present case is accordingly analyzed in terms of such **[*883]** factors, it seems clear that the plaintiff's position in this case cannot be sustained. On the present record, only the *Columbia Steel* factors dealing with size can arguably be said to favor the plaintiff's position. It may be conceded for present purposes that the *dollar volume* and *percentage of business controlled* are significant. But the *strength of the remaining competition* is clearly established in this case by the assets, deposits and loans of the seven banks in the Davidson County market remaining after the merger, and by competent testimony of bank experts familiar with the market, that the remaining banks were active, vigorous and highly **[**42]** competitive. There is also convincing testimony that the merger has actually resulted in an intensification of competition among the Davidson County banks. Of importance in this connection, as already stated, is the fact that all banks since the merger have had substantial growth. The *motive* for the present merger was not predatory, but was based upon an evaluation of business and economic factors. A merger with Third National was determined to be the best solution to the grave problems confronting the Trust Company at the time of the merger. Without the merger these problems could not have been solved without drastic expenditures over a protracted period of time. Finally, the preponderance of the evidence in this case with reference to the *probable development of the industry, consumer demands* and *other market characteristics*, is highly favorable to the merger. The Davidson County market has had no merger history; there is no trend toward concentration; the service area is rapidly growing with consumer demands being on the increase and the market being recognized as one of the most highly competitive in the nation; the remaining banks are well managed under vigorous **[**43]** and dynamic leadership; the Trust Company had reached a stagnant and deteriorating posture at the time of the merger, having critical managerial and other problems and deficiencies; the new owners were investors who were not disposed to make the sacrifices necessary to overhaul the bank so as to place it in a position to be substantially competitive with other banks; and actual or probable future oligopolistic behavior is contradicted by the record. This analysis, notwithstanding the concentration and market share figures upon which plaintiff relies, compels the conclusion that the present merger is not a transaction "in restraint of trade" and consequently not prohibited by *Section 18(c)(5)(B)* of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of *Section 1* of the Sherman Act.

Similar considerations lead to the conclusion that the effect of the present merger will not be "substantially to lessen competition or to tend to create a monopoly" in violation of *Section 18(c)(5)(B)* of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of *Section 7* of the Clayton Act.

As already stated, no reliable extrapolation as to future **[**44]** prospects may safely be predicated upon concentration or market share figures alone. But considering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. As the Court is also of this view independently of the Comptroller's findings, and concludes that the merger does not violate the antitrust standards of the 1966 Amendment, **[*884]** it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, the Court is of the opinion that the **[**45]** preponderance of the evidence supports the Comptroller's finding that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. The Trust Company had simply reached a period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking.

The Court will presently enter and file with the Clerk detailed findings of fact and conclusions of law to implement and supplement this opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

Lloyd A. Fry Roofing Co. v. Federal Trade Com.

United States Court of Appeals for the Seventh Circuit

December 28, 1966

No. 15389

Reporter

371 F.2d 277 *; 1966 U.S. App. LEXIS 3886 **; 1966 Trade Cas. (CCH) P71,964

Lloyd A. Fry Roofing Company, a corporation, and Lloyd A. Fry, Sr. and Lloyd A. Fry, Jr. v. Federal Trade Commission

Subsequent History: **[**1]** Amended February 13, 1967

Core Terms

prices, majors, competitors, price discrimination, asphalt, Robinson-Patman Act, territorial, roofing, discriminatory, price reduction, practices, predatory, saturated, lower price, purchaser, cases, market area, manufacturers, customers, subpoenas, dealers, certiorari denied, high prices, list price, low price, interlocutory, appeals, roll

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Clayton Act > 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 > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN2[] **Antitrust & Trade Law, Robinson-Patman Act**

Territorial price differences are not invalid per se, for *15 U.S.C.S. § 13(a)* requires that there be a reasonable probability of injury to competition. Injury to a competitor is not the test; the test is injury to competition.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Robinson-Patman Act, Coverage**

In most cases under § 2(a) of the Clayton Act (the Act), *15 U.S.C.S. § 13(a)*, a violation cannot be established without a close study of the market, including data as to the discriminator's share of the market. However, in cases of predatory intent, injury to even a single competitor brings the Act into play.

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 > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN4[] **Robinson-Patman Act, Claims**

In the absence of predation, market analysis is needed to show a violation of § 2(a) of the Clayton Act, *15 U.S.C.S. § 13(a)*, in primary line cases.

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Negligence > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

The law of negligence imposes liability on an individual if his conduct is a substantial factor in bringing about the harm. The principle applies to price discrimination because under § 2(a) of the Clayton Act, *15 U.S.C.S. § 13(a)*, there need be only a reasonable probability that the injury is the effect of the discrimination.

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

HN6[] **Robinson-Patman Act, Claims**

Selective price reductions by a price leader to punish deviation from an industry price is itself anti-competitive conduct.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN7[] **Reviewability, Exhaustion of Remedies**

A petitioner must exhaust its administrative remedy by complaining of interlocutory rulings in an administrative tribunal.

Administrative Law > Judicial Review > Standards of Review > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN8[] **Judicial Review, Standards of Review**

Unless arbitrary nor unsupported by the record, an administrative agency's rulings as to subpoenas will not be disturbed on appeal.

Administrative Law > Judicial Review > Reviewability > Preservation for Review

HN9[] **Reviewability, Preservation for Review**

If an administrative agency did not have an opportunity to consider a matter, it may not be raised on appeal.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN10[] **US Federal Trade Commission Actions, Remedial Powers**

The inclusion of individuals in cease and desist orders is approved where the individuals set the corporate policies and review the practices.

Judges: Schnackenberg, Swygert and Cummings, Circuit Judges.

Opinion by: CUMMINGS

Opinion

[*279] CUMMINGS, Circuit Judge:

This case arises on a petition to review a determination of the Federal Trade Commission that Lloyd A. Fry Roofing Company and two of its officers violated Section 2(a) of the Clayton Act (*15 USC § 13(a)*) by engaging in territorial price discriminations. [1] The Commission's opinion is reported in 3 Trade Regulation Reporter para. 17,303 (1965). The pertinent parts of its findings are summarized here.

Lloyd A. Fry Roofing Company ("Fry") is a Delaware corporation with its principal office and place of business in Summit, Illinois. Fry is the nation's largest producer of asphalt roofing products. There are nine other major manufacturers of asphalt roofing products and **[**2]** a large group of smaller manufacturers, the independents.

[*280] In 1956-1960, Fry operated 19 asphalt plants throughout the United States. In 1958, it sold 14.2% of the nation's asphalt saturated felt, the product involved in the proceedings before the Commission. Asphalt saturated felt is used in the roofing industry as a moisture barrier under shingles. It is also used on "built-up" roofs which consist of several layers of such felt bonded together with hot asphalt.

Roughly, Fry's customers are classified into wholesalers and retail dealers. One of Fry's principal customers is Sears Roebuck & Co., a retailer purchasing at wholesale prices totaling $5,000,000 per annum during 1956 through 1960.

Before February 1956, Fry sold at prices five to seven percent below the other majors' published prices. However, in this industry, published prices are not always the actual prices but are varied to meet competitive needs.

In February 1956, Fry revised its price schedule. It increased its prices everywhere in the United States east of the Rockies. The new price list was based on freight equalization factors. In Knoxville, Tennessee, the critical market area here, [2] the **[**3]** new list price was $2.55 per roll for 60-pound rolls of 15 and 30-pound asphalt saturated felt. [3] The other majors followed this price change, and also made Knoxville a factory point for pricing.

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[1] A charge that Fry sold below cost in violation of Section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45*) was dismissed for want of proof.

[2] Throughout this opinion, the Knoxville market area refers to that area within 100 miles of Knoxville. Until 1960, it was served by Fry's Brookville, Indiana, plant and thereafter by its Memphis plant. Fry's customers in the Knoxville area included three distributors in Knoxville, two in Chattanooga, and one in Kingsport, Tennessee. All were "approved distributors" and were substantial customers of Fry.

[3] A 10% discount was given on truckload or carload purchases and, in certain circumstances, an additional 6% was given on such purchases by "approved distributors ".

In the Knoxville, Tennessee, market area, two of Fry's competitors were Volasco Products Company and The Ohio Paper Company. Volasco was organized in 1955 to manufacture and sell asphalt roofing products. Its plant was in Knoxville, Tennessee, **[**4]** and its principal competitors included Fry and the other nine majors and The Ohio Paper Company, another independent. The Commission found that because of Volasco's natural freight advantage, it could profitably sell to dealers within the Knoxville market area in less than carload shipments at prices substantially lower than Fry's delivered prices for similar quantities there.

The Ohio Paper Company is located in Miamisburg, Ohio, and sold asphalt saturated felt in eastern Tennessee from 1955 to 1958 at 5% below the published prices of the majors. However, it stopped doing business in Tennessee in 1958 because prices were so low that it would be selling at a loss. It blamed Fry's low prices for its withdrawal from Tennessee.

From February to November 1956, Volasco was selling felt to dealers in less than carload lots in the Knoxville area at prices ranging from $2.01 to $2.25 per roll. In August 1956, Fry's list price in Knoxville was $2.62 per roll. However, on November 1, 1956, Fry lowered its list price to $2.36 per roll less a 5% secret rebate. The Commission found that Fry's prices to Knoxville customers were subsequently at or below Volasco's costs. During the relevant **[**5]** period, Fry's prices on asphalt saturated felt were higher in other felt factory areas than in the Knoxville area. In fact, until February 1, 1960, Fry maintained a price difference between Knoxville and other felt factory markets east of the Rockies.

Before November 1956, Volasco's sales of asphalt saturated felt had been increasing. Thereafter its sales diminished. Finally, because of low prices, Volasco sold felt only to its established customers instead of seeking new business.

The Commission found that Fry's February 1956 zoning price system was **[*281]** adopted to combat price competition, and that this price increase was adopted the following day by all majors. However, the independents continued to sell below the majors' published prices. Consequently, in April 1956, Fry's president agreed to "take corrective action" if the market did not become stabilized within 30 days. In the Knoxville market area, Volasco and Ohio Paper continued to sell at lower prices, and Fry took its "corrective" list price reduction there in November 1956. The Commission also found that Volasco's presence in Knoxville prompted Fry and the other majors to adopt their discriminatory price **[**6]** reductions and to make Knoxville a delivered-price basing point. The majors continued to maintain higher prices in areas where they were not competing with Volasco or other small independents.

The Commission found that Fry had initiated the price reduction of March 3, 1958, reducing prices to their lowest level in the Knoxville area. The Commission concluded that in making the Knoxville area discriminations, Fry had acted with predatory intent, with the purpose of disciplining small independent concerns selling below the prices established by Fry and followed by the other majors. The Commission rejected Fry's contentions that Volasco's losses were due to causes other than the territorial price discriminations.

The Commission concluded that there was a reasonable possibility that independents would be eliminated or seriously debilitated by Fry's discriminatory practices, and that their removal as viable competitors would adversely affect price competition generally in the Knoxville area and substantially injure competition with Fry. Finally, it rejected Fry's claim that its discriminatory lower prices in the Knoxville area were made in good faith to meet competition, as permitted **[**7]** by Section 2(b) of the Robinson-Patman Act (*15 USC § 13(b)*). Fry has not reiterated that defense here.

Territorial Price Discriminations.

HN1[] The relevant portion of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides (*15 USC § 13(a)*):

> "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

either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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 * * *." **[**8]**

One of the purposes of this provision is to protect manufacturers from discriminatory practices of their competitors. Its viability in primary line competition cases was reiterated in Federal Trade Commission v. Anheuser - *Busch, Inc., 363 U.S. 536, 544-545, 80 S. Ct. 1267, 4 L. Ed. 2d 1385*. As Commissioner Elman's concurring opinion observes in the present case, ***HN2***[] territorial price differences are not invalid *per se*, for the statute requires that there be a reasonable probability of injury to competition. Injury to a competitor is not the test; the test is injury to competition.

HN3[] In most primary line cases under this statute, a violation cannot be established without a close study of the market, including data as to the discriminator's share of the market. However, in cases of predatory intent, "injury to even a single competitor should bring the Act into play ". Attorney General's National Committee to Study the Antitrust Laws (1955) p. 165; Rowe, Price Discrimination under the Robinson-Patman Act (1962) pp. 145, 149. An intent to harm competitors distinguishes anti-competitive **[*282]** price cutting from competitive activity not meant to be prohibited **[**9]** *per se* by the Robinson-Patman Act. An illicit intent serves to show the substantiality and probability of the competitive effects that may result from the price reductions. If, as here, the price reductions are substantial and prolonged, it is proper to invoke the statute to curb the discriminatory pricing. Sunderland, "Territorial Price Differentials Under the Robinson-Patman Act ", 41 Chicago Bar Record 121, 128 (1959); Edwards, Maintaining Competition (1949) p. 170, note 75.

Since the Commission's finding of Fry's predatory intent is supported by the record, we conclude that it was unnecessary for the Commission to engage in an elaborate market study. As this Court stated in *Anheuser-Busch, Inc. v. Federal Trade Commission, 289 F.2d 835, 843 (7th Cir. 1961)*:

"If * * * the projection to ascertain the future effect of the price reductions made by the territorial price discriminator is based upon predatoriness or buccaneering, it can reasonably be forecast that an adverse effect on competition *may* occur. In that event, the discriminations in their incipiency are such that they *may* have the prescribed effect to establish a violation of § 2(a). If **[**10]** one engages in the latter type of pricing activity, a reasonable probability may be inferred that its willful misconduct may substantially lessen, injure, destroy or prevent competition."

See also Note, "Competitive Injury under the Robinson-Patman Act", 74 Harv. L. Rev. 1597, 1609 (1961); Von Kalinowski, "Price Discrimination and Competitive Effects", 17 ABA Antitrust Section 360, 366-368 (1960). ***HN4***[] In the absence of predation, market analysis is needed to show a violation of Section 2(a) in primary line cases. Rowe, op. cit., pp. 150-151.

The Commission's finding that Fry acted with predatory intent is supported by the evidence. Thus the record shows that during the early 1950's, asphalt saturated felt capacity exceeded the demand, and a number of small independent manufacturers offered vigorous competition to the majors. Various large customers were able to compel low prices on this product. All this resulted in intense price competition by 1956.

When Fry inaugurated its February 1956 basing point price increase, its president described the current price fluctuations as emanating from "lack of confidence in each other". Fry submitted the February **[**11]** 1956 price schedule as its answer to the marketing situation. The day after Fry's new pricing system became effective, all the majors adopted it, one of them noting that the effect would be "to increase prices substantially."

Mr. Musico, manager of the Fry plant which served the Knoxville area, described the February 1956 plan as one to "clean up all this mess" and noted that it had been adopted by the entire industry. Under that plan, he concluded that the roofing industry's house "will be clean, for the first time, as certainly there is no room for any such chiseling."

Although the majors were willing to match each other's higher prices, by February 1956, the independents were quoting lower prices on less than carload lots. Low prices of independents prompted Fry's president to write that Fry "will take corrective action" in the event that the independents would not raise their prices.

After Fry adopted the February 1956 higher price system, Volasco and Ohio Paper Company continued to sell below the prices adopted by Fry and the other majors in the Knoxville area. On November 1, 1956, Fry inaugurated lower Knoxville list prices than it maintained in Chicago and other felt **[**12]** factory areas where only majors were competing with it. Until February 1, 1960, Fry continued to maintain lower prices in the Knoxville area than in those other areas. Fry's consistent undercutting of Volasco's prices permits an inference of predatory purpose. Rowe, Price Discrimination **[*283]** under the Robinson-Patman Act (1962) pp. 146-147; Sunderland, "Territorial Price Differentials Under the Robinson-Patman Act," 41 Chicago Bar Record 121, 128 (1959). Moreover, Fry knowingly undercut its competitors' prices; its prices were not made to meet competition. [4]

The following price table [5] depicts significant examples of Fry's and Volasco's prices from February 1956 to August 1958:

Time	Fry's List	Fry's Dealer	Fry's "Approved Distributors"	Volasco's Range
2-19-56-4-18-56	$2.55	$2.25	$2.11	$2.01-2.14
4-19-56-6-14-56	2.62	2.25	2.11	2.01-2.25
6-15-56-8-13-56	2.62	2.17	2.17	2.10-2.25
8-14-56-10-31-56	2.62	2.01	2.01	2.10-2.25 (Sizeable sales to McClung at 2.00)
11-1-56-2-3-57	2.36	2.24	2.02	1.99-2.25
2-4-57-3-15-57	2.17	2.06	1.86	1.99-2.20
7-18-57-8-18-57	2.54	2.12	1.89	1.99-2.00
3-3-58-	3.60	1.69	1.52	1.73-1.90

[4] Fry has not challenged the Commission's ruling that its price discriminations were not made in good faith to meet competition within the proviso in Section 2(b) of the Robinson-Patman Act.

[5] The Fry prices to dealers and "approved distributors" are computed by deducting all discounts for which they are eligible from the list price. Volasco's prices are taken from its sales records. They are not exactly comparable to Fry's dealer prices because almost all of Volasco's sales are such that if they had been made by Fry, the buyer would not be entitled to any quantity discount. Volasco made isolated sales outside the price ranges as listed here. To use them as the limits of the price range would be to present a distorted picture of Volasco's sales activity.

Time	Fry's List	Fry's Dealer	Fry's "Approved Distributors"	Volasco's Range
4-3-58				
4-4-58-8-31-58	3.60	1.69	1.52	1.62-1.73

[13]**

After March 1958 and for at least six months, Fry's above-shown dealer and "approved distributor" prices were below Volasco's costs, thus amply demonstrating the deep and sustained nature of Fry's price cutting. Although the price differential between Knoxville and Chicago decreased during this time, nevertheless, it remained substantial (27 cents for "approved distributors" vice 36 cents). Another indication of Fry's motivation to discipline **[**14]** the small independents is its grant of a 52% discount to dealers and "approved distributors" in the Knoxville **[*284]** market area (and other areas served by independents during this same period), which is the largest discount that it gave east of the Rockies (apart from certain areas of New York State).

The Commission also found that Fry was the price leader and was responsible for its own and other majors' discriminatory low prices. Fry initiated the November 1956 list price reduction and almost all the later reductions. Even though some of the other majors were also discriminators, [6] that of course does not absolve Fry. ***HN5***[] The law of negligence imposes liability on an individual if his "conduct is a substantial factor in bringing about the harm * * *." A.L.I. *Restatement of the Law of Torts (2d) § 431*. The principle surely applies to price discrimination because under Section 2(a) there need be only a reasonable probability that the injury is the effect of the discrimination. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, 191 F.2d 786, 792 (7th Cir. 1951)*, certiorari dismissed, **[**15]** *344 U.S. 206, 73 S. Ct. 245, 97 L. Ed. 245*.

The record reveals that Fry was the instigator of the majors' price changes during the relevant period. Thus we have seen that the other majors adopted Fry's basing point pricing system the day after it became effective. They also copied most of Fry's subsequent price changes. Officers of The Ruberoid Company (one of the majors), Volasco and Ohio Paper Company testified that Fry had been the price leader, and upon inquiry, Fry's chairman did not deny this. It is clear that Fry created and maintained the discriminatory system. As stated by the American Bar Association's Section of ***Antitrust Law***, "There was no question that competitive injury resulted to the two competitors Volasco and Ohio Paper as the result of Fry's price discriminations. **[**16]** " 31 ABA Antitrust Section 93 (1966).

In view of Fry's predatory intent and price leadership, the Commission properly concluded that the effect of Fry's territorial price discriminations might substantially lessen competition within the meaning of Section 2(a) of the Robinson-Patman Act. *Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 552, 80 S. Ct. 1267, 4 L. Ed. 2d 1385*. In this connection, it should be noted that in reviewing a similar record, another Court of Appeals has held that there was sufficient evidence of Fry's violation of Section 2(a) of the Robinson-Patman Act to submit to a jury. *Volasco Products Company v. Lloyd A. Fry Roofing Company, 346 F.2d 661 (6th Cir. 1965)*, certiorari denied, *382 U.S. 904, 15 L. Ed. 2d 157, 86 S. Ct. 239*. [7] Since like evidence was deemed sufficient to go to the jury, it was also sufficient to support the Commission's determination here. *Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456*.

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[6] At the oral argument, the Court was advised that the Commission has cases in process against other roofing manufacturers. Cf. *Universal-Rundle Corp. v. Federal Trade Commission, 352 F.2d 831 (7th Cir. 1965)*.

[7] In the *Volasco* case, the jury rendered a verdict against Fry. A treble judgment was entered for Volasco, and that judgment was affirmed.

[17]** Because we agree that Fry's discriminatory price reductions in the Knoxville market area were motivated by predatory intent, it is unnecessary to examine their effect upon competition in detail. Yet it should be observed that Volasco and Ohio were the main independents operating in this area and had both refused to adhere to the majors' prices. Since Volasco and Ohio Paper were the principal competitors of the majors in this area, their removal would certainly have an adverse effect on price competition generally in that market. In other words, in this particular market, there were only two important price competitors of the majors, and the area price discriminations were directed at their practices. In such a situation, the injury to the two independents qualifies as **[*285]** injury to competition. *Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929)*, certiorari denied *279 U.S. 858, 73 L. Ed. 999, 49 S. Ct. 353*, is the classic example of this principle. To the same effect, see **[**18]** *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 99 L. Ed. 145, 75 S. Ct. 148*; *Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959)*, certiorari denied, *363 U.S. 843, 4 L. Ed. 2d 1727, 80 S. Ct. 1608*; *Maryland Baking Co. v. Federal Trade Commission, 243 F.2d 716 (4th Cir. 1957)*; *E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511 (6th Cir. 1944)*. ***HN6***[] Selective price reductions by a price leader to punish deviation from an industry price is itself anti-competitive conduct. In such a situation, the actual market results of the price reduction need not be manifest before enforcement of the Act is justified. Note, "Competitive Injury under the Robinson-Patman Act." 74 Harv. L. Rev. 1597, 1602, 1603 (1961).

Petitioners urge that there can be no violation of Section 2(a) in area price discrimination cases unless the Commission finds that the higher prices elsewhere support the lower prices in the market under examination. We have been cited to no authoritative decision to support this view. No such requirement was enunciated in **[**19]** *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 99 L. Ed. 145, 75 S. Ct. 148*, or *E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511 (6th Cir. 1944)*. Congress and the cases assume that the "higher price to purchasers supports the lower price to others." Austin, Price Discrimination (2nd Revised ed. 1959) p. 44; see also S. Rep. No. 698, 63d Cong. 2d Sess. pp. 2-3 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. p. 8 (1914); S. Rep. No. 1502, 74th Cong. 2d Sess. p. 4 (1936), and H.R. Rep. No. 2287, 74th Cong. 2d Sess. p. 8 (1936).

Relying upon such cases as *Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955)*, certiorari denied, *350 U.S. 991, 100 L. Ed. 856, 76 S. Ct. 545*, and *Shore Gas and Oil Co., Inc. v. Humble Oil & Refining Co., 224 F. Supp. 922 (D.N.J. 1963)*, Fry asserts there was no violation of the statute because its Knoxville prices were not the proximate cause of injury to Volasco and Ohio. But those were private treble damage actions and there plaintiff must of course establish that defendants caused actual damages to them. In the present case, the statute merely requires that **[**20]** the effect of the discrimination "may be substantially to lessen competition." Moreover, two juries have already found on similar evidence that Fry proximately caused actual damages to Volasco. *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962)*; idem, *346 F.2d 661 (6th Cir. 1965)*, certiorari denied, *382 U.S. 904, 86 S. Ct. 239, 15 L. Ed. 2d 157*.

Procedural Issues

Fry next argues that the Commission's refusal to permit Fry to subpoena pricing documents from its competitors vitiates the Commission's decision. However, the adverse rulings on the subpoenas were made in the course of interlocutory appeals and were not raised by Fry when the case was finally before the Commission for disposition. ***HN7***[] Fry should have exhausted its administrative remedy by then complaining of the interlocutory rulings. It is too late to raise the matter now. See *United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37, 97 L. Ed. 54, 73 S. Ct. 67*; *Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 413-414, 2 L. Ed. 2d 370, 78 S. Ct. 377*; 3 Davis Administrative Law Treatise, § 20.06 **[**21]** (1958). In any event, the record discloses no abuse by the Commission in denying the interlocutory appeals, for Fry's competitors had shown that production would be burdensome as to time and expense, would reveal vital business information, could not be accomplished within the requested deadline, and that the request for the issuance of six of the seven subpoenas came too late (10 months after complaint counsel had rested). ***HN8***[] Being neither arbitrary nor unsupported by the record, the Commission's rulings as **[*286]** to the subpoenas will not be disturbed on appeal. Cf. *Sue v. Chicago Transit Authority, 279 F.2d 416, 419 (7th Cir. 1960)*.

Fry also complains of Commission Chairman Dixon's participation in the rulings denying the issuance of subpoenas. At that time, Fry did not request his withdrawal. In the absence of an objection, his withdrawal was not necessitated. Section 7(a) of the Administrative Procedure Act (*5 USC § 1006(a)*). When the case reached the Commission for consideration of the merits, Fry for the first time moved that Chairman Dixon disqualify himself and he did so *sua sponte* because he had been counsel to a Senate **[**22]** Judiciary Subcommittee investigating pricing practices of roofing manufacturers. Fry knew of Chairman Dixon's prior role when it had earlier presented to the full Commission its interlocutory appeals with respect to the subpoenas. Its subsequent motion for his disqualification did not complain of his participation in the decision of the interlocutory appeals, nor was any such complaint made when the case came before the Commission for decision on the merits. ***HN9***[] Since the Commission had no opportunity to consider the matter, it may not be raised here. *Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155, 91 L. Ed. 136, 67 S. Ct. 245*.

Petitioners assert that the Commission's order is improper because it joins Messrs. Fry Senior and Junior in their individual capacities. The cease and desist order refers to them "individually and as officers" of Lloyd A. Fry Roofing Company. Complaint counsel twice proposed their inclusion in the order as individuals, without objection by petitioners. The complaint before the Commission named the Messrs. Fry "individually and as officers" of the corporation. It alleged that they were "personally and officially" **[**23]** responsible for the practices assailed. They are Fry's majority stockholders. Petitioners have not challenged the Commission's findings that these two persons formulate and control Fry's practices and were responsible for and participated in these discriminatory practices. In similar situations, we concluded that individuals responsible for corporate activities may be joined in their individual capacities. *Steelco Stainless Steel v. Federal Trade Commission, 187 F.2d 693, 697 (7th Cir. 1951)*; *Surf Sales Co. v. Federal Trade Commission, 259 F.2d 744, 747 (7th Cir. 1958)*. Petitioners rely on *Flotill Products Inc. v. Federal Trade Commission, 358 F.2d 224 (9th Cir. 1966)*, pending on petition for certiorari, No. 668. October Term 1966, but that record did not show the individuals had violated or could be expected to violate the Clayton Act (p. 233). ***HN10***[] The Ninth Circuit continues to approve the inclusion of individuals in cease and desist orders where, as here, they set the policies and review the practices. **[**24]** *Fred Meyer, Inc. v. Federal Trade Commission, 359 F.2d 351, 368 (9th Cir. 1966)*.

Finally, petitioners attack the Commission's order on the ground that it fails to lay down a standard between permissible and proscribed conduct. The order requires petitioners to cease and desist from selling asphalt saturated felt "to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, *where such lower price undercuts the lowest price offered to that purchaser by any seller having a substantially smaller annual volume of sales* " of that product. This order was less stringent than proposed by complaint counsel. The Commission modified it to cover only territorial price discrimination that would probably cause the debilitation of smaller and weaker competitors. As Commissioner Elman noted, Fry would probably continue its price tactics unless stopped. This type of order was designed to prevent recurrences of unlawful conduct. It is appropriate because, as he observed, in a market where Fry's price is below its lowest price competitor's, Fry's price is likely to represent another "attempt to discipline an upstart independent. **[**25]** " A similar order was affirmed in *Forster Manufacturing **[*287]** Co. v. Federal Trade Commission, 361 F.2d 340, 343 (1st Cir. 1966)*, cert. denied, *385 U.S. 1003, 87 S. Ct. 706, 17 L. Ed. 2d 542*. If situations arise to plague petitioners, they may seek binding advice from the Commission as to the applicability of this order. *Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 394, 13 L. Ed. 2d 904, 85 S. Ct. 1035*. The order is not to be read as forbidding justifiable area price differences.

The petition will be dismissed. The Commission's order is affirmed.

Nichols v. Spencer International Press, Inc.

United States Court of Appeals for the Seventh Circuit

January 11, 1967

Nos. 15523, 15526

Reporter

371 F.2d 332 *; 1967 U.S. App. LEXIS 7805 **; 1967 Trade Cas. (CCH) P71,974; 2 A.L.R. Fed. 829

Donald F. Nichols, Plaintiff, v. Spencer International Press, Inc., and the Crowell-Collier Publishing Company, et al., Defendants

Subsequent History: [1]** Petition for Rehearing Reported at *371 F.2d 332 at 337*.

Core Terms

no-switching, anti trust law, competitors, practices, employees, damages, impair, violation of antitrust laws, reference book, Clayton Act, certificate, agencies, supplied

LexisNexis® Headnotes

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

Business & Corporate Law > ... > Remedies > Damages > Punitive Damages

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN1[] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

See *15 U.S.C.S. § 15*.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN2[] **Causes of Action, Restraints of Trade**

One who has been damaged by loss of employment as a result of a violation of the antitrust laws is injured in his business or property" and thus entitled to recovery under *15 U.S.C.S. § 15*.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

HN3[] Causes of Action, Interference With Business Relations

See *15 U.S.C.S. § 17*.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements

29 U.S.C.S. § 52 provides that no restraining order or injunction shall be granted in any case, between parties to an employment relationship, involving, or growing out of, a dispute concerning terms or conditions of employment, except under certain conditions. The statute then provides that no such restraining order or injunction shall prohibit any person or persons from ceasing to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do. Nor shall any of the acts specified in the statue be considered or held to be violations of any law of the United States.

Judges: Castle, Kiley and Fairchild, Circuit Judges.

Opinion by: FAIRCHILD

Opinion

[*333] FAIRCHILD, Circuit Judge:

Action for treble damages under *15 USCA § 15* (§ 4 of the Clayton Act), for alleged violation of *15 USCA §§ 1* and *2* (*§§ 1* and *2* of the Sherman Act). Plaintiff Donald Nichols claims damages resulting from loss of opportunity for employment.

On motions for summary judgment the district court gave judgment dismissing the complaint against defendant Spencer International Press, Inc. ("Spencer"), and entered an order, with respect to the antitrust issues, in favor of defendants Crowell-Collier Publishing Company ("Crowell-Collier") and P. F. Collier, Inc. No judgment was entered as to the latter two defendants because breach of contract claims remain to be tried, but the district court made an appropriate certificate, and this court gave leave to appeal under *28 USCA § 1292(b)*. Plaintiff appealed from the judgment and the order.

The material facts, appearing in the complaint, [1] are summarized as follows:

Defendants Crowell-Collier **[**2]** and its subsidiary P. F. Collier, Inc., and Grolier, Inc. and its subsidiary, Spencer, are engaged in the sale of encyclopedias and reference books in interstate commerce. P. F. Collier, Inc. employed Nichols as a sales supervisor having charge of particular areas, but summarily discharged him without notice or cause December 10, 1962. Spencer employed him in a similar capacity January 3, 1963, but terminated his employment February 2, 1963, as a result of pressure from P.F. Collier, Inc., and because of a so-called "no-switching" agreement to which these companies are parties. In January, plaintiff had succeeded in persuading a number of sales employees of P. F. Collier, Inc., to resign and apply for employment with Spencer, under plaintiff's supervision.

It is alleged that defendants and **[**3]** others agreed to

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[1] Material before the court, by affidavit, in addition to the complaint, is of little consequence, and the posture of the case was virtually the same as if defendants had moved to dismiss for failure to state a claim.

> "enter into or give force and effect to so-called 'no-switching' agreements, understandings, practices and policies under which each defendant did and does refuse to permit employees or other sales personnel to go to work for competitors, and did and does refuse to hire employees and sales personnel of any other defendant or of any other competitors who leave or have left the employ of such other defendant or competitor."

It is further alleged that the agreement, together with the dominant position of Crowell-Collier and P. F. Collier, Inc.,

> "placed the plaintiff within the economic power of Crowell-Collier and P. F. Collier. And they exerted that power against the plaintiff as herein alleged to deprive him of his right to change, seek and take employment of his choice among employers in competition with Crowell-Collier and P. F. Collier."

It appears that under the "no-switching" agreement, a party thereto is not to **[*334]** employ a former employee of another party until six months after the termination of the former employment. Accordingly, Spencer did not again employ plaintiff until August, 1963.

There are also averments **[**4]** that defendants were attempting to monopolize trade and commerce, that they intended that Crowell-Collier should become a "dominant" publisher of encylopedias and reference books, and that the effect of the "no-switching" agreement has been to impair competition among defendants and others. The breadth of these averments seems to have been restricted on oral colloquy in the district court. Plaintiff's counsel indicated that adherence to the "no-switching" agreement affecting freedom of employment was the violation of the antitrust laws being claimed, and that plaintiff was not prepared to establish, beyond that, any agreement or combination in restraint of trade, affecting the business of supplying encyclopedias and reference books.

HN1[] *15 USCA § 15* (§ 4 of the Clayton Act, 38 Stat. 731) permits "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to recover threefold damages.

Defendants' principal contentions are that the facts claimed with respect to the "no-switching" agreement do not amount to a violation of any ***antitrust law*** and that plaintiff's inability to obtain employment is not an injury **[**5]** "in his business or property."

Addressing the second contention first, we readily conclude that ***HN2***[] one who has been damaged by loss of employment as a result of a violation of the antitrust laws is "injured in his business or property" and thus entitled to recovery under *15 USCA § 15*. Work as the employee of another is not, indeed, an independent business enterprise, and an opportunity to perform such work may not be property in the ordinary sense, but the interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable in this context.

In Radovich v. National Football League, [2] plaintiff was a professional football player and coach. The supreme court held that his complaint, alleging that he was blacklisted by possible employers as a result of a conspiracy to monopolize interstate commerce in professional football, stated a claim against the alleged conspirators. The contention here made (that one who is damaged by loss of opportunity for employment is not "injured in his business or property") does not appear to have been raised against Radovich. Radovich's **[**6]** claim did, however, rest upon his loss of opportunity to be employed, and the court and the parties must have assumed that such loss falls within the type of injury for which damages may be recovered under *15 USCA § 15*. Mr. Justice Clark, writing for the court, did say:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, [97 L. Ed. 1277, 73 S. Ct. 872]* (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private

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[2] (1957), *352 U.S. 445*, 77 Sup. Ct. 390, *1 L. Ed. 2d 456*.

enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public." [3]

[7]** This court, in 1942, dealt with the claim of a plaintiff who was apparently an independent contractor, rather than an employee, serving as a sales representative. [4] Defendants were manufacturers of fire prevention equipment and fire extinguishers, who combined to suppress competition. Apparently because of unlawful allocations, Roseland was deprived of the opportunity of making sales in particular territories.

[*335] This court held that a plaintiff need not, in order to recover under *§ 15*, carry on a business in competition with violators of the antitrust laws, and suffer injury in such business as a result. "Business" it was said, "denotes 'the employment or occupation in which a person is engaged to procure a living.'" [5] In the light of the remedial purpose of the section, the court concluded that Roseland should not be barred "by what seems to us a strained and unjustified limitation" on the meaning of **[**8]** "business."

In Vines v. General Outdoor Advertising Co., [6] the second circuit concluded that a plaintiff, employed by defendant to solicit orders for advertising might have a valid claim under *§ 15* if he could show that defendant deprived him of an opportunity to earn by shifting a potential customer to another firm, pursuant to an agreement which violated the antitrust laws.

The question whether the complaint here shows a substantive violation of the antitrust laws is more difficult. In *Radovich, Roseland*, and *Vines*, there were, or were assumed to be, a monopoly of or an agreement in restraint of trade in the service or commodity supplied by the particular enterprises. Thus violations of the antitrust laws were present, and loss of **[**9]** employment opportunity caused by such violations provided the basis for recovery.

Defendants here point out that the only allegedly unlawful agreement among defendants is the so-called "no-switching" agreement, requiring them to refuse for a period to employ former employees of competitors. [7] Defendants rely primarily upon two provisions of the Clayton Act to demonstrate, as a matter of law, that such agreements cannot amount to a violation of the "antitrust laws" (defined in the Clayton Act to include the Sherman Act, the Clayton Act, and certain others).

The first provision relied on is § 6. [8] The readily apparent purpose of this section is to permit the existence of labor and certain other mutual help organizations without being deemed combinations or conspiracies in restraint of trade. Except that the first sentence indicates that an agreement restraining freedom with respect to employment of labor is not, *as such*, a violation **[**10]** of the antitrust laws, § 6 has no application to the situation before us.

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[3] *Id. 352 U.S. at 453-4*.

[4] *Roseland v. Phister Mfg. Co. (7th Cir. 1942), 125 F.2d 417, 139 A.L.R. 1013*.

[5] *Id. 125 F.2d at 419*.

[6] (2d Cir. 1948), *171 F.2d 487, 491*.

[7] Monopoly or attempt to monopolize is charged only in general terms.

[8] Now ***HN3***[] *15 USCA § 17*, providing as follows: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

The other provision relied on is § 20. [9] This section protects the freedom of parties to labor disputes to employ the tactics described, in resolving such disputes, and to prohibit or minimize judicial interference with such activities. It is inapposite in the instant **[**11]** case.

Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, **[*336]** nor of regulating employment practices as such, nevertheless it seems clear that agreements **[**12]** among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.

For example, the service supplied to the public by a professional football club is highly dependent upon the ability of the players employed by the club, and a black-listing agreement, such as involved in *Radovich*, is, from the point of view of the public, an impairment of competition as to the quality of the service supplied, even though, as between player and club it is only a restriction on freedom to employ. [10]

[13]** The second circuit discerned a similar restraint upon competition in a "no-switching" agreement between employees who sold magazines, door to door. In Union Circulation Co. v. FTC, [11] petitioners were charged with engaging in unfair methods of competition and unfair or deceptive acts or practices in violation of *15 USCA § 45(a)* (§ 5 of the Federal Trade Commission Act). Petitioners were agencies engaged in the business of selling subscriptions for magazines and periodicals by door-to-door solicitation who entered into "no-switching" agreements "solely in order to prevent the fraudulent practices of certain crew members ". Apparently the magazine-selling industry had been "undermined by the deceptive selling practices and other fraudulent conduct of many of the solicitors in the field" and the companies contended that these agreements helped them maintain agency discipline and standards by reducing employee mobility between agencies. Presumably a solicitor was more amenable to discipline if he knew he couldn't switch jobs easily. Each signatory agreed not to hire each other's ex-employees until one year after the employee's termination.

[14]** An examiner held that the "no-switching" agreements were a reasonable attempt at self regulation. The commission reversed. The court of appeals affirmed, holding the "agreements, in the context of the industry affected, to be harmful to competition, and therefore an unreasonable restraint of trade within the meaning of the Sherman Act. . . ."

> " . . . Here it appears that the reasonably foreseeable effect of the 'no-switching' agreements will be to impair or diminish competition between existing subscription agencies, and to prevent would-be competitors from engaging in similar activity. One probable result of the agreements, because entered into by organizations that represent a very substantial segment of the industry, will be to 'freeze' the labor supply, which is the indispensable element of the door-to-door magazine-selling trade. Although only the signatory agencies are bound by the agreements, a crew member working for one of them will hesitate to leave his employer in order

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[9] Now ***HN4***[] *29 USCA § 52*. In its first paragraph, this section provides that "No restraining order or injunction shall be granted" in any case, between parties to an employment relationship, "involving, or growing out of, a dispute concerning terms or conditions of employment," except under certain conditions. The second paragraph provides, in part, that "no such restraining order or injunction shall prohibit any person or persons . . . from ceasing . . . to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do. " Reliance is principally placed on the last clause of this paragraph "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

[10] Since *Radovich*, Congress has exempted from the antitrust laws two types of joint agreements among persons engaged in organized professional team sports. One type of exempted agreement concerns sponsored telecasting of games (75 Stat. 732, *15 USCA § 1291 (1961)*). The other concerns the combination of two or more professional football leagues in an expanded single league, if such agreement increases the number of clubs (P.L. 89-800, 1966, 80 Stat. 1508, *15 USCA § 1291*).

[11] (2d Cir. 1957), *241 F.2d 652*.

> to join a newly formed competitor, or an expanding established one, if he knows that he may be out of work for a year in the event that the latter agency does not prove to be successful. The tendency **[**15]** of the 'no-switching' agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations." [12]

The United States Supreme Court has seldom considered, in light of the antitrust laws, the validity of employer agreements directed solely at industry employment practices. In Anderson v. Shipowners **[*337]** Ass'n of the Pacific Coast, [13] the defendant associations, alleged to be dominant, required every prospective seaman to register with them. A registration certificate was issued to each seaman reciting in part that no person would be employed unless registered, that the certificate must be delivered to the master of the vessel, and that the certificate was the personal record of the seaman and the basis of his future employment. All association members were bound to hire in accordance **[**16]** with the terms of the certificate. The question reached the Supreme Court after the district court granted a motion to dismiss. The court reversed, stating:

> " . . . each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations. . . . These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act." [14]

We cannot say, as a matter of law, that the effect of the "no-switching" agreement, challenged in this case, upon the business of supplying encyclopedias and reference books is so negligible that the agreement is not a restraint of trade **[**17]** in such products. We deem it error to have granted summary judgment upon the antitrust issues without further inquiry into the facts. As noted above, the posture of this case is such that granting summary judgment is tantamount to holding that the complaint failed to state a claim.

If, from the facts developed upon further proceedings, it does appear that the "no-switching" agreement impairs competition in the supply of encyclopedias and reference books, a question of degree may well arise, or of whether reasonable latitude may be afforded to protect some legitimate interest of the employers. Reasonableness was explored in Union Circulation Co. v. FTC [15] and in a British decision. [16] Agreements not to compete are tested by a standard of reasonableness. We do not attempt to deal with questions of this type at this stage of the proceeding.

The judgment and order appealed from are **[**18]** reversed and the cause remanded for further proceedings.

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[12] *Id. 241 F.2d at 658*.

[13] (1926), *272 U.S. 359*, *47 Sup. Ct.* 125, *71 L. Ed. 298*.

[14] *Id. 272 U.S. at 364-5*.

[15] (2d Cir. 1957), *241 F.2d 652, 656-7*.

[16] Kores Manufacturing Co., Ltd. v. Kolok, (1959) Ch. 108 (C.A.).

K-91, Inc. v. Gershwin Publ'g. Corp.

United States Court of Appeals for the Ninth Circuit

January 13, 1967

No. 20,074

Reporter

372 F.2d 1 *; 1967 U.S. App. LEXIS 7779 **; 152 U.S.P.Q. (BNA) 375 ***; 1967 Trade Cas. (CCH) P71,979

K-91, Inc., Appellant v. Gershwin Publishing Corporation et al., Appellee

Core Terms

license, anti trust law, broadcasters, music, compositions, fact finding, blanket, district court, musical composition, consent decree, repertory, trial court, publisher, radio, license fee, infringement, violations, composer, licensee, stations

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN1[] **Intellectual Property, Misuse of Rights**

Copyrighted music and drama are protected by Wash. Rev. Code § 19.24.010 (1957), but Wash. Rev. Code § 19.24.020 (1957) makes unlawful certain combinations of copyright owners.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN2[] **Intellectual Property, Misuse of Rights**

See Wash. Rev. Code § 19.24.020 (1957).

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN3[] **Intellectual Property, Misuse of Rights**

When copyrights are pooled, Wash. Rev. Code § 19.24.020 (1957) requires a complete detailed list of the works to be filed each year, together with a list of prices charged or demanded, with the Washington Secretary of State. Wash. Rev. Code § 19.24.055 (1957) requires such a list if the music is used commercially within the state, or originates or is heard therein.

Judges: **[**1]** Barnes, Koelsch and Duniway, Circuit Judges.

Opinion by: BARNES

Opinion

[*375]** **[*2]** BARNES, Circuit Judge.

This is an appeal in a civil non-jury case from a judgment in favor of the appellees, the owners of copyrights on various musical compositions. Appellant, a radio station operator in the State of Washington, played these musical compositions on the air without the permission or consent of the appellees. Appellees filed a complaint, under 17 U.S.C. §§ 1, *101*, seeking damages for and an injunction against such infringement. Appellees prevailed, and the court below entered judgment awarding them $1,000 damages and enjoining further infringement. The trial court had jurisdiction under *28 U.S.C. §§ 1337*, *1338*, and we have jurisdiction of the appeal under *28 U.S.C. § 1291*.

Appellant, both in the trial below and on oral argument before this court, admitted the expropriation and infringement of appellees' copyrights, but claimed appellees were misusing their copyrights in violation of public policy generally, and particularly in violation of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1*, *2*. **[**2]** Therefore, appellant contended, no relief should be granted because appellees had come into court with unclean hands. It was charged that appellees had, between themselves and in conjunction with the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), conspired to fix prices and to engage in other unlawful practices, in violation of (a) the Sherman and Clayton Acts, and (b) the laws of the State of Washington, particularly R.C.W. § 19.24.020. Appellant also counterclaimed seeking treble damages and an injunction against further misuse of the copyrights. *Fed. R. Civ. P. 13(a)*, *15 U.S.C. §§ 15*, *26*. This relief was denied.

This case cannot be understood without an analysis of the role of ASCAP. ASCAP is an unincorporated membership association comprising over 8000 author, composer and publisher members who own copyrights on various separate musical compositions. (Finding of Fact No. 16, C.T. p. 196.) ASCAP functions as a licensing agency for the composers, authors and publishers. When someone in the professional entertainment field wants to perform a copyrighted piece, they merely secure a license from ASCAP rather than seeking out **[**3]** the individual composer, author and/or publisher whose work they want to perform. ASCAP charges a fee or **[***376]** royalty for the license, and its members periodically receive royalty distributions from ASCAP.

In the 1940's the Justice Department became concerned over the operations of ASCAP and its overwhelming position in the entertainment field. Suit was brought under the antitrust laws to prevent restraints of trade by ASCAP, which resulted in the Amended Final Judgment of March 14, 1950, in the United States District Court for the **[*3]** Southern District of New York in Civil Case No. 13-95, 1960 Trade Cases para. 69,612 (S.D.N.Y.). There is no claim in this case that ASCAP and appellees, ASCAP members, have not conformed to the terms of the Amended Final Judgment.

We note three specific requirements of the Amended Final Judgment:

(1) The rights acquired by ASCAP to license the public performance of copyrighted compositions must be nonexclusive;

(2) The license fees or royalties must be reasonable, and if there is a dispute as to the reasonableness of the proposed fee, the fee will be set by the United States District Court for the Southern District of New York; **[**4]** and

(3) A license must be granted on the same terms and conditions to all applicants similarly situated.

Basically, appellant challenges the lower court result in three aspects: (a) failure to make certain findings of fact; (b) failure to find violations of the federal antitrust laws; and (c) failure to find violations of the Washington State antitrust laws. We treat them in that order.

I. *Failures to Make Certain Findings*

Appellant lists eight examples of the court's failure to find. Among them are the facts that: the ASCAP repertory (inventory of copyrighted compositions) includes more than a million musical compositions; that ASCAP is managed by a Board of Directors which sets the fees for its licenses; that music is a necessity to the broadcasting industry within the State of Washington and throughout the United States; and that each musical copyright is unique. We think that in view of the detailed findings of fact and conclusions of law made by the trier of fact (C.T. pp. 193-217), these eight examples (four of which we have cited) of the failure to make specific findings, are without enough substantial merit to constitute reversible error.

Instead of finding **[**5]** that one million musical compositions were controlled by ASCAP, the court found that ASCAP is made up of over 8000 members (Finding of Fact No. 16, C.T. p. 196); is but one of three music licensing organizations in the United States, which together license substantially all of the copyrighted musical works in the United States (Finding of Fact No. 18, C.T. pp. 196-97); and that fifty per cent of all performances of copyrighted music by broadcasting stations are performances of compositions which ASCAP members have created (Ibid.) That "music is a necessity to the broadcasting industry" paraphrases the trial judge's remark that "music is an essential part of the operation of a radio station." (R.T. p. 6) While the statement may not be completely true in this modern age of "two-way radio" or "conversation programs ", it has been only too evident to listeners for many years. We can likewise assume that "each musical copyright is unique ", though not with the same uniqueness as is implied in a patented article. Cf. *Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951)*.

As to each of the stipulated facts which appellant claims should have been specifically **[**6]** found as facts by the trial court, we find they were either immaterial or redundant in light of the findings made. (The trial judge, on motion for a new trial, found they were "repetitious or irrelevant." (R.T. p. 251.)) There was no error in this regard.

II. *ASCAP and the Federal Antitrust Laws*

This litigation skirts a very perplexing problem long existing in federal ***antitrust law***, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws. Fortunately, however, the present case does not call for an answer to this question.

At the beginning of this litigation there were three possible results for appellant's **[*4]** counterclaim based on federal antitrust violations. The court could have found: (1) that there were in fact no violations of the federal antitrust laws; (2) that federal antitrust laws were violated, but since the conduct of the appellees conformed to the earlier consent decree no remedy was available; **[**7]** or (3) that the federal antitrust laws were violated and that the earlier consent decree offered no protection, granting relief to the appellant on its counterclaim. While either of the last two possibilities would have squarely raised the question of immunity deriving from the earlier consent decree, it **[***377]** was the first possibility which actually occurred. Since the trial court found no violations of the federal antitrust laws, [1] we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree.

We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every

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[1] Conclusions of Law Nos. 15 and 16, C.T. p. 214.

applicant **[**8]** to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.

There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective **[**9]** licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws.

III. *ASCAP and the Washington State Antitrust Laws*

The State of Washington has certain antitrust laws relating to copyrights. ***HN1***[] Copyrighted music and drama are protected by R.C.W. § 19.24.010 (1957), but ***HN2***[] R.C.W. § 19.24.020 (1957) makes unlawful certain combinations of copyright owners. The latter section provides in part:

> "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use **[**10]** or perform publicly their separate copyrighted works: *Provided, however*, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: . . .."

HN3[] When copyrights are pooled, R.C.W. § 19.24.020 (1957) requires a complete detailed list of the works to be filed each **[*5]** year, together with a list of prices charged or demanded, with the Washington Secretary of State. R.C.W. § 19.24.055 (1957) requires such a list if the music is used commercially within the state, or originates or is heard therein.

Washington frankly states the purpose of its requirements in R.C.W. § 19.24.060 (1957). [2] There are also special purpose statutes, defining "doing business" with respect to licensing pools such as ASCAP (R.C.W. § 19.24.100 (1957)); providing for appointment of receivers and the escheat of property for persons who refuse to abide by the state copyright laws (R.C.W. § 19.24.140 (1957)); and providing that special appearances in copyright suits are to be deemed general appearances (R.C.W. § 19.24.280 (1957)).

[11]** The court below, in findings of fact unchallenged here, noted the previous concern over the application of the Washington statute.

> "38. In 1958, certain broadcasters in the State of Washington stopped **[***378]** paying fees to ASCAP under existing license agreements on the alleged ground that payment of such license fees would violate Ch. 19.24, R.C.W.
>
> "39. The license agreements referred to in Finding 38 expired on December 31, 1958.

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[2] "The provisions of this chapter, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state . . . in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this chapter and of the state Constitution; . . ." R.C.W. § 19.24.060 (1957).

"40. In 1959, a group of broadcasters, including eleven broadcasters located in the State of Washington, commenced a proceeding in the United States District Court for the Southern District of New York under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses to be effective as of January 1, 1959.

"41. In that proceeding, the Court ruled that, in the circumstances presented, ASCAP would not be directed to issue licenses to any petitioning broadcasters in the State of Washington.

"42. Thereafter, and until November 20, 1959, ASCAP did not offer licenses to broadcasters in the State of Washington.

"43. On November 20, 1959, the owners of 61 Washington radio stations filed a petition in the United States **[**12]** District Court for the Southern District of New York asking that Court to issue an order

'(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

'(b) determining and establishing the terms and conditions of such licenses.'

"44. At the request and with the consent of the petitioners, the Court (Ryan, C.J.) entered an order on November 20, 1959 directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963. The Court ruled:

'6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24 -- Laws of 1937, C. 218, the licenses **[*6]** which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed **[**13]** to enter into such license agreements with each of the petitioners.

'7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states.'

"45. The two specified license forms were the so-called 'blanket' and 'per program' radio licenses. Both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee charged is 2.125% of the licensee's over-all revenues from sale of time on the air, after extensive deductions. Under the per program license, the licensee pays a higher percentage, but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed." (C.T. pp. 204-205.)

Appellant seems to feel that since ASCAP was authorized to issue, in addition to other kinds, "blanket" licenses which might arguably be contrary to R.C.W. § 19.24.020 (1957), it has made out a valid defense to the infringement action. If such is its approach, it is mistaken. Appellant has offered no evidence that it applied for **[**14]** a license and could obtain only a blanket license. There is no evidence in the record that appellees did not at all times stand ready to negotiate licenses which would be lawful in the State of Washington.

On the contrary, plaintiffs (appellees here) introduced into evidence (P. Ex. 9) a copy of a letter dated August 23, 1948, from the Washington Attorney General to the Secretary of State, stating ASCAP had, by its filing [3] on April 20, 1948, demonstrated:

(a) "it does issue licenses on rates assessed on a per piece system of usage . . .,"

(b) "it does not issue licenses at a rate in excess of any per piece system in operation in any other state, . . .,"

(c) it had filed "a complete list of their copyrighted works or compositions," **[***379]**

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[3] Appellees assert that they have, since at least 1961, and each year prior to the filing of the suit on January 16, 1963, filed with the Secretary of State of Washington State a catalog of their copyrighted musical compositions, together with forms of licenses available to all users, and fees therefor. (P. Exs. 1, 5, 6; D. Exs. A-7, A-8, A-8a.)

(d) it had filed "a list completely detail[ing] prices charged and demanded," and

(e) it had listed the date of each copyright, and name of the author, the names of the publishers and the dates of assignment to ASCAP.

[15]** The Attorney General concluded there had been "a reasonable compliance with the provisions of Chapter 218 [4];" and that "the defects which the Supreme Court pointed out [5] have now been cured." (P. Ex. 9, p. 9. Cf. Finding of Fact No. 53, C.T. p. 207.)

The trial court found that no public official of the State of Washington had at any time requested ASCAP to make any changes in either the form or substance of its filings. (Finding of Fact No. 52, C.T. p. 207.)

Thus it seems clear that at all times, at least since the November 20, 1959 rate fixing hearing in the New York district court (in which eleven State of Washington broadcasters participated) appellant could have obtained a license from ASCAP, valid under Washington **[*7]** law so far as this record before us discloses, to perform publicly for profit any musical composition in ASCAP's repertory, **[**16]** subject only to its obligation to pay a reasonable license fee, as fixed by the New York district court.

As appellees point out, appellant had five options open to it. Four of them were:

(1) Appellant could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely as it desired, any of the compositions in the ASCAP repertory.

(2) Appellant could have obtained a per program license which would have required it to pay a license fee only for those programs in which appellant broadcast music from the ASCAP repertory.

(3) It could have undertaken to deal with ASCAP members directly.

(4) Appellant could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, appellant chose the fifth option. Appellant never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in unlawfully appropriating appellees' property without cause and without justification.

There seems little purpose in going into detail to discuss further the reason why the court's conclusions of law are not only not erroneous, [6] but are fully supported by the findings **[**17]** of fact, which in turn, find support in the evidence.

We find (1) all filing requirements of the State of Washington have been met; (2) no "extortionate means" nor "terrorizing practices" are found in the bringing of law suits against infringing broadcasters; (3) R.C.W. § 19.24.020 prohibiting blanket licenses must be read with the proviso contained therein, and raises serious doubt if an absolute prohibition against all blanket licenses was intended; (4) there was no proof of any refusal at any time by any individual appellee to grant, or to negotiate, for a separate license (in fact, there exists no proof that there was ever an attempt to obtain such a license); and (5) any would-be user has the right to have the United States District Court for the Southern District of New York fix what is reasonable as a license fee.

In Conclusion II, the trial judge found: "The ASCAP per program license may reasonably **[**18]** be regarded as assessing rates 'on a per piece system of usage,' as the Washington statute uses that phrase." (C.T. p. 214.)

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[4] Laws of 1937; Rem. Rev. Stat. 3830-1 et seq., the forerunner of R.C.W. § 19.24.020 (1957).

[5] *Taylor v. State, 29 Wash. 2d 638 (1948)*.

[6] Conclusions of Law 5 to 14, inclusive, as to Washington law, and 15 to 18, inclusive, as to federal law.

We need not specifically approve or disapprove of the trial court's interpretation of the Washington statute. If the per program license were interpreted as a blanket license and it was found that R.C.W. § 19.24.020 (1957) permits only licenses of specific individual compositions, ASCAP members nevertheless retain the absolute right to license their individual compositions, and the trial court found:

> "Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the State of Washington for a license to perform any of plaintiffs' copyrighted musical compositions on any mutually agreeable basis, including 'rates assessed on a per piece system of usage.' In the last ten years, no broadcaster in the State of Washington has requested such a license from any plaintiff. No defendant has ever made any attempt to contact any plaintiff individually for the purpose of obtaining licenses to play any of plaintiffs' compositions on a 'per piece' or any other basis." (Finding of Fact No. 50, C.T. p. 206.)
>
> "In the last ten years, **[**19]** ASCAP has **[***380]** not received any request from any broadcaster in the State of Washington and any ASCAP member in interest for the issuance of a license to perform one or more specified compositions." **[*8]** (Finding of Fact No. 51, C.T. p. 206.)

We do not find it necessary to discuss the other points raised in the respective briefs.

We find the trial court's findings and conclusions were properly made, and support the judgment in favor of appellees. That judgment is correct, and is affirmed.

End of Document

Y & Y Popcorn Supply Co. v. ABC Vending Corp.

United States District Court for the Eastern District of Pennsylvania

January 25, 1967

Civil Action No. 28546

Reporter

263 F. Supp. 709 *; 1967 U.S. Dist. LEXIS 11147 **; 1967 Trade Cas. (CCH) P72,022

Y & Y Popcorn Supply Co. v. ABC Vending Corp., Berlo Vending Co., and Jacob Beresin

Core Terms

decree, Clayton Act, anti trust law, consent decree, hearing examiner, FTC Act, violations, matters, abuses, Film

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See 15 U.S.C.S.§ 18.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See 15 U.S.C.S. § 16(a).

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN3[] **Settlements, Antitrust Procedures & Penalties Act**

Section 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)*, allows the use in private antitrust suits of decrees resulting from government actions as prima facie evidence of matters determined in the antecedent government suit which "would be an estoppel" between the government and the defendant.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN4[] **Settlements, Consent Judgments**

The findings and initial decision of a hearing examiner do not automatically become those of the Federal Trade Commission unless it adopts them in its own findings.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

The mere absence of expressed findings by the Federal Trade Commission does not necessarily preclude the applicability of the § 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)*, in a case where the defendant fails to capitulate before the taking of testimony.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Private Actions, Remedies**

Section 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)* is undoubtedly a powerful deterrent to antitrust violators and an enviable weapon in the armory of the treble damage suitor. It is also an undeniable aid to the government in correcting antitrust abuses without the necessity of protracted litigation. But it is precisely because the effect of the invocation of § 5(a) is so potently prejudicial and its "emotive impact," especially in a jury case, is so great, that the district court must restrict the application of the statutory mandate to its logically compelling consequences.

Judges: [1]** Joseph S. Lord, III, D.J.

Opinion by: LORD, III

Opinion

[*710] Pretrial Memorandum and Order

JOSEPH S. LORD, III, D.J.

Plaintiff brought this treble damage antitrust action under the Clayton Act, charging defendants with violations of *Sections 1* and *2* of the Sherman Act [1] and *Section 7* of the Clayton Act. [2] **[**2]** In order to expedite their preparation for trial, the parties have asked us to rule *in limine* on the applicability of Section 5(a) of the Clayton Act [3] to the present suit. Specifically, the question presented is whether the plaintiff can make use of a Federal Trade Commission (FTC) consent order entered against the corporate defendants, and, if so, to what extent.

I.

On November 4, 1959, the FTC issued its complaint against the defendants. Count I charged violations of *Section 7* of the Clayton Act, arising from the acquisition by defendants in 1957 of two companies: "Sweets", a firm operating in the "Philadelphia Film Exchange Area", [4] and "Confection", a company operating largely in the "New **[**3]** York Film Exchange Area." [5] Count II charged the defendants with "unfair methods of competition" proscribed by Section 5 of the Federal Trade Commission Act [6] (FTC Act) and occurring in both the New York and Philadelphia Film Exchange Areas. This count repeated and incorporated by reference the charge of unlawful acquisitions as one basis of a Section 5, as opposed to a Clayton Act violation, and added alleged abuses which consisted of making preclusive loans and affording other inducements to customers, requiring preclusively long contract commitments from customers, and exacting favored treatment from suppliers.

After an extensive hearing, the FTC hearing examiner handed down an initial decision on April 15, 1964 in which he **[*711]** ordered divestiture of both Sweets and Confection. The examiner concluded that: "Both acquisitions, separately and jointly are violative of the provisions of *Section 7* of the Clayton Act." Defendants argue **[**4]** that the examiner clearly "dismissed" Count II of the complaint, dealing with FTC Act violations. More precisely, it appears that he felt these alleged transgressions were ancillary to the root evil of agglomerated market power and need not be the subject of separate attack as long as the primary remedy of divestiture was effected.

The examiner's decision was the subject of appeal by both sides. The prosecutorial arm of the FTC wanted additional sanctions against the practices enumerated in Count II of the complaint; the defendants demanded exoneration. However, on September 29, 1964, an agreement and stipulated order was signed in which the defendants admitted "all of the jurisdictional facts alleged in the complaint * * *." With respect to all other matters, the agreement recited that "[the] Commission has not made and will not make any adjudication or determination of any issue of law or fact presented by the complaint in this proceeding."

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[1] *15 U.S.C. §§ 1*, *2*.

[2] ***HN1***[] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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*.

[3] ***HN2***[] "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title. * * *" *15 U.S.C. § 16(a)*.

[4] Defined in FTC order, PIII.

[5] Id.

[6] *15 U.S.C. § 45*.

The Commission's decision and order was issued on October 22, 1964. The Commission "determined that it should waive * * * the timely filing of notice of intent to enter into a consent agreement" [7] and made findings of jurisdictional fact. **[**5]** It then ordered the divestiture of "motion picture theater concessions and contract rights for the operation of motion picture theater concessions * * * having aggregate concessionary sales of not less than $4,000,000 of which not less than $3,500,000 shall be in the New York and Philadelphia film exchange areas * * *." Additional terms of the order dealt with ancillary divestiture assurances as well as the other abuses enumerated in Count II of the complaint. In accordance with the consent agreement, the order contained no other findings of fact or conclusions of law.

It is this order which plaintiff wishes to use in the present suit.

II.

Plaintiff's complaint, which was filed on September 12, 1960, is largely a catalogue of the anti-competitive abuses charged in the FTC proceeding. There is appended, of course, the critical allegation that **[**6]** defendants' conduct had an adverse economic impact on plaintiff.

The operations of the respective parties differ in that plaintiff is a wholesale merchant of candy and pop-corn selling to theater owners in the Philadelphia area, whereas defendants are concessionaires, selling directly to the public from vending machines and booths within client theaters located in both the New York and Philadelphia areas.

III.

Section 5(a) of the Clayton Act ***HN3***[] allows the use in private antitrust suits of decrees resulting from government actions as prima facie evidence of matters determined in the antecedent government suit which "would be an estoppel" between the government and the defendant. The proviso, exempting consent decrees "entered before any testimony has been taken" does not apply here because the FTC order was entered only after the hearing examiner had taken thousands of pages of testimony. And it is undisputed that the FTC order was "a final judgment or decree."

There is likewise no question, at least in this Circuit, that as respects Count I, the FTC order is the product of a "civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws." *New **[**7]** Jersey Wood Finishing Co. v. Minnesota Min. & Mfg. Co., 332 F.2d 346* (C.A. 3, 1964), aff'd, *381 U.S. 311, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*. On the other hand, **[*712]** the charges contained in Count II stand on a different footing. Section 5 of the FTC Act, which was the asserted basis for liability in Count II, is not one of the "antitrust laws." *Id. at page 352*. Therefore, no use could be made of a decree entered pursuant to that count.

The real problems presented are: (1) whether the decree is "to the effect that a defendant has violated [the antitrust] laws"; and (2) if so, what are the matters, if any, "respecting which said judgment or decree would be an estoppel as between the parties thereto" which the statute makes prima facie evidence of the same matters in the present treble damage suit.

Defendants vigorously contend that since the FTC made no findings of fact the decree is evidence of nothing, [8] least of all that it constitutes an adjudication of liability. ***HN4***[] The findings and initial decision of the hearing examiner do not automatically become those of the Commission unless it adopts them in its own findings, [9] and there were no such findings here. Insofar **[**8]** as the FTC is concerned, argue defendants, the consent order adjudicates nothing at all; by the FTC's own rules, it is not an admission of law. [10] Therefore, they conclude that the

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[7] The normal time for such a filing is ten days after the FTC has given notice of its intent to issue a complaint. See FTC Rules of Practice, *16 C.F.R. §§ 2.1*, *2.2*.

[8] It does, however, seem unmistakably clear that the FTC order found and determined the Commission's jurisdiction and the facts upon which jurisdiction is grounded.

[9] FTC Rules of Practice, *16 C.F.R. § 3.24*.

FTC order is not "to the effect" that defendants violated *Section 7* of the Clayton Act, and that even if it were, there would be no way to discern the scope of any resulting estoppel.

Plaintiff counters by emphasizing that Section 5(a) is designed not only to aid private suitors in subsequent treble damage actions, *Emich Motors Corp. v. General Motors Corp., 340 U.S.* **[**9]** *558, 95 L. Ed. 534, 71 S. Ct. 408 (1951)*; *New Jersey Wood Finishing Co. v. Minnesota Min. & Mfg. Co., supra*, but also to induce "prompt capitulation" by the defendants in the antecedent government proceeding. See, e.g., *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412* (C.A. 7, 1963), cert. denied, *376 U.S. 939, 11 L. Ed. 2d 659, 84 S. Ct. 794 (1964)*; *City of Burbank v. General Electric Company, 329 F.2d 825* (C.A. 9, 1964); *General Electric Company v. City of San Antonio, 334 F.2d 480* (C.A. 5, 1964); *De Luxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983 (E.D. Ill. 1951)*.

This latter purpose emerges from the proviso to Section 5(a) which exempts from the operation of the main provisions those consent decrees entered before the taking of testimony. Confronted with the impending peril of "double jeopardy" - a government victory followed by the pleadings of alerted private suitors - the defendant is more likely to enter into a consent decree before any testimony has been taken. The effect of the statutory scheme in this case urges plaintiff, is that since the defendants here did not agree to the entry of a consent decree until after the hearing examiner had **[**10]** taken testimony and announced his decision, the preclusive effects of Section 5(a) must obtain, notwithstanding the fact that the FTC promulgated no explicit findings or conclusions. Plaintiff points out that Congress must have intended *some* consent decrees to be encompassed by the main provisions of Section 5(a) for it specifically excluded only those consent decrees entered before any testimony has been taken. There is nothing in the language or purpose of the statute which compels specific findings of fact, and plaintiff argues that we ought not import such a requirement.

We agree that ***HN5***[] the mere absence of expressed findings by the FTC does not necessarily preclude the applicability of Section 5(a) in a case where the defendant **[*713]** has failed to capitulate before the taking of testimony. However, in this case it is not at all clear that the decree was "to the effect" that the defendants violated one of the antitrust laws, i.e., *Section 7* of the Clayton Act, rather than Section 5 of the FTC Act, which is not such a law.

To be sure, the hearing examiner found a violation of *Section 7*. But his decision was never adopted by the Commission. In fact, the order which **[**11]** the FTC issued departed substantially from the examiner's suggested decree in that it encompassed several of the additional abuses enumerated in Count II of the complaint, which dealt with FTC Act violations. It will be recalled that Count II began by incorporating the same factual charge of unlawful acquisitions as that contained in Count I. Therefore, it is conceivable that the FTC might have ultimately determined that the defendants' conduct throughout constituted only "unfair methods of competition" not rising to the level of an "***antitrust law***" violation.

HN6[] Section 5(a) is undoubtedly a powerful deterrent to antitrust violators and an enviable weapon in the armory of the treble damage suitor. It is also an undeniable aid to the government in correcting antitrust abuses without the necessity of protracted litigation. But it is precisely because the effect of the invocation of Section 5(a) is so potently prejudicial and its "emotive impact" (especially in a jury case) so great, *Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 631* (C.A. 2, 1952), cert. denied, *344 U.S. 875, 97 L. Ed. 678, 73 S. Ct. 168 (1952)*, that we must restrict the application of the statutory **[**12]** mandate to its logically compelling consequences. Here, we are drawn to no ineluctable inference that the Commission's order was "to the effect" that a *Section 7* violation had occurred. Rather, we are confronted with an ambivalence which neither intensive interpretation nor reasoned reflection can resolve.

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[10] FTC Rules of Practice, *16 C.F.R. § 2.3*. Actually the Rules say only that "the [consent order] agreement may contain a statement that the signing thereof * * * does not constitute an admission by any party that the law has been violated * * *."

Furthermore, even if this decree were to the effect that defendants violated the antitrust laws, it would, at best, only show prohibited conduct in a market composed of the combined New York and Philadelphia Film Exchange Areas. [11]

[13]** The relevant market for the purposes of the present suit is the Philadelphia area. Of course, it cannot be said that illegal behavior in a defined market area necessarily assumes anticompetitive conduct in any included portion of that area. Since we cannot say that the FTC order was "to the effect" that defendants violated *Section 7*, we need not reach the question of whether the decree would have any probative value at all as to the merits of this case.

Our decision also renders unnecessary any attempt to delineate those matters of which the FTC order "would be an estoppel" and hence prima facie evidence in the present action.

The Federal Trade Commission consent order will not be admissible in evidence nor may any reference be made to its existence or terms at trial.

It is so ordered.

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[11] The FTC order required divestiture of a stated volume of concessionary rights "in the New York and Philadelphia film exchange area * * *." From this language, it would appear that for purposes of relief the FTC was structuring a market composed of both the New York and Philadelphia areas. Since defendants might conceivably have divested themselves of a large volume of business in one component area while retaining largely intact their interests in the other area, it is not possible to say that the Commission was convinced that grave abuses constituting antitrust violations existed in each area independently.

[L. S. Good & Co. v. H. Daroff & Sons, Inc.](#)

United States District Court for the Northern District of West Virginia

February 2, 1967

Civil Action No. 1547-W

Reporter

263 F. Supp. 635 *; 1967 U.S. Dist. LEXIS 9346 **; 1967 Trade Cas. (CCH) P72,027

L. S. Good & Co., Plaintiff v. H. Daroff & Sons, Inc., Defendant

Core Terms

manufacturer, dealers, anti trust law, men's clothing, retail, pool, venue, distributor, conspiracy, products, monopolize, foreign corporation, instant case, antitrust, district court, installation, transaction of business, cause of action, Sherman Act, prices, resale, place of business, do business, telephone, commerce, Auditor, violation of antitrust laws, restraint of trade, service of process, minimum contact

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1[] **In Rem & Personal Jurisdiction, In Personam Actions**

See W. Va. Code § 31-1-71 (1966).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

The amount and kind of activities which must be carried on by a foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the personal jurisdiction of a court in that state under W. Va. Code § 31-1-7 (1966) must be determined according to the facts and circumstances of each case.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN3[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Under the U.S. Const. am. XIV due process clause it must appear that a defendant over whom jurisdiction is asserted has had minimum contact within the state which renders it consistent with traditional notions of fair play and substantial justice that he be compelled to defend himself in that state; and assuming the existence of such requisite minimum contact, there must be a method of service which is designed to give the defendant actual and reasonable notice of the pending action against him.

Civil Procedure > ... > Service of Process > Methods of Service > Foreign Service

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Agents

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

HN4[] **Methods of Service, Foreign Service**

Fed. R. Civ. P. 4(d)(3) provides that personal service shall be made upon a foreign corporation by delivering a copy of the summons and the complaint to, among others, any other agent authorized by appointment or by law to receive service of process. *Rule 4(d)(7)* also provides that on a foreign corporation it is sufficient if the summons and complaint are served in the manner prescribed by the law of the state in which the district court is held.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN5[] **Jurisdiction, Exclusive Jurisdiction**

The United States District Courts are given jurisdiction over private antitrust actions by *15 U.S.C.S. § 15*, which provides that any person who is 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. Federal jurisdiction is exclusive in that section. This rule has been liberalized in the case of corporate defendants by *15 U.S.C.S. § 22*, which provides that any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.

Civil Procedure > Preliminary Considerations > Venue > Agents

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN6[] **Venue, Agents**

A corporation is engaged in transacting business in a district, within the meaning of *15 U.S.C.S. § 22*, in such sense as to establish the venue of a suit - although not present by agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process, - if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.

Business & Corporate Law > Foreign Corporations > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN7[] **Business & Corporate Law, Foreign Corporations**

If a corporation is engaged in promoting or carrying out a substantial amount of its corporate business in a foreign state, it is engaged in transacting business in that state for purposes of *15 U.S.C.S. § 22*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

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*, *2*, prohibits, respectively, every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce, and every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons, to monopolize any part of the trade or commerce among the several states.

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. §§ 15*, *22*, authorizes private suits by persons injured because of violations of the antitrust laws.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN10[] **Pleadings, Rule Application & Interpretation**

Where a complaint charges a defendant with engaging in a "combination, contract and conspiracy," but no supporting facts have been alleged, such a conclusory allegation of this type does not set forth a cause of action for violation of federal antitrust laws.

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

HN11[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Only unreasonable restraints of trade are unlawful. When an exclusive dealership is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement is a reasonable restraint of trade. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that a dealer asks for the arrangement does not make it illegal.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Antitrust & Trade Law > Clayton Act > General Overview

HN12[] **Coverage, Commerce Requirement**

The Clayton Act, *15 U.S.C.S. § 13(a)*, provides that nothing contained in the statute shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

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

HN13[] **Private Actions, Remedies**

The hybrid nature of a private antitrust suit dictates that, to succeed, the plaintiff must prove not only that the defendant has infringed one or more of the antitrust laws to the public injury, but also that such infringement has resulted in private injury to the plaintiff in its business or property. *15 U.S.C.S. § 15*. In the absence of a showing of either the public or private harm, the plaintiff cannot prevail.

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

Antitrust & Trade Law > Sherman Act > General Overview

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

In the absence of any intent to create or maintain a monopoly, the Sherman Act, *15 U.S.C.S. § 1*, does not prevent a manufacturer engaged in a private business from announcing in advance the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such prices. However, this exception to the antitrust laws has been narrowed in cases where the state has no fair trade laws making this type of agreement legal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Contracts Law > Defenses > Illegal Bargains

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Vertical Restraints, Resale Price Maintenance**

The Sherman Act, *15 U.S.C.S. § 1*, makes an agreement to maintain resale prices legal in states such as West Virginia having fair trade laws, by providing that nothing contained in sections 1-7 of the Act shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN16[] **Practices Governed by Per Se Rule, Boycotts**

A manufacturer's or a distributor's discretion as to whom it will sell is not unlimited. If a refusal to deal is a device used to acquire a monopoly, or to fix prices,or to establish market dominance and drive out competitors or as part of a boycott, it is illegal. These are per se violations - restraints which are inherently bad, and any contract, combination or conspiracy used to accomplish such a result is unreasonable and is therefore prohibited.

Judges: [1]** Maxwell, D.J.

Opinion by: MAXWELL

Opinion

[*638] Memorandum

MAXWELL, D.J.

This is an action brought by L. S. Good & Company, a West Virginia corporation, against H. Daroff & Sons, Inc., a Pennsylvania corporation. L. S. Good operates a department store in Wheeling, West Virginia, and handles, among other items, men's clothing. H. Daroff & Sons, Inc., is a manufacturer and distributor of men's clothing and has its principal place of business in Philadelphia, Pennsylvania. One of Daroff's lines of men's clothing is the "Botany 500" brand of men's suits, a highly advertised and widely known brand.

L. S. Good in its complaint, filed on April 14, 1965, alleged the following:

> "The defendant has attempted to engage in and has engaged in a wrongful and unlawful combination, contract and conspiracy to: (a) prevent and restrict the selling and distribution of its products, by reason of its refusal, for the unlawful reason stated by plaintiff as aforesaid, to sell its products to the plaintiff;
> (b) unlawfully discriminate against a retail distributor, the plaintiff;
>
> (c) force and compel the plaintiff to cease and desist from distributing its 'Botany 500' line in favor of **[**2]** a competitor, the said Bernhardt's; and that such actions have unreasonably restrained, do unreasonably restrain, and will continue unreasonably to restrain trade and commerce in violation of the antitrust laws of the United States of America above cited."

The statutory provisions, referred to in the above quoted section of the complaint, are designated in the complaint as "*Sections 1 through 33*, inclusive, Title 15, United States Code Annotated."

The plaintiff, L. S. Good, alleges that the jurisdiction of this Court is predicated upon a question arising under the Antitrust Laws of the United States. The complaint also states that jurisdiction is "further predicated upon diversity of citizenship and an amount in controversy in excess of that prescribed."

The defendant, H. Daroff & Sons, on May 4, 1965, filed a motion to dismiss the complaint and quash the return of service of the summons on the grounds of lack of jurisdiction over the defendant, improper venue and improper service. This motion was based upon the affidavit of Samuel H. Daroff, Secretary-Treasurer of the defendant. Also, on February 8, 1966, the defendant filed a motion pursuant to *Rule 12(b) of the Federal **[**3]** Rules of Civil Procedure* to dismiss the complaint for failure to state a claim upon which relief could be granted. In addition, both parties have filed motions with regard to the taking of the depositions.

Counsel for both of the parties thoroughly briefed the questions involved in these motions and oral argument was heard in Wheeling on June 9, 1966.

This Court holds (1) that the defendant's motion to dismiss, because of improper venue and improper service, is denied, and (2) the defendant's motion to dismiss for failure to state a claim is granted, unless within 30 days the plaintiff amends its complaint so as to set forth a cause of action based on the common law. Also, the further taking of depositions by both parties is stayed.

H. Daroff & Sons, Inc., is a manufacturer and distributor of men's clothing to the retail clothing trade throughout the United States. Among its products is the "Botany 500" line of men's clothing which is well known and highly respected. For over 40 years Daroff has been selling the "Botany 500" line to Bernhardt's, a retail men's clothing store in Wheeling. In 1964, Daroff appointed L. S. Good as a retail distributor of its (Daroff's) products, **[**4]** including the "Botany 500" line. By a letter dated March 27, 1965, Daroff discontinued L. S. Good as a retail distributor of the "Botany 500" line, giving as its reason a prior exclusive franchise commitment to Bernhardt's.

[*639] In addition to Bernhardt's, Daroff has authorized dealers in the following cities in the Northern Judicial District of West Virginia: Wheeling (Stone & Thomas), Parkersburg (Dil's Brothers), Clarksburg (Millet & Stern), Fairmont (Maunz Men's Shop), Morgantown (J. Beafora & Sons), and Martinsburg (Stewart's).

Daroff has annual gross sales in excess of one hundred million dollars, and, although it is not entirely clear what portion of this business is done in the Northern District of West Virginia, [1] the dollar volume appears to be substantial. Sidney S. Good, Jr., President of L. S. Good, in his affidavit stated that between September, 1964, and March, 1965, L. S. Good sold "approximately $20,000" worth of the defendant's products. The defendant does not dispute this figure. Assuming that each of the seven other retail outlets which Daroff has in the Northern District of West Virginia do a comparable business, this would amount to annual gross **[**5]** sales in excess of $225,000. This figure is, of course, only a projection from the seven months period in which L. S. Good sold Daroff's products, but it does indicate, at least, the extent of Daroff's sales in Northern West Virginia.

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[1] L. S. Good contends that it alone accounted for.002% of the defendant's annual gross sales while it was a dealer, whereas Daroff contends that its total sales in the Northern District constitute only.0015% of its annual sales.

Daroff employs a salesman, a Leonard Finkelnor of Pittsburgh, Pennsylvania, who makes four trips per year into West Virginia, "one trip each to take orders for the spring and fall seasons and two trips for customer goodwill purposes." Daroff contends that these orders are subject to approval in Philadelphia and, if they are approved, they are shipped FOB Philadelphia.

Daroff in its affidavit in support of its motion to dismiss the complaint states that "the defendant is not licensed to do business in West Virginia, pays no taxes in West Virginia and does **[**6]** not do any business in West Virginia." It further states that "the defendant has no mailing address, telephone listing or any agent within the Northern District of West Virginia."

The plaintiff, L. S. Good, obtained service of process and complaint through the Auditor of West Virginia, in accordance with the provisions of Chapter 31, Article 1, of the 1931 Code of West Virginia, as amended. The State Auditor then forwarded the process and complaint to the defendant in Philadelphia.

The pertinent provision of the ***HN1***[] West Virginia Code, § 31-1-71, Michie 1966, reads as follows:

> "Any foreign corporation which shall do any business in this State without having been authorized to do so pursuant to the provisions of section seventy-nine (§ 3091) of this article shall be conclusively presumed to have appointed the auditor of the State as its attorney in fact with authority to accept service of notice and process on behalf of and upon whom service of notice and process may be made in this State for and upon every such corporation in any action or proceeding described in the next following paragraph of this section.
> * * *
>
> "For the purposes of this section, a foreign corporation **[**7]** not authorized to do business in this State pursuant to the provisions of section seventy-nine (§ 3091) of this article shall nevertheless be deemed to be doing business herein if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State, or if such corporation commits a tort in whole or in part in this State. The making of such contract or the committing of such tort shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the auditor pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract **[*640]** or such tort shall be of the same legal force and validity as process duly served on such corporation in this State."

The Supreme Court of Appeals of West Virginia considered this section in two fairly recent cases, the more recent of which was *State ex rel. Coral Pools, Inc. v. Knapp, 131 S.E.2d 81, 147 W. Va. 704 (1963)*. This was an original proceeding brought by an Ohio corporation seeking a writ to prohibit a Circuit Judge and the plaintiff from proceeding to trial. The **[**8]** Court stated the issue:

> "The prohibition proceeding is based in the claim of Coral Pools, Inc., that it is not subject to the personal jurisdiction of the trial court in the civil action." *131 S.E.2d 81, 83*.

In this case, the written contract to build the swimming pool was executed at Columbus, Ohio, by the appearance of the plaintiff. However,

> " . . . the oral contract pertaining to the construction of a swimming pool on Kennedy's home property at Charleston was negotiated and made by a telephone conversation between Kennedy at Charleston, West Virginia, and a representative of Coral Pools, Inc., at Columbus, Ohio." *131 S.E.2d 81, 83-84*.

So when faced with the question of an oral modification via long distance telephone call of a contract which had originally been made in Ohio, the Supreme Court of Appeals held:

> "Inasmuch as the oral contract relating to the construction of the pool on Kennedy's property was to be performed in this state and resulted from an offer made by Onderdonk by telephone from Columbus, Ohio, to Kennedy in Charleston, West Virginia, and an acceptance by Kennedy during the course of the same telephone conversation, that contract **[**9]** must be deemed to have been made in this state." *131 S.E.2d 81, 86*.

However, the Court went on to make this warning:

> "A trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations. ***HN2***[] The amount and kind of activities which must be carried on by a foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the personal jurisdiction of a court in that state must be determined according to the facts and circumstances of each case." *131 S.E.2d 81, 90*.

It is not clear from reading the case exactly who was to perform the installation of the pool on Kennedy's property. Coral Pools did send Kennedy "a detailed set of plans for installation of such swimming pools and a letter requesting an estimate of the cost of installation in the Charleston area." *131 S.E.2d 81, 84*. Also, Kennedy performed the initial excavation and other preliminary work. So it seems to be a fair reading of the case that Coral Pools was simply going to ship the pool kit to Charleston and, at most, send one engineer to supervise the installation of the pool.

> "In relation to the parol contract **[**10]** made by telephone, Kennedy testified that Onderdonk agreed that the corporation's engineer would be sent to Charleston to supervise the installation of the pool on his property. There is no specific denial of this portion of Kennedy's testimony." *131 S.E.2d 81, 85*.

In the instant case, L. S. Good stated in its answer to Daroff's interrogatories that:

> " . . . defendant sent its specialist advisor on men's alteration rooms, one Joseph Parazino, to the premises of plaintiff who advised plaintiff on setting up its alteration room; that the defendant provided the plaintiff, through the said Joseph Parazino, blueprints for the layout of said alteration room; that said blueprints are signed ' Drawn by Jos. Parazino', 'approved M. Mutolese', ' A O.K. by Jos. Parazino and H. Daroff and Sons'; that the said Joe Parazino further advised on the lighting, position of racks and all other details in the planning and designing **[*641]** of said alteration room; that the defendant sent the said Joseph Parazino back to the store of the plaintiff for the opening of its new men's wear department and the said Joseph Parazino advised and trained new tailors for the plaintiff, advised on fitting **[**11]** and assisted with the fitting during the opening of said new men's wear department, all of which services were without charge to the plaintiff; that the defendant advised the plaintiff on the advertising for the opening of said new men's wear department and contributed to its costs; . . ."

So quite apart from Daroff's other extensive contracts in the Northern District of West Virginia, it seems that its contacts with L. S. Good alone are enough to bring it within the *Coral Pools* case. The Court in *Coral Pools* construed the statutory provision of " . . . a contract to be performed, in whole or in part, by any party thereto, in this State . . ." so as to include a situation which is somewhat analogous to the instant case.

Gavenda Bros. Inc. v. Elkins Limestone Company, 116 S.E.2d 910, 145 W. Va. 732 (1960), is not inapposite. There, the West Virginia Court construed an Illinois statute which authorized extraterritorial service on the defendant. The Illinois statute was considerably more comprehensive than the present West Virginia statute, involved in the instant case. "The public policy of this State, though less comprehensive in scope, is in harmony with the public **[**12]** policy evidenced by the Illinois statute." *116 S.E.2d 910, 916*.

Speaking of the limitations imposed on the states by the *due process clause of the Fourteenth Amendment*, the West Virginia Court said:

> "It ***HN3***[] must appear that the defendant over whom jurisdiction is asserted has had minimum contact within the state which renders it consistent with traditional notions of fair play and substantial justice that he be compelled to defend himself in that state; and assuming the existence of such requisite minimum contact, there must be a method of service which is designed to give the defendant actual and reasonable notice of the pending action against him." *116 S.E.2d 910, 916*.

All of this is in accord with the guide lines laid down by the Supreme Court in *International Shoe Company v. State of Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*, where the Court said:

> "Historically the jurisdiction of courts to render judgments *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him . . . But now that **[**13]** the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95*.

The case of *Mann v. Equitable Gas Company, 209 F. Supp. 571* (N.D. West Virginia, 1962) is not applicable here. In the *Mann* case, the Court held that a Texas corporation, that had manufactured a pipe, in Texas, and subsequently sold it to a West Virginia gas company, did not establish the necessary "minimum contact" so as to permit service of process through the State Auditor. The Texas corporation had merely sold the pipe to the West Virginia company, which subsequently used it in West Virginia where it exploded injuring the plaintiff. The only question before the Court was " . . . whether the mere commission of the tort alleged in the complaint constituted the 'minimum contacts' required by *International Shoe* . . ." *209 **[**14]** F. Supp. 571, 573*. The Court held:

> "I would construe the West Virginia statute to mean that the commission of **[*642]** a tortious act within the State means that the alleged tortfeasor, or his agents were in West Virginia at the time of the act, which is alleged to have resulted in the tort." *209 F. Supp. 571, 574*.

This is in accord with the leading case in this Circuit on the question of extraterritorial service of process, *Erlanger Mills, Inc. v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956)*, which was an action brought by a North Carolina corporation in North Carolina against a New York corporation for defective goods sold. In this case, the North Carolina corporation placed an order with the New York corporation after a visit by the North Carolina corporation's representative at the plant in New York. The goods were sold FOB at the New York plant, and the New York corporation had never done any business in North Carolina prior to this transaction. A North Carolina statute, G.S. § 55-38.1, "Jurisdiction over foreign corporation not transacting business in this State ", provided:

> "(a) Every foreign corporation shall be subject to suit in this State . **[**15]** . . on any cause of action arising as follows:
>
> (3) Out of the production, manufacture, or distribution of goods by such corporation with the *reasonable expectation that those goods are to be used or consumed in this State and are so used and consumed*, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers." *239 F.2d 502, 504*.

The Court of Appeals held that the New York corporation was not present in North Carolina in a manner sufficient to sustain the requirement of jurisdictional due process notwithstanding the North Carolina statute.

> "The problem in each case, therefore, is to determine whether or not the relationships, ties and contacts between the defendant and the state of the forum warrant jurisdiction . . . the place of execution and of performance of the contract are not alone decisive." *239 F.2d 502, 505*.

Although the West Virginia statute has received some scholarly criticism, this Court is of the opinion that the contacts which Daroff has had with L. S. Good and its other West Virginia distributors are of such a continuing and substantial nature **[**16]** that it does not offend the requirements of jurisdictional due process to hold Daroff accountable for its actions in West Virginia.

The recent decision of the West Virginia Supreme Court of Appeals in *Tufe Hodge v. Sands Manufacturing Company, 151 W.Va. 133, 150 S.E.2d 793*, W. Va. (1966), is distinguishable from the case at bar. In *Tufe Hodge*, the plaintiff employed a plumbing contractor to do certain work which included the installation of an electric hot water heater on the plaintiff's premises. The defendant, Sands Manufacturing Company, sold the allegedly defective hot water heater to a dealer in Huntington, West Virginia, who in turn sold it to the plaintiff, Tufe Hodge. The other defendant, Therm-O-Disc, had sold two thermostats to the Sands Manufacturing Company which were installed in the hot water heater.

The Court in deciding this case did not give any indication as to the amount of business which these two defendant corporations did in the state of West Virginia. In its holding the Court stated that neither of the defendants had "engaged in any persistent course of conduct in selling such heaters to purchasers or engaged in other transactions in this State . . **[**17]** . ." So the factual situation in *Tufe Hodge* seems to be quite similar to that in *Mann v. Equitable Gas Co., supra*, where an isolated business transaction between the resident plaintiff and the non-resident defendant corporation which led to the plaintiff's injury was held not to establish the necessary minimum contacts to confer jurisdiction upon the court under the applicable statute, **[*643]** West Virginia Code, § 31-1-71 (Michie, 1966).

The Supreme Court of Appeals of West Virginia in its decision also laid great stress on the fact that the allegedly defective hot water heater was not sold directly to Tufe Hodge but was sold to the Huntington dealer, who sold it to Tufe Hodge. This, of course, serves to distinguish *Tufe Hodge* from the case at bar.

Perhaps much of the foregoing is unimportant, in that the venue and service of process requirements are much easier to meet in antitrust suits than they are in the normal, ordinary civil case. However, the plaintiff in this case chose to utilize the procedure afforded it by the West Virginia statute and in light of the Court's decision on the motion to dismiss, for failure to state a cause of action, infra, the question **[**18]** of personal jurisdiction over the defendant can be raised. Now, however, that question is determined.

HN4[] *Rule 4(d)(3) of the Federal Rules of Civil Procedure* provides that personal service shall be made upon a foreign corporation by delivering a copy of the summons and the complaint to, among others, " . . . any other agent authorized by appointment or by law to receive service of process . . . ." Also *Rule 4(d)(7)* provides that on a foreign corporation it is sufficient if the summons and complaint are served " . . . in the manner prescribed by the law of the state in which the district court is held . . . ." So the plaintiff's actions were completely in accordance with the Federal Rules of Civil Procedure, and all of the requirements for personal jurisdiction over the defendant have been met.

HN5[] The United States District Courts are given jurisdiction over private antitrust actions by *15 U.S.C.A. § 15* which 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 **[**19]** to the amount in controversy . . . ."

Federal jurisdiction is exclusive here. See e.g. *Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964)*.

This rule has been liberalized in the case of corporate defendants by *15 U.S.C.A. § 22* which reads:

> "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . . ."

One purpose of liberalizing the requirements, when corporate defendants are concerned, was to "increase the number of districts in which a corporation might be sued for violation of the antitrust laws." *American Football League v. National Football League, 27 F.R.D. 264, 267 (D. Md. 1961)*. See also *Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (Pa. 1958)*, and *Cinema Amusements v. Loew's, Inc., 85 F. Supp. 319 (Del. 1949)*.

An ancillary purpose of the expanded venue provision was to "relieve persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business **[**20]** or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." *U.S. v. Scophony Corp. of America, 333 U.S. 795, 808, 92 L. Ed. 1091, 68 S. Ct. 855 (1948)*.

The question of venue and service of process in the instant case seems to be controlled by the decision in *Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927)*, which arose shortly after Congress inserted the additional words "or **[*644]** transacts business" after the original phrase "may be found." Eastman Kodak, the plaintiff-in-error, which was represented by John W. Davis, argued that the phrase "or transacts business" was not intended to broaden the scope of the section but was meant only "to make explicit what the Court had already decided ". *273 U.S. 359, 361, 47 S. Ct. 400, 71 L. Ed. 684*.

The Court was faced with a factual situation which, with regard to the question of proper venue, was weaker than presented by the instant case.

> " . . . the defendant - which resides and has its principal place of business in New York **[**21]** - had not registered in Georgia as a non-resident corporation for the purpose of doing business in that State, and had no office, place of business or resident agent therein. It had, however, for many years prior to the institution of the suit, in a continuous course of business, carried on interstate trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its traveling salesmen who visited Georgia several times in each year and solicited orders from these dealers which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed traveling 'demonstrators ', who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the **[**22]** defendant." *273 U.S. 359, 370-71, 47 S. Ct. 400, 71 L. Ed. 684*.

The question before the Court was " . . . whether there was local jurisdiction or venue in the District Court ". *273 U.S. 359, 370, 47 S. Ct. 400, 71 L. Ed. 684*. The Court said that by the amendment " . . . the local jurisdiction of the district courts was materially enlarged in reference to suits against corporations." *273 U.S. 359, 372, 47 S. Ct. 400, 71 L. Ed. 684*. As for the construction of the phrase "transacts business," the Court held:

> " . . . ***HN6***[] a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit - although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process, - if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." *273 U.S. 359, 373, 47 S. Ct. 400, 71 L. Ed. 684*.

It is the opinion of this Court that the instant case falls squarely within the *Eastman Kodak* guidelines, with regard to the venue requirements of the antitrust aspects of the case.

A reading of **[**23]** *U.S. v. Scophony Corporation of America, supra*, further illustrates the appropriateness of the Northern District of West Virginia as the proper venue for this type of antitrust suit. In *Scophony* the District Court quashed the service of process and dismissed the complaint as to a British corporation which had its principal place of business in London. The facts of this case are set out in the syllabus at *333 U.S. 795, 68 S. Ct. 855, 92 L. Ed. 1091*:

> "A British corporation with its principal place of business in London engaged in the Southern District of New York in various but continuing efforts to conserve and exploit its television inventions and patents. This was done through a series of complex contractual arrangements made with certain American corporations and involved the British company's constant intervention and supervision. The company was represented in the New York district by two of its directors, one of whom held a comprehensive power **[*645]** of attorney to protect its interests in the United States."

Justice Rutledge began the Court's opinion with a review of the historical changes in the venue provisions in the antitrust laws. He concluded **[**24]** by saying:

> "Thus, by substituting practical, business conceptions for the previous hairsplitting legal technicalities encrusted upon the 'found' - 'present' - 'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." *333 U.S. 795, 808, 68 S. Ct. 855, 92 L. Ed. 1091*.

In the case of *Yonce v. Miners' Memorial Hospital Association, et al., 161 F. Supp. 178 (Va. 1958)*, an action was brought by certain laundry owners against the hospital association and a firm of laundry consultants alleging an unlawful combination and conspiracy in violation of the Sherman Act to restrain and monopolize the commercial laundry service in a particular area.

The laundry consultants, Victor Kramer Co., Inc., a New York corporation, spent approximately two weeks in Virginia, West Virginia and Kentucky, before it entered into an agreement of indefinite duration to serve as laundry management consultants for the hospitals. Process **[**25]** was served on Kramer through the Secretary of the Commonwealth of Virginia, in accordance with § 13-217 of the Code of Virginia of 1950, as amended. Judge Thompson, after stating the facts of the case, said " . . . if Kramer was doing business in the Western District of Virginia, it is amenable to process served on it through the Secretary of the Commonwealth . . ." He went on to point out that the question of doing business is one of fact and must be determined according to the factual situation of each case.

> ***HN7***[] "If a corporation is engaged in promoting or carrying out a substantial amount of its corporate business in a foreign state, it is engaged in transacting business in that state . . . The business activities of Kramer in Virginia are the same activities - the substantive acts - upon which the plaintiff bases its antitrust allegation against Kramer. If Kramer in the conduct of its business in Virginia has violated the ***antitrust law***, then it is amenable to the process of this Court." *161 F. Supp. 178, 184*.

In the instant case, it is also the business activities of Daroff in the Northern District of West Virginia, which are the basis of L. S. Good's complaint, that **[**26]** make it amenable to process and complaint served upon the State Auditor of West Virginia.

Daroff's other motion is to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*. As the defendant states in its brief, for the purposes of this motion, all well-pleaded allegations of fact must be deemed to be admitted and the plaintiff is entitled to the benefit of all reasonable inferences therefrom. The pertinent allegations of the complaint are as follows:

> "Plaintiff, in the spring and summer of 1964, enlarged and remodeled its place of business . . . and added a large and well equipped men's clothing department. Defendant gave great assistance to the plaintiff in the planning and organization of this department and helped install its said 'Botany 500' line of men's clothing and plaintiff used the said promotional materials sent and in addition expended large sums on its own promotion of the said 'Botany 500' line including statement enclosures, newspaper advertising, extensive radio and television advertising, roadside billboards, and concentrated sales effort in the said men's clothing **[**27]** department of plaintiff."

[*646] The plaintiff also alleges in its complaint:

> "Prior to March 27, 1965, the plaintiff had been appointed and had acted as a retail distributor of defendant's products including that line of men's clothing products of the defendant well known and highly respected as the 'Botany 500' line.
>
> "By letter of March 27, 1965, defendant through its president, Joseph Daroff, discontinued plaintiff as a retail distributor of the defendant's products with the 'Botany 500' label. The reason given was as follows:

> "We have been selling Bernhardt's in this city for over 40 years and when we inaugurated the 'Botany 500' line the account was handled by my brother Michael, who made a definite commitment to them that they would have the exclusive franchise thereafter.
>
> "The aforesaid Bernhardt's is a retail men's clothing store also located in Wheeling, Ohio County, West Virginia."

By reason of the above, plaintiff claims injury to its business and property in an amount in excess of $100,000, and demands treble damages, costs and reasonable attorney's fee.

The complaint shows a situation where a manufacturer (that is also a distributor) **[**28]** of men's clothing has chosen to favor one retailer over another as an outlet for *one line* of the manufacturer's products. There is no allegation, nor is there any indication, that this refusal to deal was a product of anything other than an exercise of Daroff's business judgment. Bernhardt's also operates a store in Rockford, Illinois, but there is no allegation that the purchasing "leverage" from this store was used to influence the decision as to which retail outlets Daroff would use in Wheeling. In short, there is no allegation of a contract, combination or conspiracy which would run afoul of the antitrust laws. Also, there is no allegation that Daroff refused to sell any other of its many lines to L. S. Good. In answer to Daroff's Interrogatory 4(B) ("Set forth . . . the name and address of the manufacturer, producer, or wholesaler of each such article of men's clothing."), L. S. Good lists six firms whose merchandise it carries, in addition to the defendant. So it appears that the market foreclosure incurred by Daroff's refusal to sell is a rather insubstantial one.

The sole issue before the Court is whether a cause of action exists under the antitrust laws. The complaint **[**29]** does not designate which section of the antitrust laws is alleged to be violated. The defendant suggests that under no section could the plaintiff plead a valid cause of action. The antitrust laws of the United States are set out in the Sherman Antitrust Act (*15 U.S.C.A. §§ 1-7*), the Clayton Antitrust Act [2] (*15 U.S.C.A. §§ 12-27*), and the Robinson-Patman Act (*15 U.S.C.A. §§ 13-13c*, *21a*). [3]

The only possibly relevant sections of the antitrust laws are *Sections 1* and *2* of ***HN8***[] the Sherman Act (*15* ***[**30]*** *U.S.C.A. §§ 1* and *2*) which prohibit, respectively, "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." and " 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 . . ." *Sections 4* and *12* of ***HN9***[] the Clayton Act (*15 U.S.C.A. §§ 15* and *22*) authorize private suits by persons injured **[*647]** because of violations of the antitrust laws.

The basis of the complaint, as noted above, is the refusal of the defendant to continue to sell its "Botany 500" line to the plaintiff. ***HN10***[] The complaint does charge the defendant with engaging in a "combination, contract and conspiracy," but no supporting facts have been alleged. A conclusory allegation of this type does not set forth a cause of action. *Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 888 (4th Cir. 1934)*; *Black & Yates v. Mahogany Ass'n, 129 F.2d 227 (3rd Cir. 1941)*, cert. den. *317 U.S. 672, 87 L. Ed. 539, 63 S. Ct. 76*.

The case which most nearly resembles the instant case is *Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S. App.* ***[**31]*** *D.C. 161, 243 F.2d 418 (D.C. Cir. 1957)*, rev'g *135 F. Supp. 4 (D.D.C. 1955)*, cert. den. *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38*, rehearing denied *355 U.S. 900, 78 S. Ct. 259, 2 L. Ed. 2d 197*. In this case, Zell Motor Car Company, the largest of Packard's three Baltimore dealers, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive distributorship. Packard agreed to do so and told its two other Baltimore dealers that their contracts would not be renewed. The District Court submitted to the jury the question " .

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[2] Section 3 of the Clayton Act (*15 U.S.C.A. § 14*) makes illegal any lease or sale of goods on the condition that the purchaser will not use or deal in the goods of a competitor where the same may substantially lessen competition or tend to create a monopoly. This section has no relevance to instant case.

[3] The Robinson-Patman Act, which amended the Sherman-Clayton Acts, prohibits discrimination in price, services or facilities among customers. The complaint in the instant case does not suggest such violations.

. . whether there was an unreasonable restraint of trade and also whether there was an agreement or attempt to monopolize." The Court of Appeals entered judgment for the defendant (Judge Bazelon dissenting).

> "There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the Court informed the jury, it has long been clear that ***HN11***[] only unreasonable restraints of trade are unlawful. *Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619*. When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller **[**32]** and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case. . . . The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.
>
> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it." *100 U.S. App. D.C. 161, 243 F.2d 418, 420-21*.

The situation in the men's clothing industry is quite similar to the situation described in the *Packard Motor Car* case. **[**33]** Daroff, despite its large annual gross sales, is only one of a large number of manufacturers, each with only a small share of the market. [4] Therefore, it is hardly conceivable that Daroff's refusal to sell in this case could constitute an attempt to monopolize.

That such a refusal to sell by a manufacturer is not an unreasonable restraint of trade can clearly be seen from the **[*648]** fact that ***HN12***[] the Clayton Act specifically provides (*15 U.S.C.A. § 13(a)*):

> " . . . *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide **[**34]** transactions and not in restraint of trade . . . ."

The Courts of this Circuit have followed the holdings affirming a manufacturer's freedom to refuse to deal with any particular customer. In *Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958)*, the Court held that an automobile manufacturer's collection of contributions to a dealer's advertising association, by including assessments in the price of the new cars delivered to the dealers, did not violate the Sherman Act:

> "The ***HN13***[] hybrid nature of a private antitrust suit dictates that, to succeed, the plaintiff must prove not only that the defendant has infringed one or more of the antitrust laws to the public injury, but also that such infringement has resulted in private injury to the plaintiff in its business or property. *15 U.S.C.A., Sec. 15*. In the absence of a showing of either the public or private harm, the plaintiff cannot prevail." *252 F.2d 441, 448*.

In *Glenn Coal Co. v. Dickinson Fuel Co., supra*, the Court said:

> "In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular **[**35]** subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanctions of the Anti-Trust Act, does not give rise to a personal civil suit for damages." *72 F.2d 885, 887*.

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[4] The 1963 United States Census of Manufacturers, Series MC63 (P-23a-1) shows that there are some 1105 manufacturing establishments of men's and boys' suits and coats. The Statistical Abstract of the United States - 1965, p. 776, Table 1125, shows the net total selling value of men's and boys' suits and coats in 1963 was in excess of 1 1/2 billion dollars.

And in the instant case, the plaintiff, L.S. Good, has simply not met these requirements.

Even if Daroff had discontinued selling to L.S. Good in furtherance of a scheme to maintain resale prices (there is no indication of this in the complaint, but the very barrenness of that document forces one to search for possible theories of recovery), this alone would not be enough to afford a basis for denying Daroff's motion to dismiss. The law in this area - resale price maintenance backed up with a refusal to deal - is not altogether clear, but this complaint does not allege enough to even come within that vagueness. The original rule which was laid down in *U.S. v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)* was:

> "In ***HN14***[] the absence of any intent to create or maintain a monopoly, the Sherman **[**36]** Act does not prevent a manufacturer engaged in a private business from announcing in advance the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such prices." Syllabus, *250 U.S. 300, 301, 39 S. Ct. 465, 63 L. Ed. 992*.

However, this exception to the antitrust laws has been so narrowed that Justice Harlan in his dissent in *U.S. v. Parke, Davis & Co., 362 U.S. 29, 49, 4 L. Ed. 2d 505, 80 S. Ct. 503*, said:

> "Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine . . . ."

Parke, Davis, a civil suit under *§ 4* of the Sherman Act, charged a drug manufacturer with combining and conspiring to maintain the resale prices of its products in areas where, unlike West Virginia, [5] there were no Fair Trade laws. ***HN15***[] However, the first proviso to *Section 1* of the Sherman Act (*15 U.S.C.A. § 1*) which was added by Act of Congress August 17, 1937, makes this type of agreement legal in states such as West Virginia.

> **[*649]** "*Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum **[**37]** prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale . . ."

The second proviso to *Section 1* prohibits any contract or agreement between manufacturers or between retailers (and certain other classes not applicable here), "providing for the establishment or maintenance of minimum resale prices . . ." However, this issue is not raised by the complaint.

However, ***HN16***[] a manufacturer's or a distributor's discretion **[**38]** as to whom it will sell is not unlimited. If the refusal to deal is a device used to acquire a monopoly, *U.S. v. General Motors Corporation, 121 F.2d 376 (7th Cir. 1941)*; or to fix prices, *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922)*; or to establish market dominance and drive out competitors, *Lorain Journal Co. v. U.S., 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*; or as part of a boycott, *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; it would be illegal. These are *per se* violations - restraints which are inherently bad, and any contract, combination or conspiracy used to accomplish such a result is unreasonable and is therefore prohibited.

None of the above are alleged in this case. All that is alleged is that defendant refused to sell to plaintiff and sold to plaintiff's competitor. And this, under all of the cases, is perfectly legal and proper. As the Honorable Archie O. Dawson stated at the *Seminar on Protracted Cases, 23 F.R.D. 430, 431*:

> "The filing of a complaint in a federal court is, in effect, a license to the plaintiff to subject the defendant to the expense **[**39]** and difficulties of extensive discovery proceedings. The least that can be expected is that the

[5] *West Virginia Code, § 47-11-1 to 8* (Michie 1966).

> plaintiff, as a condition of getting this license, should be able to set forth in a complaint a short and plain statement of the plaintiff's claim against the defendant, showing that the plaintiff is entitled to relief against the defendant."

The complaint in this action does not show any conspiracy or unreasonable restraint of interstate commerce, nor any monopoly forbidden by the antitrust laws, nor any other allegations sufficient to support an action for treble damages.

However, since the Court has decided that the defendant is properly before it, regardless of the nature of the action, and the plaintiff has alleged the requisite diversity of citizenship, leave will be granted to the plaintiff to amend its complaint so as to set forth a cause of action based on the common law. See *Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 826 (D. Md. 1937)*. If the plaintiff fails to allege a common law cause of action within 30 days from the date of the entry of this opinion, then the complaint will be dismissed for failure to state a claim upon which relief can be granted. Also, **[**40]** in event plaintiff attempts to allege a common law cause of action, the requisite jurisdictional amount must be alleged in the new complaint. As Judge Chesnut said in *Arthur v. Kraft-Phenix Cheese Corp., supra*:

> "It is not generally desirable to decide cases of doubtful import on the pleadings only as by demurrer. But suits of this character involving alleged **[*650]** conspiracies to monopolize or restrain trade often lead to very protracted trials and it is not reasonable to subject either or both parties to the expense of a long trial when it fairly appears with reasonable clarity from the declaration that conceding all of the facts therein well pleaded, there would have to be a directed verdict against the plaintiff . . . ." *26 F. Supp. 824, 830*.

An order will be entered denying defendant's motion to dismiss because of improper venue and improper service; and granting defendant's motion to dismiss for failure of the complaint to state a claim, unless within 30 days of the date of this opinion the plaintiff amends its complaint to set forth a common law cause of action.

Quinn v. Mobil Oil Co.

United States Court of Appeals for the First Circuit

March 31, 1967, Decided

No. 6737

Reporter

375 F.2d 273 *; 1967 U.S. App. LEXIS 6904 **; 1967 Trade Cas. (CCH) P72,052

Robert A. Quinn, Plaintiff, v. Mobil Oil Co., Defendant

Disposition: [1]** Affirmed.

Core Terms

dealer, manufacturer, retailers, supplier, prices, lease, maximum price, gasoline, Sherman Act, resale price, retail price, competitors, conspiracy, vertical, horizontal, maximum, consignment, fixing, minimum price, insistence, proscribe, terminate, station, renew

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Resale pricing agreements that unreasonably restrain trade or commerce, whether they fix minimum or maximum prices, are proscribed by *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. In order to set forth a cause of action under this section it is essential that a contract, combination or conspiracy, express or implied, be alleged.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

To be actionable under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, pressure to achieve retail price maintenance that exceeds a mere refusal to deal must occur in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute.

Judges: Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges. Coffin, Circuit Judge (concurring). Aldrich, Chief Judge (dissenting).

Opinion by: McENTEE

Opinion

[*273] McENTEE, Circuit Judge:

In this action plaintiff, a gasoline station operator, charges the defendant oil company, his former lessor and supplier, with violations of the federal antitrust laws as a result of which he suffered great damage. The district court dismissed the suit for failure of the amended complaint to allege a federal ***antitrust law*** violation.

Viewing this ambiguous complaint in the light most favorable to the plaintiff, **[*274]** the following facts will be taken as true. In November 1962 plaintiff leased a Mobil gasoline station from defendant for a period of one year -- and entered into a contemporaneous retail dealer contract agreeing to purchase certain minimum quantities of defendant's petroleum products. The contract also provided for the purchase of tires, batteries and other accessories. This venture became fairly successful in the very first year of operation. In late 1963 when the lease and contract came up for renewal, defendant orally informed plaintiff that unless **[**2]** he reduced the retail price of gasoline by one cent a gallon his rent under the new lease would be substantially increased. Plaintiff flatly refused to reduce his price and vehemently protested the threatened rent increase. Apparently he won out -- at least temporarily -- because shortly thereafter the parties executed new agreements substantially the same as the old ones except for a slight increase in the rent. [1]

A few months later defendant began exerting various pressures on plaintiff to force him either to reduce his price of gasoline [2] or terminate his lease. It delayed payments due him at a time when it knew he needed the money; attempted to unload a consignment of tires, batteries and accessories on him [3] and apply the money owed in payment for this unwanted merchandise. After plaintiff refused to accept this consignment, defendant entered upon a campaign of harassment **[**3]** against him by delaying its deliveries of gasoline to his service station. Finally, when these pressures and harassments failed to bring about the desired results, defendant notified plaintiff in July, 1964 that it was terminating the lease as of the end of its current term (November, 1964). This, despite the fact that the receipts from the station had increased substantially in the relatively brief period he had operated it. Shortly thereafter, plaintiff was required to vacate the gasoline station premises and as a consequence suffered great damage -- all because of his refusal to comply with defendant's request that he reduce the retail price of its gasoline.

From these facts it is clear that the only provision of the federal antitrust laws that **[**4]** need be considered here is *Section 1* of the Sherman Act, and I shall confine my discussion to defendant's alleged violation of that section. [4] **[**5]** ***HN1***[] Resale pricing agreements that unreasonably restrain trade or commerce, whether they fix minimum or maximum prices, are proscribed by *Section 1* of the *Sherman Act. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*. [5] It should be pointed out, however, that in order to set

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[1] These agreements ran automatically from year to year but were subject to termination in any year on notice of either party.

[2] There is no allegation that defendant renewed its request for this price increase at this or any later time.

[3] That he did not order; that defendant did not require his competitors to take and which under his contract plaintiff was not obliged to accept.

[4] Plaintiff contends that defendant's above stated tactics also violated the Clayton Act as amended by the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13(a)(b)(f)* but this act is inapplicable under any view of the facts and for that reason we shall not consider this contention.

[5] In this case the Court stated that both minimum and maximum price fixing agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

forth a cause of action under this section [6] it is essential that a "contract, combination or conspiracy", express or implied, be alleged. *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*.

[*275] Beginning with *United States v. E.C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895)*, the first case decided under the Sherman Act, and continuing down through *United States v. General Motors, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, I have found no case where the Supreme Court has allowed recovery under this section absent a showing of at least one of these elements. Nowhere in his amended complaint has this plaintiff alleged the existence of any contract, combination or conspiracy between the defendant and others fixing the resale price of its gasoline nor does he **[**6]** allege any facts from which any such agreement, policy, scheme or conspiracy may be implied. Thus, I think the absence of such allegations renders the amended complaint fatally defective. Accord, *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2d Cir. 1962)*.

The allegation that defendant pressured plaintiff to reduce his retail price at best amounts to a unilateral attempt to coerce plaintiff into making such an agreement. [7] Therefore the immediate question is whether this is actionable under *Section 1* of the Sherman Act. I think not. If Congress intended to make attempts actionable under this section undoubtedly it would have done so expressly as it did in the very next section of the Act (*15 U.S.C. § 2*) dealing with monopolies. It certainly is not within our province to read into this section interstitially a proscription which Congress clearly did not intend.

[7]** There are three cases which it is argued tend to support the contrary view. I think these cases are distinguishable. The first is *United States v. Parke, Davis & Co., supra.* There the Court held that a manufacturer's conduct which went beyond a mere announcement of its price policy and a simple refusal to deal, violated *Section 1* of the Sherman Act. In that case the manufacturer took steps to pressure certain unwilling retailers into adhering to its resale price policy through the cooperation of its dealers and some of its retailers. The Court found that this joint action to maintain resale prices constituted a combination or conspiracy in restraint of trade. Although defendant's conduct in the case before us may have been more than a simple refusal to deal, our case is clearly distinguishable from *Parke, Davis* in that no combination or conspiracy is alleged nor can any be implied.

The facts in the other two cases, *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* and *Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965)*, are practically identical. In both, a resale price agreement was entered **[**8]** into between supplier and dealer. Subsequently the dealer reneged and the supplier terminated the lease. Unlike the present case, in *Simpson* there was evidence of a large scale price maintenance program maintained through written consignment agreements under which the supplier fixed the retail price of gasoline. The dealer would not abide by the price fixed thereunder and for that reason the supplier refused to renew the dealer's lease. The Court held that resale price maintenance through this coercive type of consignment *agreement* violated *Section 1* of the Sherman Act. The case turned on the existence of an agreement for resale price maintenance. *Simpson, supra at 24*. In the instant case there is no such agreement.

Broussard, supra involved a situation where the dealer reduced his retail price of gasoline only after repeated insistence by the supplier. Finding that he could not make a living at the reduced price, the dealer raised it to its former level. The supplier again insisted upon a reduction in price and when the dealer refused, the supplier declined to renew the lease. The record in that case is much stronger for the dealer than **[**9]** in the **[*276]** instant one. In *Broussard* there was clear evidence that the supplier's insistence that the retail price be reduced was part of a "marketing program"; also that at least one other dealer had reduced his retail price due to this insistence. When the dealer in *Broussard* reduced his price an agreement to control the retail price came into existence. I think this was a determinative factor in that case, even though shortly thereafter the dealer refused to abide by it. [8] The

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[6] *Section 1* reads 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. . . ." 26 Stat. 209, *15 U.S.C. § 1 (1964 ed.)*.

[7] A simple refusal to deal, standing alone, is not a vertical agreement; in fact the refusal indicates there has been a failure to obtain agreement. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 686 (1962).

evidence above mentioned also supplied the basis upon which a combination or conspiracy in restraint of trade could be implied.

Plaintiff Quinn never having complied with defendant Mobil's request to reduce his price, **[**10]** no agreement to control the resale price of gasoline ever came into existence between them. This, plus the absence of any allegation that Mobil's request was part of a general price maintenance scheme or policy or that any other dealer reduced his retail price as a result of defendant's insistence, clearly distinguishes our case from *Broussard*. ***HN2***[] To be actionable under *Section 1* of the Sherman Act pressure to achieve retail price maintenance that exceeds a mere refusal to deal must occur "in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute." *Dart Drug Corporation v. Parke, Davis & Company, 120 U.S. App. D.C. 79, 344 F.2d 173, 186 (1965)*. Clearly, in the instant case there is no such "framework."

The allegation that defendant terminated the lease, despite the fact that plaintiff's business had increased substantially, perhaps comes close to raising an inference that defendant was policing a general scheme to fix prices for the area. But this court should not be required to so speculate. Nor is it too much to require this plaintiff, absent the showing of an agreement, to allege enough facts to indicate that the acts **[**11]** complained of took place within the larger framework of a pricing program, policy or conspiracy -- if this is the real basis of his complaint. He has not done so here.

Affirmed.

Concur by: COFFIN

Concur

COFFIN, Circuit Judge (concurring):

I agree with Judge McEntee's conclusion that the absence of allegation of contract, combination, or conspiracy is a fatal defect in the complaint. But I would go further and say that even had plaintiff alleged either a completed agreement between himself and defendant or pressure on him to conform to a general maximum pricing policy of defendant, the complaint would not have stated a cause of action under *section 1* of the Sherman Act.

My reasoning lies in the difference I see -- admittedly without the benefit of authority -- between the anti-competitive effects of minimum price fixing and of maximum price fixing, as practiced by a single manufacturer or supplier. [1] When a single manufacturer establishes and seeks to police a minimum resale price policy, he in effect is acting as the convenient instrumentality for his retailers. For the motive to maintain floors to prices is theirs, not his. It must be immaterial to the manufacturer **[*277]** **[**12]** what profit his retailers receive so long as they pay his price and sales are satisfactory. Therefore, what appears to be unilateral and vertical action by a manufacturer aimed toward retailers, may in reality amount to a horizontal agreement among retailer-competitors. The essence of combination is present although the mechanics may be obscure.

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[8] We do not subscribe to the view that an agreement broken shortly after it was made is in effect no agreement at all. See *Guidry v. Continental Oil Company, 350 F.2d 342, 344 (5th Cir. 1965)*, where the same court, on the same day it decided Broussard, strongly emphasized this point.

[1] To be sure, *United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811*, contains the classic statement, often repeated, that "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*." But this was made in the context of industry-wide policies. As I shall hope to demonstrate, while maximum price fixing among manufacturers is more than likely to restrain price competition, the same cannot be said of maximum price fixing by one manufacturer acting truly independently.

But in the case **[**13]** of a single manufacturer's policy to set ceilings above which resale prices shall not rise, the motive and the pressure must be, in the great generality of cases, the manufacturer's desire to maximize his profits. While it is of prime concern to a retailer that his competitor not undercut him, it is generally of no concern to him that his competitor cannot charge higher prices. It is, of course, important to him that he cannot raise his prices and increase his margin of profit. Whether, therefore, the retailer has his eye on his competitor or on himself, it is difficult to conceive of a situation in which retailers would pressure a supplier to put into effect a maximum price. In other words, unilateral maximum price pressure against retailers is not the equivalent of a horizontal combination, but rather of a series of vertical agreements for the manufacturer's benefit.

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 1951, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259, which condemned agreement between two liquor manufacturers to fix maximum resale prices, gives indirect support to this proposition in two ways. First, its specific holding was that "an agreement among **[**14]** competitors, to fix maximum resale prices . . . violates the Sherman Act." *340 U.S. at 213*. Second, it rejected the argument that the two defendants, because of common ownership and control, were "mere instrumentalities of a single manufacturing-merchandising unit" and therefore could not conspire. The Court noted not only the separateness of the corporate entities but that they held themselves out as competitors. *340 U.S. at 215*. The strong implication, I think, is that the same actions, if taken by a bona fide single unit, would not be proscribed by the Sherman Act.

Because of this reasoning, I do not agree with *Broussard v. Socony Mobil Oil Co., 5 Cir., 1965, 350 F.2d 346*. In that case a dealer's lease was not renewed, allegedly because of his refusal to acquiesce in his supplier's request to reduce prices (i.e., to observe a maximum price ceiling). There was evidence of one other dealer's reducing his price, a "marketing program", and "suggestions of prices to [supplier's] dealers". The "program" was Socony Mobil's response to meet competition from a new gasoline in the area. While this evidence of pressure on more than one dealer, **[**15]** as Judge McEntee's opinion points out, distinguishes *Broussard* from the present case, it does not aid in reconciling the approach in *Broussard* to that which I find persuasive. For *Broussard* presented precisely the case of the "single manufacturing-merchandising unit" which *Kiefer-Stewart* took pains to distinguish. The court in *Broussard* cited the language of *Kiefer-Stewart* to the effect that "such agreements [among competitors to set maximum prices] no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *350 F.2d at 349*. But it ignored the fact that the referent of "such agreements" in that context was agreements *among competitors*. By so doing, I believe, it construed *section 1* of the Sherman Act to elevate individual decision-making above competitiveness as a prime policy objective. *Kiefer-Stewart*, in my view, said only that interference with individualism achieved through an agreement among competitors to fix maximum prices was violative of the Sherman Act.

I readily accept the proposition that an agreement between two manufacturers **[**16]** to impose maximum prices on their dealers constitutes a combination in restraint of competition since (a) an identical or parallel system of maximum prices between two competing sets of **[*278]** dealers is likely to become a system of minimum prices and (b) the motive of each manufacturer is likely to be something other than maximizing his own return. I am also in sympathy with the principle of unfettered decision-making by the retailer, but I do not think the Sherman Act goes any further than to proscribe shackles on such decision-making which are the result of (1) a combination which (2) restricts competition.

It is now pertinent to ask whether the above analysis is still valid in the light of *Simpson v. Union Oil Co., 1964, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*. It is possible to read *Simpson* as proscribing a price fixing agreement between a single supplier and a single retailer. In that case the oil company and a dealer had entered into a consignment agreement (coupled with a lease) under which the company set the retail price of gasoline. The dealer violated the agreement, selling below the authorized price to meet competition. Because of this, **[**17]** the oil company refused to renew plaintiff's lease. The Court held that resale price maintenance through such a consignment agreement was illegal. I would make two observations about *Simpson*. First, the Court faced the particular agreement between the parties against the background of use of the same lease-consignment device with some 3000 retailers in a "vast gasoline distribution system" in eight states. The Court characterized the arrangement as one which would "impose noncompetitive prices on thousands of persons whose prices might otherwise be competitive." *377 U.S. at 21*. And, second, the agreement was one which set a specific authorized price, which prevented dealers from meeting competitive prices. Even if the data concerning the widespread use of the device could be considered irrelevant to the decision, I would not readily read *Simpson* as prohibiting a single-supplier -- single-dealer maximum resale price agreement. This is because of the differences of critical significance between fixing a maximum and fixing a minimum, or, worse, a specific price. A minimum price agreement between one supplier and one dealer not only prevents him from meeting **[**18]** prices below that minimum but also is most unlikely to exist, absent pressure from other dealers to produce the end result of a horizontal combination. A maximum price agreement between one supplier and one dealer, on the other hand, not only leaves the dealer free to meet competitive prices but also is completely explicable in terms of the supplier's desire to maximize his return, without reference to any interest on the part of the dealer's or the supplier's competitors.

If, therefore, an agreement between a single manufacturer and a single dealer on a maximum price is not illegal, a frustrated effort to achieve such an agreement is not actionable, under the Sherman Act. Were such a completed agreement illegal, we would then confront a troublesome dilemma in dealing with unsuccessful efforts to obtain such an agreement. If we were to hold such conduct actionable, we would, as Judge McEntee notes, be adding judicially to *section 1* the same kind of "attempt" provision which Congress has spelled out in *section 2* dealing with monopoly. If we were to refrain from such judicial enlargement, we would create the anomalous situation of giving a treble damage remedy to a plaintiff, as **[**19]** in *Simpson*, who entered and then withdrew from an agreement, and denying such a remedy to a plaintiff who steadfastly resisted pressure to enter such an agreement in the first place. In my view, , we embrace neither horn.

Dissent by: ALDRICH

Dissent

ALDRICH, Chief Judge (dissenting):

Both of the opinions of my brothers discuss the case of *Broussard v. Socony Mobil Oil Co., 5 Cir., 1965, 350 F.2d 346*, in which the court held that a claim that Mobil -- also defendant here -- attempted to set maximum prices for its retailers stated a claim of violation of *section 1* of the Sherman Act. Judge McEntee finds the case distinguishable, while Judge Coffin finds it possibly in point, but **[*279]** wrongly decided. Regretfully, I disagree with both.

I.

In *Broussard*, as in the present case, Mobil suggested to the plaintiff, who was its lessee and at the same time one of its retailers, a maximum retail price for gasoline. Subsequently, when plaintiff refused to accept this maximum, Mobil exercised its contract right to terminate his lease. It is true that in *Broussard* there had been a price agreement with which the plaintiff at first complied, and that in the case **[**20]** at bar there was none. Broussard lost his lease because he refused to continue his undertaking; Quinn lost his because he refused to enter into one. The injury of which Broussard complained, however, did not arise out of the agreement, but out of the cancellation of his lease. I do not believe that if his cancellation was an act "forbidden in the antitrust laws," *15 U.S.C. § 15*, Quinn's was not. In other words, I see no difference in substance between pressure to induce the making of an unlawful agreement and pressure to reinstate one that has been broken. To the extent that it be suggested that the rejected agreement in *Broussard* is what brought the case within the act, this would not only be an unfortunate distinction, since any future "Quinn" could establish rights for himself simply by making the requested agreement one day and breaking it the next, but also, it seems to me, an illogical one.

If, on the other hand, a distinction is to be sought in the fact that in *Broussard* there was an allegation that Mobil was engaging in a "marketing program" covering many dealers, [1] then I find myself in accord with Judge Coffin that such a program is not **[**21]** a horizontal conspiracy (as it might be in a minimum price situation) but a series of separate vertical agreements that are not in any collective interest of the retailers. There could be an implied

[1] Cf. *Guidry v. Continental Oil Co., 5 Cir., 1965, 350 F.2d 342, 344*.

horizontal combination where a manufacturer is enforcing minimum pricing, but no dealer wishes possible competitors to keep their prices down. Consequently I do not find in Mobil's general marketing program alleged in *Broussard* [2] any support for the allegation, if such be necessary, of an "agreement or combination."

II.

Turning to Judge Coffin's views on *Broussard*, he asserts, first, that he does not find it to have been dictated by *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 1951, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259*. In that case the Court held that a combination of two **[**22]** manufacturers to force a dealer to accept maximum resale prices violated *section 1*, and that the dealer could recover treble damages. The reasoning that led to this result seems important. The court of appeals had reversed the district court and denied recovery because it viewed *section 1* as aimed at promoting competition and concluded, "Competition . . . does not rest upon the ability to charge a higher price than a competitor but upon the ability to meet the price or undersell that fixed by the competitor." *182 F.2d 228, 235*. In reversing, the Supreme Court held that the Sherman Act is concerned not merely with competition in this limited, classical sense, but with the freedom and independence of the individual entrepreneur: "[Maximum price agreements] cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *340 U.S. at 213* [3]

[23]** **[*280]** It is true, as my brethren point out, that in *Kiefer-Stewart* the Court found a horizontal agreement between manufacturers to compel dealers to accept the stipulated maximum prices, while in the present case only a single manufacturer is involved. Since *Kiefer-Stewart* was decided, however, principles have developed that seem to me to make the presence of only one manufacturer and the absence of any consummated agreement, irrelevant. In *Simpson v. Union Oil Co., 1964, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*, plaintiff, a gasoline retailer, alleged that Union cancelled his lease for refusal to abide by an agreement to adhere to prices stipulated by Union. The Court held that he had stated a claim, noting again (see *Kiefer-Stewart, supra*) that the lease and agreement were allegedly being used "to injure interstate commerce by depriving independent dealers of the exercise of free judgment" in setting prices. *Simpson* thus seems to me to hold that a coercively extracted vertical agreement depriving a retailer of pricing discretion violates the act, and hence that where the requisite coercion to procure the vertical agreement **[**24]** is shown, a horizontal conspiracy such as that alleged in *Kiefer-Stewart* is unnecessary.

Nor does this result seem offensive. A free and independent dealer, as in *United States v. Colgate & Co., 1918, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465*, may not be actionably wronged if a single manufacturer says to him, "Accept my conditions or I will not deal with you." Such a dealer is free to turn to other manufacturers, and may rely for his protection on competition among those manufacturers for his trade. A retailer who, like Quinn and Simpson, is also a lessee, is in a distinctly different position. The manufacturer's power as a landowner gives it leverage with which to interfere with the price discretion of others. [4]

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[2] I agree with my brethren that no such allegation can be found or inferred in Quinn's complaint, or should be supplied.

[3] Cf. the language of Learned Hand, writing for the Second Circuit in *United States v. Aluminum Co. of America, 1945, 148 F.2d 416, 427*. "[In outlawing monopolies, Congress] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." Compare *Klor's, Inc. v. Broadway-Hale Stores, 1959, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705*.

[4] An interestingly comparable case is *Northern Pacific Ry. v. United States, 1958, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514*. There the Court held that a vertical agreement between a railroad-landowner and a shipper-land purchaser, in which the purchaser agreed, in partial consideration for the sale of land, to "prefer" Northern Pacific over other carriers, violated *section 1*. Northern Pacific could not, the Court said, use one resource it possessed (land) to coerce its own customers in another market (shipping) in order to obtain an advantage over the railroad's own competitors. Here it is alleged that Mobil is using its land ownership to deprive one of its customers of price discretion, in order to gain an advantage over Mobil's own competitors

[25]** Judge Coffin suggests, in response, a rather different interpretation of *Simpson*. He points out that *Simpson* involved the dictation of specific, rather than maximum prices, to numerous dealers rather than to one. He suggests that the unlawful "agreement" in *Simpson* was therefore not the vertical agreement between plaintiff and defendant but a horizontal combination of retailers with Union acting, apparently, as the hub of an illicit wheel. My difficulty with this is that it seems to run counter to what the opinion says. [5] The Court uses the word "agreement" invariably to refer to the vertical agreement between Simpson and Union. It refers to no other agreement, combination, or conspiracy except for similar vertical agreements with other dealers, and these are mentioned only for the purpose of showing that Union is **[*281]** in interstate commerce, and in order to refute the contention that the vertical agreements should be treated as lawful consignment agreements rather than unlawful price maintenance.

[26]** While I am not 100% certain, I do believe that *Kiefer-Stewart* and *Simpson*, taken together, proscribe coercively extracted vertical contracts to fix maximum prices, and that no distinction should be drawn between temporarily successful, as in *Broussard*, and totally unsuccessful coercive measures, as here, and accordingly I dissent.

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through low dealer margins. The agreements in *Northern Pacific* affected discretion to choose shippers rather than discretion to set prices, but the analogous structure of the two arrangements is suggestive.

[5] See generally Note, "Combinations" in Restraint of Trade: A New Approach to *Section 1* of the Sherman Act, 1966 Utah L. Rev. 75, 78-89. The note argues that *Simpson* does not fit within the traditional definition of conspiracy, and suggests that what happened in *Simpson* should be described, and proscribed, as a vertical combination (but not conspiracy) in restraint of trade.

[Nelson v. Berry Petroleum Co.](#)

Supreme Court of Arkansas

April 3, 1967, Opinion delivered

No. 5-4136

Reporter

242 Ark. 273 *; 413 S.W.2d 46 **; 1967 Ark. LEXIS 1235 ***

G. D. Nelson v. Berry Petroleum Company et al

Prior History: [*1]** Appeal from Pulaski Chancery Court, First Division, Murray O. Reed, Chancellor.

Disposition: Reversed and Remanded.

Core Terms

taxpayer, exaction, cause of action, demurrer, allegations, Chancery, cases, public funds, highway department, pleaded

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Pretrial Judgments, Judgment on Pleadings**

The court must treat all allegations in the complaint, which are well pleaded, as true, and construe them liberally in favor of the pleader.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] **Pretrial Judgments, Judgment on Pleadings**

It is not necessary that a complaint state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption is that the defects in the complaint are cured by the proof at the trial.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3[] **Defenses, Demurrers & Objections, Demurrers**

In testing the sufficiency of a pleading by general demurrer every reasonable intendment should be indulged to support it. If the facts stated in the pleadings, together with every reasonable inference therefrom constitute a cause of action, or a valid defense, then a demurrer should be overruled.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Clayton Act, Jurisdiction**

State courts have no jurisdiction in federal antitrust actions.

Constitutional Law > State Constitutional Operation

HN5[] **Constitutional Law, State Constitutional Operation**

See *Ark. Const. art. XVI, § 13*.

Constitutional Law > State Constitutional Operation

HN6[] **Constitutional Law, State Constitutional Operation**

The provision of *Ark. Const. art. XVI, § 13* is self-executing, and imposes no terms or conditions upon the right of the citizens there conferred.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial Governments > Employees & Officials

HN7[] **Constitutional Law, State Constitutional Operation**

"Illegal Exaction" under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial Governments > Claims By & Against

Tax Law > State & Local Taxes > Administration & Procedure > Judicial Review

HN8[] **Constitutional Law, State Constitutional Operation**

Any arbitrary or unlawful action exacting taxes or tax revenues may be restrained and annulled by a taxpayer affected by such procedure.

Governments > Courts > Authority to Adjudicate

HN9[] **Courts, Authority to Adjudicate**

Chancery has jurisdiction and the power to grant affirmative as well as injunctive relief in circumstances involving misapplication of public funds.

Constitutional Law > State Constitutional Operation

HN10[] **Constitutional Law, State Constitutional Operation**

Ark. Const. art. XVI, § 13 is self-executing, and requires no enabling act or supplementary legislation to make its provisions effective.

Constitutional Law > State Constitutional Operation

HN11[] **Constitutional Law, State Constitutional Operation**

Nothing in the *Ark. Const. art XVI, § 13* makes the refusal of any public officer to bring suit a condition precedent to the exercise of a right given without condition imposed upon its exercise.

Headnotes/Summary

Headnotes

1. Equity -- invalid spending of tax funds -- jurisdiction. -- While State courts have no jurisdiction in federal anti-trust actions, a suit instituted pursuant to *Art. 16, Sec. 13 of Ark. Constitution* was properly brought by citizen and taxpayer in chancery court for determination of monies owed taxpayers alleged to have been unlawfully spent for asphalt by Highway Department.

2. Constitutional law -- prohibitions & restrictions -- illegal exaction. -- Under Ark. Constitution, illegal exaction means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official, as well as collection of unlawfully levied taxes.

3. Pleading -- demurrer -- scope of review. -- In testing a case on demurrer, the question presented is whether treating all allegations in the complaint, which are well pleaded, as true, and construing them liberally in favor of pleader, a cause of action is stated.

4. Pleading -- demurrer -- scope of inquiry. -- In testing sufficiency of pleading by general demurrer, **[***2]** every reasonable intendment should be indulged to support pleading, and if facts stated, together with every reasonable inference therefrom, constitute a cause of action or a valid defense, the demurrer should be overruled.

5. Constitutional law -- illegal exaction -- right of action. -- *Art. 16, Sec. 13 of Ark. Constitution*, which provides that any citizen has a right to institute suits in behalf of himself and others interested to protect against enforcement of

illegal exaction, is self-executing and requires no enabling act or supplementary legislation to make its provisions effective.

6. Constitutional law -- illegal exaction -- right of action. -- Citizen and taxpayer's right to bring action against enforcement of illegal exaction was not dependent upon making Highway Department or any state agency a party, nor upon inaction of Attorney General, although intervention on behalf of State was not precluded.

7. Appeal & error -- determination & disposition of cause -- reversal & remand with directions. -- Where appellant's complaint was good as against the demurrer filed, the facts stated having been sufficient to constitute a cause of action, the decree is reversed **[***3]** and cause remanded with directions.

Counsel: *Kenneth Coffelt*, for appellant.

Keith, Clegg & Eckert and *Wright, Lindsey & Jennings* and *Mahony & Yocum* and *Catlett & Henderson* and *Smith, Williams, Friday & Bowen*, for appellee.

Judges: Carleton Harris, Chief Justice.

Opinion by: HARRIS

Opinion

[*274] **[**47]** Appellant, G. D. Nelson, a citizen and taxpayer of Arkansas, instituted suit against appellee companies, Berry Petroleum Company, Arkansas Bitumuls Company, Lion Oil, Inc., Humble Oil and Refining Company, The American Oil Company, [1] MacMillan Ring-Free Oil Company, Inc., and Bitucote Products Company, alleging, *inter alia*:

"For several years next before the filing of this suit, the defendants have sold to the State of Arkansas and its Highway Department asphalt for the construction of highways in this State, and during said period this plaintiff believes and therefore alleges:

"That said defendants have purposely, intentionally and fraudulently connived together and entered into a conspiracy to fix prices for said asphalt far in excess of the fair market and customary value thereof in this and adjoining territories. That the defendants have systematically **[***4]** over the years, in an effort to carry out their designed scheme as herein alleged, agreed with one another that they would not compete with each other on asphalt contracts and prices fixed thereunder in the various highway districts of Arkansas. * * *"

The complaint asserts that appellee companies have received unlawfully in excess of $ 3 million of taxpayers' money; that the grades and quantities of asphalt sold to the taxpayers of this state have been of a lower grade and quantity than paid for. Appellant **[**48]** prayed for an accounting of appellees' dealings and transactions with the state and its highway department, in order that the amount of **[*275]** funds and monies owed the taxpayers by reason of the foregoing allegations might be determined. To this complaint, appellees filed their several demurrers, and these demurrers were sustained by **[***5]** the court. Appellant elected to stand on his pleading, declining to plead further, and the court thereupon dismissed said complaint. From the decree so entered, appellant brings this appeal. The issue is thus simply whether the complaint stated a cause of action.

In *Quinn v. Stuckey, Admr., 229 Ark. 956, 319 S. W. 2d 839*, this court said:

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[1] By agreement of the parties, and the consent of the court, the cause was dismissed as to Humble Oil and Refining Company, and the American Oil Company.

"At the outset it is well to state the rule for testing a case on demurrer. In *Tyler v. Morgan, 214 Ark. 667, 217 S. W. 2d 606*, we said:

"'Appellees demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer and this appeal followed.

"'The question presented is: ***HN1***[] Treating all allegations in the complaint, which are well pleaded, as true, and construing them liberally in favor of the pleader, as we must, was a cause of action stated? We hold that there was. "It ***HN2***[] is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption would be that the defects in the complaint were cured by the proof at the trial." *Clow v. Watson **[***6]** , 124 Ark. 388, 187 S. W. 175*.'"

Likewise, in *Dodson v. Abercrombie, 212 Ark. 918, 208 S. W. 2d 433*, we stated:

"It is well settled that ***HN3***[] in testing the sufficiency of a pleading by general demurrer every reasonable intendment should be indulged to support it. If the facts stated **[*276]** in the pleadings, together with every reasonable inference therefrom constitute a cause of action, or a valid defense, then a demurrer should be overruled. *Ark. Life Ins. Co. v. Am. Nat. Ins. Co., 110 Ark. 130, 161 S. W. 136*; *Neal v. Parker, 200 Ark. 10, 139 S. W. 2d 41*."

With the rule as thus stated, we have reached the conclusion that the complaint did state a cause of action, and accordingly our discussion will be directed to the points relied upon by appellees in their argument supporting the action of the Chancellor in sustaining the demurrers. Four different arguments are advanced, and we proceed to a discussion of these points, though not in the order listed.

It is asserted that the court has no jurisdiction of the cause, it being the position of appellees that the instant complaint is no more than an attempt to assert a cause of action based upon the Sherman **[***7]** Anti-Trust Act and the Clayton Act. We agree that ***HN4***[] state courts have no jurisdiction in federal antitrust actions, and many federal cases so hold. However, we do not agree that the instant suit is simply an attempt to seek recovery under these federal acts. Instead, it appears to be an action instituted pursuant to ***HN5***[] *Article XVI, Section 13, of the Constitution of the State of Arkansas*, which reads, as follows:

"Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

This is a broad provision of our Constitution, and has been utilized in various types of actions. The case of *Starnes v. Sadler, 237 Ark. 325, 372 S. W. 2d 585*, contains a comprehensive discussion of the meaning of the term, "Illegal Exaction." There, we said:

"This Chancery Court action was instituted pursuant to *Article XVI, Section 13, of the Constitution of the **[*277]** State of Arkansas*, and the Chancery Court had **[**49]** jurisdiction of this Constitutional proceeding. ***HN6***[] This Constitutional provision is self-executing, and imposes no terms or conditions **[***8]** upon the right of the citizens there conferred. *Samples v. Grady, 207 Ark. 724, 182 S. W. 2d 875*; 8 Ark. Law Review 129 (1954).

"'Illegal ***HN7***[] Exaction' under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official, *Quinn v. Reed, 130 Ark. 116, 197 S. W. 15*; *Farrell v. Oliver, 147 Ark. 599, 226 S. W. 529*.

"'Illegal Exaction' means far more than the mere collection of unlawfully levied taxes. With little limitation, almost any misuse or mishandling of public funds may be challenged by a taxpayer action. Even paying too much for cleaning public outhouses has been held by our courts as basis for a taxpayer's right to relief, *Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718*. ***HN8***[] Any arbitrary or unlawful action exacting taxes or tax revenues may be restrained and annulled by a taxpayer affected by such procedure, *Bush v. Echols, 178 Ark. 507, 10 S. W. 2d 906*; *McClellan*

v. Stuckey, 196 Ark. 816, 120 S. W. 2d 155; Park v. Hardin, 203 Ark. 1135, 160 S. W. 2d 501; Brookfield v. Harahan Viaduct Improvement District, 186 Ark. **[***9]** 599, 54 S. W. 2d 689.

"The remotest effect upon the taxpayer concerning any unlawful act by a tax supported program or institution may be enjoined under Article XVI, Section 13, of the Constitution of the State of Arkansas, Green v. Jones, 164 Ark. 118, 261 S. W. 43. * * *

"Our Court thoroughly discussed 'illegal exaction' in the case of Arkansas Association of County Judges v. Green, 232 Ark. 438, 338 S. W. 2d 672, wherein jurisdiction of the Chancery Court was questioned and illegal exaction was involved. This Court stated that the theory **[*278]** of an illegal exaction does not necessarily involve an illegal tax citing the case of Lee County v. Robertson, 66 Ark. 82, 48 S. W. 901, wherein the Court was not dealing with illegal tax, but with the question of illegal use or appropriation of county funds. * * *

"The case of *Arkansas County Judges Association* v. *Green*, cited the case of Ward v. Farrell, 221 Ark. 636, 253 S. W. 2d 353, wherein this Court stated concerning the involved Constitutional provision:

"'There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as referred to above, **[***10]** that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitles them to relief against such misapplication.'"

In Revis v. Harris, 217 Ark. 25, 228 S. W. 2d 624, suit was instituted by Owen Revis, a citizen and taxpayer, against Sam Harris for recovery of money, which Revis alleged was illegally paid to Harris while he (Harris) was acting as Municipal Judge. Pursuant to a motion to dismiss the complaint filed by Harris, the court overruled so much of the motion as sought to strike the prayer seeking injunctive relief, but granted the motion as to that part of the complaint seeking recovery of the funds allegedly illegally paid to Harris. On appeal to this court, we reversed this holding, stating:

"In that case [Sitton v. Burnett, 216 Ark. 574, 226 S. W. 2d 544], Burnett, a citizen and taxpayer, brought suit to recover salary illegally paid Sitton by the second class City of Clinton, while serving as a *de facto* marshal. There it was alleged Burnett was not a proper party **[***11]** to bring the suit and that equity was without jurisdiction. We there held that Burnett, as a resident and **[*279]** taxpayer, was a proper party to bring this suit since taxpayers are the **[**50]** equitable owners of public funds and may sue to prevent any illegal exactions whatever, within the meaning of Art. 16, § 13, of our Constitution.

"So here, if appellant's allegations in this complaint to the effect that appellee had been paid sums of money illegally by the City of Clarksville while acting as Municipal Judge, and for other services, without right or authority of law, were true, appellant stated a cause of action and was a proper party to initiate the suit.

"Chancery ***HN9***[] had jurisdiction and the power to grant affirmative as well as injunctive relief in the circumstances. Grooms v. Bartlett, 123 Ark. 255, 185 S. W. 282."

In Grooms v. Bartlett, supra, this court stated:

"The taxpayers of a county are the persons from whom the public revenues are obtained and are directly interested in protecting the same. They are proper persons to maintain suits against public officers to prevent or remedy misapplication of the public funds, and in such cases chancery **[***12]** has the power to grant affirmative as well as injunctive relief. Chancery has not only power to prevent such wrongs, but it has power to require reparation for that which has been done."

We think these cases make it clear that the Chancery Court had jurisdiction to hear this suit. [2]

It is also asserted by appellees that the complaint **[*280]** does not state facts sufficient to constitute a cause of action. Again, we are unable to agree with the contention made. **[***13]** In the first phase of this argument, appellees mention that there is a complete absence of any allegation in the complaint that appellant, or anyone else, had made demand upon the State Highway Commission or the State of Arkansas, or its attorneys, to institute proceedings against appellee companies. Appellees contend that it is necessary that this suit be brought by the Attorney General, or at least he must have refused to bring it, before a taxpayer may act, and it is pointed out that there is no allegation that the Attorney General refused to bring the suit. Several earlier cases are cited in support of this argument, [3] but the controlling case on this point is *Samples v. Grady, supra.* There, we stated:

"Unlike § 23 of Art XIX of the Constitution, § ***HN10***[] 13 of Art. XVI of the Constitution is self-executing, and requires no enabling act or supplementary legislation to make its provisions effective. This section of the Constitution last mentioned confers the right upon any citizen to institute suits in behalf of himself and all others interested to protect against the enforcement of any illegal exaction whatever.

"This is made a class suit in which any citizen may for **[***14]** the benefit of himself, and all other interested citizens, and any citizen would have the right to be made a party, and this is a right which other citizens should exercise if there were any reason to apprehend that the suit was **[**51]** collusive between the parties, plaintiff and defendant.

"This § 13 of Art. XVI of the Constitution is not **[*281]** only self-executing, but it imposes no terms or conditions upon the right of the citizen there conferred, and we would be required to write something into the constitution, which does not there appear, if we hold that this right was conditional. However, the General Assembly has the power to prescribe the practice to be pursued in its enforcement.

[*15]** "We do not hold that the attorney general, where the interest of the state is involved, or the prosecuting attorney, in appropriate cases, might not institute such an action; but we do hold that the right of a citizen is not dependent upon the inaction of these officers, or either of them. We have rather two methods whereby the interests of affected inhabitants may be protected. We find ***HN11***[] nothing in § 13 of Art. XVI of the Constitution making the refusal of any officer to bring this suit a condition precedent to the exercise of a right given without condition imposed upon its exercise." [4]

Under the same point, it is also asserted that, though alleging that appellees have defrauded the taxpayers of Arkansas, there are no particular facts pleaded to substantiate this statement, and that, standing alone, the facts pleaded constitute no more than a conclusion of the pleader. The simple answer to this contention is found in **[***16]** the recent case of *Brewer v. Hawkins, 241 Ark. 460, 408 S. W. 2d 492 (Nov. 1966)*. In comparing the complaint in that case (the allegations being set out in full) with the complaint in the instant case, it is immediately apparent that the allegations before us are as specific as those in *Brewer*. For that matter, it is evident that it would have been difficult, if not well nigh impossible, for Nelson to have alleged specific acts relied upon. This information could hardly be obtained until after institution of the suit. Of course, if appellees felt that the allegations were vague

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[2] There is also a state law, Ark. Stat. Ann. § 70-101 (Repl. 1957) prohibiting corporations, partnerships, individuals, "or other association or person whatsoever" from entering into combinations to fix prices, maintain certain prices, or to fix or limit the amount or quantity of certain articles. This is defined as a conspiracy to defraud. Aside from any statutory authority, an attempted monopoly or an agreement in restraint of trade, was a criminal conspiracy at common law. *Hammond Packing Company v. State, 81 Ark. 519, 100 S. W. 407*.

[3] *Griffin v. Rhoton, 85 Ark. 89, 107 S. W. 380*; *Gladish v. Love-well, 95 Ark. 618, 130 S. W. 579*; *Oats v. Smith, 194 Ark. 812, 109 S. W. 2d 955*; *Etheridge v. Riley, 196 Ark. 713, 118 S. W. 2d 665*. The last two cases were suits to collect on the bond of officeholders, and the actions were brought in compliance with specific statutory provisions.

[4] The opinion also distinguishes this case from *Gladish v. Love-well. supra.*

and should be pleaded **[*282]** more distinctly and clearly, a motion to make more definite and certain could have been filed. This was not done.

It is also contended that Nelson, as a citizen and taxpayer, does not have legal capacity to maintain the action. The cases cited in our discussion of the other points answer this contention, and no additional comment is necessary.

Finally, it is alleged that there is a defect of parties plaintiff, it being asserted that the Arkansas Highway Department was a necessary party. We have already cited sufficient authority to the effect that the taxpayer **[***17]** has a perfectly valid right to institute an action to recover public funds, and this being true, the right is not dependent upon any state agency becoming a party. Of course, there is nothing to prevent the Arkansas Highway Department from intervening in the case, and it might well do so; for that matter, the Attorney General, on behalf of the state, is entitled to intervene. Appellees do not make clear just how appellant could force the Highway Department to become a plaintiff, but, from what has been said, it is evident that the department is not an essential party to the litigation.

We reiterate, in effect, the statement made at the outset, *viz.*, that we are only called upon to determine whether the complaint was good as against the demurrers filed, and, under the cases cited on that point, we unhesitatingly reply in the affirmative.

The decree is reversed, and the cause remanded, with directions to proceed in a manner not inconsistent with this opinion.

Hanover Shoe, Inc. v. United Shoe Machinery Corp.

United States Court of Appeals for the Third Circuit

May 3, 1966, Argued ; April 11, 1967, Filed

Nos. 15626, 15627

Reporter

377 F.2d 776 *; 1967 U.S. App. LEXIS 6778 **; 1967 Trade Cas. (CCH) P72,067

The Hanover Shoe, Inc. v. United Shoe Machinery Corp.

Subsequent History: [1]** Reported at: *377 F.2d 776 at 793*.

Core Terms

leasing, decree, damages, machines, machinery, manufacturers, shoe, anti trust law, monopolization, customers, shoe machinery, treble damages, cases, district court, antitrust, charges, Sherman Act, lease-only, pages, statute of limitations, circumstances, passing-on, rentals, provisions, parties, cost of capital, counsel fees, retroactivity, competitors, violations

LexisNexis® Headnotes

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

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN1[ ] **Sherman Act, Remedies**

The Sherman Act, *15 U.S.C.S. § 2*, prescribes sanctions; and it does not make uncollectibility of the purchase price one of them. The appropriate remedy for injury resulting from a violation of the antitrust laws is a treble damage suit.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[ ] **Antitrust & Trade Law, Sherman Act**

Antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events that may have reduced the impact of the wrongful conduct.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

The question of multiple liability is fundamental in determining whether the passing-on defense shall have validity.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN4[] Clayton Act, Claims

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, requires not only injury but also a causal relationship between the antitrust violation and the injury.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] Antitrust & Trade Law, Clayton Act

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

Section 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)*, makes a government decree prima facie evidence against a defendant in future actions as to all matters respecting which the judgment or decree would be an estoppel as between the parties thereto.

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] Antitrust & Trade Law, Clayton Act

Courts should give prima facie effect to any fact that the previous findings or opinion fairly show was actually adjudicated in the government case. To do otherwise would hamper on a technicality of form the policy of affording private antitrust litigants the fullest benefit of a successful government suit.

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Antitrust & Trade Law, Clayton Act

Section 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)*, embodies a congressional policy to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the government brought suit.

Civil Procedure > Trials > Bench Trials

HN9[] **Trials, Bench Trials**

Under *Fed. R. Civ. P. 52(a)*, findings of fact and conclusions of law need not be isolated under specific designations if they appear generally in the opinion of the court.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN10[] **US Department of Justice Actions, Civil Actions**

The remedial character of an equity decree does not necessarily imply that the conduct it prohibits in the future was valid in the past.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN11[] **Antitrust & Trade Law, Clayton Act**

As of July 7, 1955, a federal four-year statute of limitations in antitrust actions is applicable. *15 U.S.C.S. § 15b*.

Judges: Freedman, Circuit Judge.

Opinion by: FREEDMAN

Opinion

[*779] Opinion

FREEDMAN, Circuit Judge:

This private antitrust action presents a number of important questions.

Plaintiff, The Hanover Shoe, Inc., is a manufacturer of shoes and a customer of defendant, United Shoe Machinery Corporation, a manufacturer and distributor of shoe machinery. In this action brought under *§ 4* of the Clayton Act (*15 U.S.C. § 15*) based on violations of *§ 2* of the Sherman Act (*15 U.S.C. § 2*) Hanover obtained a trebled damage judgment against United in the amount of $4,239,609, with interest, and an award of $650,000 for counsel fees. United appeals from the judgment on a number of grounds, and Hanover has taken a cross-appeal on the ground that there was not sufficient evidence to support the district court's rejection of one of its large items of damage.

The Proceedings

Almost twenty years ago, on December 15, 1947, the United States brought a civil action against United in the United States District Court for the District of Massachusetts, under *§ 4* of the Sherman Act (*15 U.S.C. § 4*) **[**2]** to restrain alleged violations of §§ 1, 2). Judge Wyzanski, who heard the case, graphically detailed what he called the "prodigious length" of the trial. "The hearings took 121 days and covered 14,194 pages of transcript and included the offer of 5512 exhibits totalling 26,474 pages (in addition to approximately 150,000 pages of OMR's [records concerning machines in shoe factories as of a certain date] and over 6,000 soft copies of patents) and 47 depositions covering 2122 pages. At the close of the evidence the Court asked for briefs, and requested findings of fact and conclusions of law. The Government offered briefs totalling 653 pages, and requests totalling 667 pages. United submitted briefs totalling 1240 pages, and requests totalling 499 pages." [1] On February 18, 1953, Judge Wyzanski filed an elaborate opinion in which he found that United was guilty of monopolization in violation of *§ 2* of the *Sherman Act.* ***[*780]*** *United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953)*. The Supreme Court affirmed on May 17, 1954 in a per curiam opinion. *United Shoe Machinery Corp. v. United States, 347 U.S. 521, 98 L. Ed. 910, 74 S. Ct. 699 (1954)*. **[**3]**

More than a year later, on September 21, 1955, Hanover brought the present treble damage action against United in the United States District Court for the Middle District of Pennsylvania. By pretrial agreement the parties submitted for preliminary decision the defense that any excessive rentals charged to Hanover for shoe machinery would not constitute an injury to its business or property if the excess was passed on to its customers. After the hearing had been held on this issue the district judge died and Chief Judge Biggs designated Circuit Judge Goodrich in his place. Judge Goodrich summarized the complaint as charging that defendant, "as a result of its unlawful control of the market, has caused plaintiff . . . to pay excessive rentals for the lease of shoe machinery." He held as a matter of law that if United was guilty of monopolization **[**4]** and had charged Hanover excessive rentals, Hanover had a cause of action for the difference between what it was charged and what it could properly have been charged in the absence of monopolistic practices. He also held that the injury occurred when Hanover was overcharged for the machinery and that since the cause of action arose at the moment the tort occurred, United would not be relieved of liability because subsequent events might have alleviated some of the ultimate consequences of the wrong, for these would not inure to the benefit of the defendant. Judge Goodrich certified that the case was appropriate for an interlocutory appeal under *28 U.S.C. § 1292(b)*, because the issue involved a controlling question of law as to which there was substantial ground for difference of opinion, and an immediate appeal might materially advance the ultimate termination of the litigation. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826 (M.D. Pa. 1960)*. We affirmed in a per curiam opinion in which we rejected the claim that treble damages would result in a windfall to Hanover, stating that Congress had imposed this rigorous penalty **[**5]** and any modification was for it to make and not for the courts. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 281 F.2d 481* (3 Cir. 1960), cert. denied, *364 U.S. 901, 5 L. Ed. 2d 194, 81 S. Ct. 234 (1960)*.

After a subsequent trial without a jury, Chief Judge Sheridan on April 28, 1965 filed a comprehensive opinion holding that Hanover was entitled to recover treble damages for the excess of the leasing costs over what it would have cost to own the same machines had they been available for purchase. Damages were limited to the period beginning July 1, 1939 on the ground that any earlier period was barred by the Pennsylvania statute of limitations, and were awarded to September 21, 1955, the date the action was brought. *The Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D. Pa. 1965)*. Hanover's alternative claim for damages, that the leasing charges were themselves excessive, was rejected by the district court because the Government decree, on which Hanover relied, had made no finding that United's leasing charges were excessive. Hanover has not sought review of this ruling on appeal. On August 12, 1965 Chief Judge **[**6]** Sheridan denied United's motion for a new trial, and entered the judgment from which these appeals are taken.

Acquiescence and Demand

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[1] *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 299 (D. Mass. 1953)*, aff'd, *347 U.S. 521, 98 L. Ed. 910, 74 S. Ct. 699 (1954)*.

At the outset United contends that Hanover acquiesced in its leasing system which helped Hanover to obtain high profits and gave Hanover special benefits such as the right to return obsolete machines and the free services of United's technicians on problems in shoe making. According to United, the absence of a formal demand by Hanover for the sale of United's shoe machinery is fatal to Hanover's claim.

[*781] The court below found that "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available." *245 F. Supp. at 287*. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of **[**7]** machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support the finding by the court below and forbid our declaring it to be clearly erroneous.

The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case." *245 F. Supp. at 280*.

Hanover was, as the court below found, along with the entire shoe machinery industry, a "captive customer" of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim **[**8]** of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

Injury

1. United urges that its leasing system did no injury to Hanover because Hanover's competitors were subject to the same practices which United uniformly imposed on all its customers. This is a remarkable proposition. It is founded upon the premise that harm done to a customer loses its injurious effect when similar harm is inflicted upon other customers similarly situated. It would punish a partial wrong but absolve it if it is widespread and thus would reduce the antitrust laws to a moral imperative without realistic effect. There is no reason to relieve actual injury on a basis so unrealistic and undesirable. *Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)* does not require us to do so. There a shipper sued several railroads for treble damages on the ground that they had by agreement among themselves fixed excessive freight rates. United relies on the statement by Mr. **[**9]** Justice Brandeis that the exaction of the alleged excessive rate, which had been approved by the Interstate Commerce Commission, might not have harmed the plaintiff because all other shippers were entitled to be put on a parity with him. What was involved in *Keough*, however, was a case of "plain repugnancy between the antitrust and regulatory provisions," [2] for the plaintiff was held barred from invoking the original treble damages provision of the Sherman Act because he was limited to the remedy provided by § 8 of the Interstate Commerce Act which conferred a right to untrebled damages where a carrier charged an illegal rate. The statement relied on by United plainly was dictum and was unnecessary to the decision in the case; it is not controlling here. See, e.g., **[*782]** *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co., 335 F.2d 203, 205-6* (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59, 65-66 (S.D.N.Y. 1964)*.

[10]** 2. United also contends that Hanover suffered no injury from United's no-sale policy in the damage period because it could have obtained foreign machinery. The court below found, however, that the foreign machinery

[2] See *United States v. Philadelphia National Bank, 374 U.S. 321, 351, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*; *Pan American World Airways, Inc. v. United States, 371 U.S. 296, 322, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963)*, Brennan, J., dissenting.

which was available was not acceptable to Hanover both because of its inadequate capacity and performance and the lack of available servicing and technical advice. *245 F. Supp. at 285, 286*. We cannot say from the record that this finding is clearly erroneous.

3. United claims that Hanover was not legally injured because the leases were lawful and therefore no damage could result from them. The claim of legality of the leases is based on an abstract characterization, torn from the context of United's market control. Judge Wyzanski specifically held that the leases which United employed constituted a means of its monopolization of the industry. Since the leases, although valid as instruments conferring the right of possession on the lessee, were instruments of monopolization, their lawfulness in the abstract does not undo their character as weapons in the consummation of the monopoly. Neither *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)* **[**11]** nor *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)* are of aid to United. They refused to allow a party to a contract to avoid payment thereunder because the underlying contract violated the antitrust laws. This was because the antitrust laws do not provide such a remedy: "***HN1***[] The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them." *Bruce's Juices, Inc. v. American Can Co., supra 330 U.S. at 750*. The court expressly recognized, however, that the appropriate remedy for injury resulting from a violation of the antitrust laws was a treble damage suit. What was said in those cases regarding contracts which are intrinsically or inherently illegal related merely to the right to avoid payment thereunder and not to the remedy available for violation of the antitrust laws. [3]

[12]** 4. United also claims that Hanover passed on to its customers the difference between what it paid to United in rentals and what it would have cost it to purchase the machines. The validity of a passing-on defense in this case was decided by Judge Goodrich in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826 (M.D. Pa. 1960)*, aff'd, *281 F.2d 481* (3 Cir. 1960), cert. denied, *364 U.S. 901, 5 L. Ed. 2d 194, 81 S. Ct. 234 (1960)*. United seeks to distinguish the effect of the decision because it was based on the assumption that the damage claim was for excessive rental charges, whereas the judgment below is based on the difference between the rentals charged and the reasonable cost of the machinery if Hanover had purchased it.

Even if we assume that Judge Goodrich's determination of the passing-on issue is not binding here, his reasoning, which we accept, extends equally to the present claim. As we have seen, he pointed out that the ***HN2***[] antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct. The fact that Hanover might have recouped **[**13]** some of that damage later by increasing the prices of its shoes is irrelevant to the question of damage. We may, indeed, add that if United's claim were accepted it would be difficult to apply the antitrust laws in a prosperous industry, **[*783]** where damages would readily be passed on to the consuming public. It would be contrary to the far-reaching social and economic purposes of the antitrust laws to afford release from their obligations to an economic wrongdoer because his victim in self-defense sought recoupment for the injury from the consuming public.

Our decision in *Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830* (3 Cir. 1962), cert. denied, *371 U.S. 829, 9 L. Ed. 2d 67, 83 S. Ct. 40 (1962)*, does not impair our rejection of passing-on as a defense by a violator of the ***antitrust law***. There fruit brokers brought a treble damage suit for violation of the Robinson-Patman Act resulting from an improper terminal charge. The brokers had purchased the fruit at the defendant's auction on behalf of regular clients and the jury made a special finding that plaintiffs suffered no injury because they received a separate commission for their **[**14]** services, and their clients paid all the charges, including the terminal charges. In upholding the passing-on defense we specifically distinguished the case from the present one. Judge Kalodner, speaking for the Court, said: "Hanover affords no nourishment to plaintiffs' contention with respect to it. There the District Court in granting relief to the plaintiff premised its action on its fact-finding that plaintiff was a *consumer* and

[3] *Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49* (7 Cir. 1949) was a special antitrust case involving patents in which plaintiff conceded that it would not be entitled to recover unless the agreements were inherently illegal. In any event, to the extent that it would support United's claim that the leases must be inherently illegal to support an antitrust action for damages, we decline to follow it.

not a *middleman* and implicit in that distinction is its subscription to the doctrine enunciated in earlier cases that middlemen cannot recover damages where they suffer no injury by reason of their payment of proscribed charges." (301 F.2d at 833) Moreover, **HN3**[] the question of multiple liability is fundamental in determining whether the passing-on defense shall have validity. See Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co., 335 F.2d 203, 208-9 (7 Cir. 1964); Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59, 71 (S.D.N.Y. 1964). This explains the difference between the present case and *Freedman*. There it was the clients of the brokers who had the direct injury which **[**15]** would support treble damage claims against the auctioneer. Here, however, the injury to the customers who purchased the shoes which Hanover made with the machinery it acquired from United is too remote and its force too fragmentized and diluted to support a claim by the individual customers of Hanover. [4]

Remoteness of Injury

What has been said regarding the passing-on defense supplies in part the answer to United's contention that any damage that Hanover suffered is too remote and indirect to support a cause of action under **HN4**[] § 4 of the Clayton Act, which requires not only injury, but also a causal relationship between the antitrust violation and the injury. [5] **[**17]** The court below found that "Hanover's injury flows proximately **[**16]** from the monopolization," and that by the leases United extracted "large sums of money in excess of the reasonable value of machinery and of the service rendered by United." *245 F. Supp. at 274*. In this respect the case resembles Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 51 L. Ed. 241, 27 S. Ct. 65 (1906), where it was held that injury was sufficiently demonstrated by the City's payment of more than the reasonable price of the defendant's pipes because of defendant's price fixing. [6] Here, **[*784]** as in that case, the cost to the customer of doing business was increased as a result of the monopolist's conduct. The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4 [7] was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted.

Effect of the Government Decree as to the Lease-Only Policy

HN6[] Section 5 (a) of the Clayton Act (15 U.S.C. § 16 (a) makes the Government decree "prima facie evidence" against United in the present action "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. **[**18]** "

Here the Government decree expressly declared that United's leases with any one of four specified restrictive provisions -- a term of ten years, a full capacity clause, deferred charges on return and non-segregation of repair and service charges -- were means by which United had monopolized the shoe machinery industry. The decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. From this United argues that the Government decree is not prima facie evidence that its failure to offer shoe

[4] Wolfe v. National Lead Co., 225 F.2d 427 (9 Cir. 1955), cert. denied, ***350 U.S. 915, 100 L. Ed. 802, 76 S. Ct. 198 (1955)***, which United urges upon us, was specifically rejected by Judge Goodrich (185 F. Supp. at 831) whose opinion we affirmed.

[5] "**HN5**[] 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."

[6] See also Georgia v. Evans, 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 (1942).

[7] It is unnecessary for us to consider whether the broad terms of the statute should be narrowed by construing § 4 to require that the injury be "direct," Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9 Cir. 1955), or whether a presumption of liability exists once injury has been shown, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4 Cir. 1966); Note, Standing to Sue for Treble Damages under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 586-88 (1964). See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962).

machinery for sale was illegal, since this is not a matter which was adjudicated in the Government case. For additional support it points to the fact that Paragraph 61 of the Government's complaint expressly alleged that United had refused to sell machinery, and urges that this was one of the "other charges of violation of the Sherman Act set forth in the complaint" which *Section 2* of the Government decree declared "are dismissed with prejudice." On the face of the decree, therefore, United's contention is not lacking in merit.

United supports its contention by the claim that the courts are limited to the Government decree itself **[**19]** in determining the existence and extent of an estoppel under § 5 (a) unless it is necessary to go beyond it to resolve an ambiguity in the decree. Such a construction of § 5 (a) would seriously weaken its underlying policy of lightening the burden on private antitrust plaintiffs, who play such an important role in the implementation of the antitrust laws. [8] It is in harmony with that policy to ***HN7***[] give prima facie effect to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case. [9] To do otherwise would hamper on a technicality of form the policy of affording private antitrust litigants the fullest benefit of a successful Government suit. In *Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69, 95 L. Ed. 534, 71 S. Ct. 408 (1951)* the Supreme Court held that a criminal judgment was available to private litigants as prima facie evidence of "all matters of fact and law necessarily decided by the conviction and the verdict," since ***HN8***[] § 5 (a) embodied a Congressional **[*785]** policy "to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine **[**20]** would afford had the Government brought suit." This goes further than the use of the determinations which appear in the findings and opinion of the judge sitting without a jury in a civil case.

United would distinguish *Emich* on the ground that it rested on a general verdict of guilty which does not specifically indicate the nature of the **[**21]** jury's findings and that the conclusion in that case therefore was a result of necessity. The absence of any factual finding in a criminal verdict is no reason for holding that findings by a judge without a jury in a civil case are to be ignored because his decree is more elaborate.

We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski which accompanied the decree. A separate heading entitled "Effects of the Leasing System" in the findings of fact describes the effect of United's leasing system as it worked in practice from the viewpoint of United, of shoe manufacturers and of potential and actual competitors of United. In dealing with the effect of United's leasing system on shoe manufacturers, there is a full appraisal of the advantages to the shoe manufacturer and note is made of the virtual absence of dissatisfaction with the system. Judge Wyzanski then went on to say: "However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. **[**22]** Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated." *110 F. Supp. at 323-24*. There follow six consequences to shoe manufacturers if United's machinery were available for sale. Among these is the fact that shoe manufacturers who bought United's machines "would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. . . . United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have." *110 F. Supp. at 324*. In another category is this statement: "Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines and to take on competitors' machines in their place." *110 F. Supp. at 324*. These statements are **[**23]** reiterated in a form which shows that this effect was

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[8] See, e.g., *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)*; *Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68, 95 L. Ed. 534, 71 S. Ct. 408 (1951)*; *Radovich v. National Football League, 352 U.S. 445, 453-54, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*; *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*.

[9] ***HN9***[] Under *Rule 52(a)* findings of fact and conclusions of law need not be isolated under such specific designations if they appear generally in the opinion of the court.

inherent in the lease-only system itself, and did not arise solely from the four restrictive features: "Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect." *110 F. Supp. at 324*.

Throughout his opinion Judge Wyzanski repeatedly stressed this distinction between the special obstacles to competition established by the four restrictive provisions in the United leases, and the general anticompetitive effects which flowed from the mere existence of a lease-only system. On the latter issue, he recognized the "magnetic ties inherent in [United's] . . . system of leasing, and not selling, its more important machines," and stressed that these ties, especially in the context of United's market control, fostered a sense of "partnership" among United and its customers which made it more difficult for another manufacturer of shoe machinery to take **[*786]** away part of the United market. [10] **[**26]** Moreover, he declared **[**24]** that the end of the lease-only system would also increase competition by making available secondhand machines, which would promote a "substitute competition" and would make it possible for other manufacturers to study the United machines so as to

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[10] "However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field.

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10-year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if he keeps this and other United machines to the end of the periods for which he leased them." *110 F. Supp. at 340*.

"In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors." *Id. at 343*.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many "partnership " aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *Id. at 344*.

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. . . .

"A further answer is that if the creation of a sales alternative to leasing is, as this Court believes, necessary to dissipate United's monopoly power, the Court should not withhold its decree because its effect is to allow competitors to copy United's designs." *Id. at 350*.

See Kaysen, United States v. United Shoe Machinery Corporation (1956), p. 275: "The most important single alteration in the operation of the shoe machinery market leading to an increase in the degree of competition therein is the end of the lease method of marketing, and the dissolution of the lease bundle which United provides under that method." See also pp. 193-94, 197-98, 276. Kaysen, an economist, acted as Judge Wyzanski's law clerk so that he could serve as an economic assistant on the United Shoe case. Kaysen's book is a reprint, with additional material, of the memorandum which he submitted to Judge Wyzanski after two years of research.

experiment with alterations in them and to copy their unpatented features. [11] Finally, although he ordered United's leases to be purged of their restrictive provisions in the future, he also ordered United in Section 5 of the decree to offer for **[*787]** sale in the future any machine which it held out for lease. Judge Wyzanski thus justified this provision: "[United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the **[**25]** decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are." [12] Rejecting the Government's suggestion that the decree require United to make its sales terms more attractive to customers than its lease terms, the opinion states: "It seems to the Court sufficient to direct defendant, if it offers any machine type for lease, to set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine." *110 F. Supp. at 351*.

All this, we believe, demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization. Read in the light of the policy of making the Government's decree fully available to the private antitrust plaintiff, Hanover is entitled to the benefit of the determination and United is estopped from questioning it. See *Emich Motors Corp. v. General Motors Corp., supra, 340 U.S. at 568*.

The Retrospective Effect of the Government Decree

The court below concluded that the adjudged violations were illegal from their initiation decades **[**27]** earlier, but it limited damages to the period within the statute of limitations as suspended by various tolling provisions. See *245 F. Supp. at 294, n. 15*.

The Government decree, entered in the District Court in Massachusetts on February 18, 1953 and affirmed by the Supreme Court on May 17, 1954, prohibited United after "A-Day," which turned out to be January 1, 1955, from offering machines for lease unless it also offered them for sale. United urges that the decree was meant to operate only prospectively. In support of this view it points to the absence of any specific declaration in the decree that the lease-only system violated the ***antitrust law*** and maintains that the exclusive purpose of the decree was to break up United's market power in the future.

What we have already said requires us to reject the contention that the Government decree has no retrospective effect. For ***HN10***[] the remedial character of an equity decree does not necessarily imply that the conduct which it prohibits in the future was valid in the past. Decrees such as the Government decree are aimed at redressing the effects of antitrust violations in the future, and acceptance of United's contention **[**28]** would subvert the purpose of § 5 (a), for it would put an end to treble damage recovery by private parties in reliance on Government decrees, since they are prima facie evidence only in cases where the damage period is within the period covered by the Government case. *International Shoe Machinery Corp. v. United Shoe Machinery Corp., 315 F.2d 449* (1 Cir. 1963), cert. denied, *375 U.S. 820, 11 L. Ed. 2d 54, 84 S. Ct. 56 (1963)*; *Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D.C. 79, 344 F.2d 173, 184-86 (D.C. Cir. 1965)*. [13]

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[11] *110 F. Supp. at 344, 349-50*. See also Kaysen, supra, at p. 73: " . . . the absence of a secondhand machinery market, which is a consequence of the leasing system, is a substantial support to United's market dominance and is probably second in importance in its effect on United's market power only to the duration of the lease and the circumstances surrounding terminations of leases among all the aspects of the leasing system which affect that power."

[12] *110 F. Supp. at 350*.

[13] There is no dispute that United machines leased by Hanover were unavailable for sale to Hanover before June 1, 1955, the date on which Judge Wyzanski approved United's plan for terminating the leases. Moreover, the court below made specific findings as to the unavailability and unsuitability of other manufacturers' machines which were offered for sale for any part of the

[29]** This leads us to the question of the extent of the retroactivity of the Government decree.

[*788] Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court. *United States v. Winslow, 227 U.S. 202, 57 L. Ed. 481, 33 S. Ct. 253 (1913)*; *United States v. United Shoe Machinery Co. of N.J., 247 U.S. 32, 62 L. Ed. 968, 38 S. Ct. 473 (1918)*; *United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 (1922)*. In Judge Wyzanski's words: "What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned, -- indeed, one ought to go further and say they were in part endorsed." *110 F. Supp. at 348*. [14] He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice. "This inferior court feels precluded," said Judge Wyzanski, "from so deciding because of the overhanging shadows of . . . the Sherman **[**30]** and Clayton Act cases involving this company's predecessor and itself. Though these cases may ultimately be overruled by the Supreme Court, they have not yet lost all authority." *110 F. Supp. at 343*. Judge Wyzanski was of the view, however, that the interpretation of *§ 2* of the Sherman Act was significantly changed in 1946 when the Supreme Court in *American Tobacco Co. v. United States, 328 U.S. 781, 811-15, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* expressly approved Judge Learned Hand's analysis in 1945 in the *Alcoa* case, *United States v. Aluminum Co. of America, 148 F.2d 416* (2 Cir. 1945). Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization. [15] He held that United's conduct now ran afoul, however, of *§ 2* under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although "honestly industrial" cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon **[**31]** him. *110 F. Supp. at 341-42*. In so finding, however, Judge Wyzanski said: "It is only fair to add that the more than 14,000 page record, and the more than 5,000 exhibits, representing the diligent seven year search made by Government counsel aided by this Court's orders giving them full access to United's files during the last 40 years, show that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." *110 F. Supp. at 345*.

In these circumstances, we believe it was error to hold that United was liable in damages **[**32]** to Hanover for the period stretching back to the beginning of its conduct, despite the approval of its leasing policy in various forms by three successive decisions of the Supreme Court. The court below cut off damages prior to July 1, 1939 only because the statute of limitations barred such recovery. On the contrary, we think it erroneous to award damages for conduct manifestly pursued in the shelter of Supreme Court approval, at least until such time as subsequent decisions have clearly announced a change in the applicable law. **[*789]** This conclusion follows from Judge Wyzanski's opinion and the modern view of the rights of parties who have relied upon authoritative statements of the law which are later changed.

Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary. [16] **[**34]**

1939-1955 period. In these circumstances, Hanover is not barred from damages occurring before June of 1951, the date of the close of evidence in the Government case (Compare *International Shoe Machinery Corp. v. United Shoe Machinery Corp., supra*), nor does United so argue.

[14] This was so even though certain provisions of its leases, since terminated, had been held violative of § 3 of the Clayton Act in the third case, for United was specifically found free of the taint of predatory practices. *258 U.S. at 455*.

[15] See, e.g., *United States v. United States Steel Corp., 251 U.S. 417, 64 L. Ed. 343, 40 S. Ct. 293 (1920)*.

[16] Thus, e.g., retroactivity was refused to be accorded in *Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)*, to *Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)*, dealing with exclusion of illegally seized evidence; in *Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966)*, to *Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965)*, dealing with comment on the failure of a defendant in a state criminal trial

In antitrust cases the question of retroactivity is still open. [17] We believe that retroactivity should be determined **[**33]** from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity. In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of retroactive imposition of the penalty of treble damages. In the present case the penalty of treble damages is enough, in conjunction with the absence of predatory practices and the survival of United's leasing policy under the Sherman Act after three passages through the Supreme Court, to require that United should not be held to have violated the antitrust laws before the change occurred in the law which for the first time made its conduct unlawful.

The remnant of the problem which remains is whether the appropriate date which marks the commencement of liability should be the date of the *American Tobacco* decision of June 10, 1946 or the *Alcoa* decision of March 12, 1945. The high authority of Judge Hand's opinions and the unusual circumstances in which *Alcoa* came to be decided give the case a place of preeminence in the history of ***antitrust law***. We do not believe, however, that another business which had three times in various forms been adjudged free from violation of the Sherman Act was required to abandon its well known form of operation before Judge Hand's view in *Alcoa* received the imprimatur of the Supreme Court, however inevitable it may now seem in retrospect. At the time it was well known that Alcoa could not be passed on by the Supreme Court, [18] and whether it would agree with Judge Hand's opinion could only **[**35]** be made known in another case, as **[*790]** it was a year later in *American Tobacco* on June 10, 1946.

[36]** We conclude, therefore, that United's conduct cannot be held to have violated *§ 2* of the Sherman Act at any time prior to June 10, 1946. We believe this is the effect to be given to the Government decree. The damages recoverable by Hanover therefore may not reach any earlier period.

Certification

United urges that the court below should have certified to the District Court in Massachusetts the questions dealing with the interpretation and effect of that court's decree. The obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United, speaks strongly in its favor. On the other hand, there is much to be said for a litigant's right to the judgment of the court which he invokes and for the view that the scope of the conclusions and decrees of sister federal courts, however complicated may be the litigation out of which they arose, may well be determined by an objective evaluation of

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to take the stand; in *Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966)*, to *Escobedo v. Illinois, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964)* and *Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)*, dealing with custodial police questioning of criminal suspects. See also *Butcher v. Philadelphia, 380 Pa. 290, 110 A.2d 349 (1955)*.

[17] *Simpson v. Union Oil Co., 377 U.S. 13, 24-25, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; see also *Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526, 536-37 (S.D.N.Y. 1964)*.

[18] The decision in Alcoa by the Circuit Court of Appeals for the Second Circuit was final because of the unique circumstances which surrounded the case. The district court had dismissed the complaint, ***United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941)***, and on a direct appeal the Supreme Court was without a quorum due to the disqualification of four Justices. The Court therefore transferred the case to a special docket and postponed further proceedings in the appeal until such time as there was a quorum of Justices qualified to sit in the case. ***320 U.S. 708 (1943)***. Congress thereafter amended *15 U.S.C. § 29* by the Act of June 9, 1944, ch. 239, 58 Stat. 272, which provided that in such circumstances the Court should certify the case to the appropriate circuit court of appeals, in lieu of a decision by the Supreme Court, and the decision of the circuit court of appeals should be final and unreviewable. Acting under the statute the Supreme Court certified the case to the Circuit Court of Appeals for the Second Circuit and it was in what Mr. Justice Frankfurter concurring in *United States v. United States District Court for the Southern District of New York, 334 U.S. 258, 265, 92 L. Ed. 1351, 68 S. Ct. 1035 (1948)* called "an extraordinarily rare, if not unique, situation in the history of the Court," that Judge Learned Hand's decision came to be written in Alcoa. See also *American Tobacco Co. v. United States, 328 U.S. 781, 811-12, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*.

what has been recorded in opinion and decree rather than by a subjective interpretation which may include in retrospect what was locked in the breast of the original judge.

In the circumstances which prevail in **[**37]** this case, however, we need not determine this interesting question. [19] United did not apply for certification of the questions relating to the meaning and effect of the Government decree during the lengthy trial in the court below. It did not even do so immediately after the opinion was filed in the district court on April 28, 1965. Instead, on May 21, 1965, United applied to Judge Wyzanski in the District Court in Massachusetts on notice to Hanover and the Government for construction or amendment of the Government decree. At a hearing on May 28, 1965 Judge Wyzanski declined to act on the ground of comity in view of the late stage of the case in the Middle District of Pennsylvania.

United contends with much force that Judge Wyzanski **[**38]** plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below. But whatever the parties may make of Judge Wyzanski's comments from the bench at that time, it was not until after the application was denied on May 28, 1965 that United, on June 9, 1965 in connection with its motion for a partial new trial applied for a certification by the court below to the District Court in Massachusetts of the questions relating to the effect of the Government decree.

We hold that in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion.

Statute of Limitations

The suit was filed before the effective date of the amendment ***HN11***[] of July 7, 1955 creating a federal four year statute of limitations in antitrust actions (*15 U.S.C. § 15b*). The parties are agreed that by virtue of the applicable Pennsylvania statute and various tolling provisions **[*791]** [20] the six-year period under the statute was extended backward so as to bar claims for conduct prior to July 1, 1939.

[39]** The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations.

Damages

1. *The Damages Within the Allowable Period*.

The court below held that as a result of United's unlawful monopolization Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market. It held that as a result Hanover was damaged in the period from July 1, 1939 through September 21, 1955 in the amount of $1,413,203, which when trebled amounted to $4,239,609.

The damage period, as we have already seen, must be limited to commence on June 10, 1946. In the present state of the record it is not **[**40]** clear that the court below was justified in fixing the end of the damage period at the date of the institution of the action. Section 9 of the Government decree required United to present to the court before "B Day" a detailed plan for terminating all outstanding leases and for converting the lessees' rights to ownership of the machines they then held. The plan was approved by Judge Wyzanski on June 1, 1955. The record shows that Hanover actually converted to ownership its previously leased machines sometime in October, 1955.

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[19] See *United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 1 L. Ed. 2d 465, 77 S. Ct. 490 (1957)*; see also Levin, InterJurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344 (1963).

[20] See ***245 F. Supp. at 294, n. 15***.

In these circumstances, the damage period ended on June 1, 1955 for on that date the conversion from leasehold to ownership was available to Hanover and the unlawful lease only policy had ended.

Accordingly, no damages may be allowed for the period between June 1, and September 21, 1955, [21] or, as we have already determined, for the period prior to June 10, 1946. Since there is no division in the record of the damages for either of these two periods, it will be necessary to award a new trial on the issue of damages so that the proof may be broken down to show what damages, if any, were sustained during the allowable period.

[41]** A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial.

2. *Cost of Capital*.

United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as "the rate of return expected by investors on capital funds they place at . . . a concern's disposal," after hearing the conflicting testimony of expert economists called by each party. It found that "cost of capital" is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to justify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of **[**42]** general agreement in its application and that in **[*792]** any event it was not a proper element in the calculation of damages but was only a guide to investment.

The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation.

3. *Tax Benefits*.

The court below held that whatever tax advantages Hanover obtained by the leasing system could not be considered in reduction of the amount of Hanover's recovery. It did so on the grounds that generally in tort and breach of contract actions taxes are not considered in assessing damages [22] and that any recovery by Hanover would be subject to taxation. It relied upon Judge Goodrich's statement in the passing-on trial that whatever happens after the injury which permits an injured plaintiff to escape some of the consequences of the wrong done him does not inure to the benefit of the defendant. [23] It therefore held that tax consequences to Hanover such as deductions for rents and royalties of leased machines and capital **[**43]** gains treatment for machines if owned and later sold were extraneous and were not to be considered.

In this we think the court below erred. What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required. In making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made. It therefore was significant in determining whether Hanover, if it had been able to do so, would have purchased the machinery which it leased from United, to evaluate the respective tax consequences of purchase and of lease and their financial impact. Since these tax consequences are so inherently a part of the choice which would be made and since the court below has found that Hanover would have chosen **[**44]** to buy rather than lease the machinery, the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it. The excess of one

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[21] Of course, the credit for salvage value should be computed as of that date.

[22] Citing annotations in 63 A.L.R.2d 1393 and 1433.

[23] *185 F. Supp. at 829*.

over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation. We deal here not with subsequent tax effect on damages inflicted, but rather with damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance. This is as realistic an element as the deduction which the court below required in order to reflect the fact that United serviced its machines as lessor, a duty which Hanover itself would have had to assume and pay for if it had been the owner of the machines. [24] In the same way, if Hanover had owned rather than leased the machines it would not have had the benefit of tax deductions for the rental and royalty payments to United and would have been subject to capital gains tax on the sale of any machines it sold at more than depreciated book value. It would be a distortion of reality to permit Hanover to recover damages **[**45]** on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed.

Hanover's damages therefore must be diminished by permitting United to show the favorable tax consequences which **[*793]** Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery. We do no more than require accuracy in the calculation of the relative financial cost of leasing compared to buying the machinery, which must include those elements which a business corporation would necessarily consider in choosing between the two alternatives.

Hanover's Cross-Appeal

Hanover in its cross-appeal attacks the district court's exclusion **[**46]** from its recoverable damages of those damages attributable to the unavailability of the United Goodyear Outsole Rapid Lockstitch Machine ("ORL") for the period 1939-1955, which it claimed amounted to $324,356. [25]

The court below excluded the item on the ground that another manufacturer's equipment, known as the Landis Stitcher, was available to Hanover and would have been satisfactory for its operations. [26] Hanover maintains that there is no evidence to support the conclusion that the Landis Stitcher was a satisfactory substitute for the ORL. It therefore seeks to have its damage judgment increased by threefold the amount of $324,356.

Even if Hanover's contention is correct, the present record does not permit an award of damages for this item. For **[**47]** the amount of $324,356 stretches over the period from 1939 to 1955 and we cannot allocate it within the allowable period beginning June 10, 1946 and ending June 1 1955 reconsideration as part of the retrial on damages. When evidence haent from what is now before us. In these circumstances, therefore, whe conclusion that the Landis Stitcher could be used satisfactorily in Hanover's welt shoe manufacturing as a substitute for the ORL machine.

Counsel Fees

The court below allowed to Hanover an attorneys' fee of $600,000 for the services of New York counsel and $50,000 for the services of Pennsylvania counsel. United objects that the allowances are excessive.

The district court tested the reasonableness of the fees, especially to New York counsel, not only by the hours devoted to the case, but also by the percentage of the recovery in its original and trebled amounts. See *245 F. Supp. at 303-4*. Since the period for which damages may be awarded is now being reduced and a retrial will be held on damages, it will be for the court below to determine the reasonable fees which should be made to counsel in the light of whatever new award it may make on damages.

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[24] See ***245 F. Supp. at 287***.

[25] See ***245 F. Supp. at 299, 302***.

[26] ***245 F. Supp. at 283***.

[48]** We will therefore vacate the award of counsel fees and order counsel fees to be redetermined in the light of whatever damages the court may find on the rehearing.

Conclusion

In United's appeal (Appeal No. 15626) the judgment of the court below will be vacated as to damages and a new trial will be awarded limited to damages, in accordance with this opinion; and the award of counsel fees in the amount of $600,000 for the services of Donovan, Leisure, Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris will be vacated for further proceedings in accordance with this opinion.

In Hanover's appeal (Appeal No. 15627) the judgment will be vacated so that the issue therein raised may be reconsidered as part of the retrial of damages.

Royal Crown Cola Co. v. Coca-Cola Co.

United States District Court for the Northern District of Georgia, Atlanta Division.

May 16, 1967.

Civil Action No. 10,129.

Reporter

1967 U.S. Dist. LEXIS 11191 *; 1967 Trade Cas. (CCH) P72,176

Royal Crown Cola Co. v. Coca-Cola Co., Coca-Cola Bottling Co., Atlanta Coca-Cola Bottling Co., Arthur Montgomery, Atlanta Braves, Inc., Automatic Retailers of America, and The City of Atlanta and Fulton County Recreation Authority.

Core Terms

Interrogatory, documents, discovery, objected, products, requests, inducement, antitrust, business record, good cause, questions, drink, confidential, suppliers, Cola

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

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

Under *15 U.S.C.S. § 14* of the Clayton Act, a plaintiff must establish that a defendant is involved in interstate commerce, that sales or contracts for the sale of goods are made on the condition or agreement that goods of competitors will not be carried, and that the effect of such condition or agreement is to substantially lessen competition or tend to create a monopoly.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN2[] **Methods of Discovery, Inspection & Production Requests**

The basic purpose of the Federal Rules of Civil Procedure, and in particular the intent of the discovery rules, is to lay open all relevant facts in an effort to reach the truth. Thus, relevancy is the key. Of course, in the instance of documents, mere relevancy does not suffice, as a party seeking production must show good cause.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN3[] **Discovery, Privileged Communications**

No protective cloak shrouds so called "confidential" business information when it is relevant and necessary to the litigation at hand.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN4[] **Regulated Practices, Trade Practices & Unfair Competition**

In an action under the antitrust laws, based upon an alleged abuse of competition, a competitor's business records, where good cause is shown, are not only not immune from inquiry, but the records are precisely the source of the most relevant evidence.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN5[] **Methods of Discovery, Inspection & Production Requests**

Because a plaintiff's right to recover must be determined as of the time of institution of a suit, discovery is necessarily so limited to the time prior to the institution of such suit. However, the above-enumerated principle is not a rule which must be strictly followed even in instances where such adherence would be contrary to simple reason.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN6[] **Methods of Discovery, Inspection & Production Requests**

Absent a proper motion for production, the court may not issue an order to that effect.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN7[] **Methods of Discovery, Inspection & Production Requests**

Though good cause cannot be equated with relevancy in the general case, in instances where documents sought are business records, the applicable test often becomes one of relevancy. While there may be wide variation in the appraisal of practical considerations in particular cases, these considerations are resolved into a judgment as to the extent to which a moving party's not having documents will embarrass it in its preparation for trial. Inevitably this judgment must turn upon a party's ability to explore fully the facts of a case through other sources or by other means. In the case of business records, this two-factor test, relevancy plus need, often resolves itself into a question of simple relevancy, for the exclusive possession of information through which a claim or defense must be established is so plain as to make the requirement of a showing little more than a requirement of a recitation.

Opinion by: [*1] MORGAN

Opinion

MORGAN, District Judge: The above-styled action is presently before the Court on numerous motions concerning discovery pursuant to *Rules 33* and *34 of the Federal Rules of Civil Procedure*. The essence of the problem is that the plaintiff seeks to obtain information and documents which the various defendants seek to withhold.

The volume and breadth of the objections necessitates that each objection of the individual defendants be dealt with separately; however, the Court is of the opinion that certain general principles and observations are relevant to the objections as a whole and that thus a general discussion would be of value before proceeding to an examination of each specific objection.

First, the instant action involves an alleged antitrust violation and, as such, there are numerous critical elements which the plaintiff must establish in order to establish its case. ***HN1***[] Under Title *15, U.S.C., § 14* of the Clayton Act, the plaintiff must establish that the defendants are involved in interstate commerce, that sales or contracts for the sale of goods were made on the condition or agreement that goods of competitors would not be carried, and that the effect of such **[*2]** condition or agreement is to substantially lessen competition or tend to create a monopoly. The plaintiff further contends that the defendants violated Title *15, U.S.C., § 1* of the Sherman Anti-Trust Act by entering into a conspiracy to restrain trade and competition.

It is obvious that a wide gamut of information is both material and necessary to establish the above-enumerated elements of an antitrust action.

Second, ***HN2***[] the basic purpose of the Federal Rules of Civil Procedure, and in particular the intent of the discovery rules, is to lay open all relevant facts in an effort to reach the truth.Thus, relevancy is the key and, as noted previously, there is a wide realm of relevant information in antitrust actions.Of course, in the instance of documents, mere relevancy does not suffice, as the party seeking production must show good cause.

In sum, ***HN3***[] no protective cloak shrouds socalled "confidential" business information when it is relevant and necessary to the litigation at hand. This Court concurs with the statement of the Court in *Service Liquor Distributors v. Calvert Distillers Corp. , 16 F.R.D. 507 (1954)*, which took the position that ***HN4***[] ". . . in an action under the antitrust **[*3]** laws, based upon an alleged abuse of competition, a competitor's business records, where good cause has been shown, are not only not immune from inquiry, but they are precisely the source of the most relevant evidence."

At this point the Court will proceed to examine the individual objections of the separate defendants.

Royal Crown Cola v. Atlanta Coca-Cola Bottling Company

The defendant Atlanta Coca-Cola Bottling Company has filed objections to plaintiff's Interrogatories Nos. 17, 18, 19, 20, 21, 22 and 23. The plaintiff has conceded that Interrogatories Nos. 20 and 23 are improper in that both seek to obtain documents which must properly be sought under *Rule 34*.

Interrogatories Nos. 18, 19 and 22 request the names and job titles of individuals having custody or control over certain business records and identification of the specific records over which each particular individual has control. The defendant's objections to these interrogatories are without merit and, hence, the defendant Atlanta Coca-Cola is ordered to answer Interrogatories Nos. 18, 19 and 22.

Interrogatories Nos. 17 and 21 request information regarding the cost of production and sales, along with the **[*4]** net profit derived, of the goods sold to defendant Automatic Retailers of America. This information is relevant for two purposes: (1) the information regarding net profits is relevant to the question of damages, and (2) the information regarding cost and profit may lead to evidence of price concessions made in return for exclusivity. Thus, Interrogatories Nos. 17 and 21 must be answered by defendant Atlanta Coca-cola Bottling Company.

With regard to depositions, Mr. Richard Horsey was instructed not to answer numerous questions propounded by plaintiff's attorneys. After a careful examination of all the questions which were asked of Mr. Horsey, the Court has concluded that all of the questions are relevant and must be answered.

Though it should be unnecessary for the Court to pinpoint obvious relevancy, the attorneys for the defendant Atlanta Coca-Cola Bottling Company apparently desire such an exercise. Thus, the Court will briefly and summarily point out the relevancy. Question (1) (designations are percounsel for plaintiff) requests information regarding the competitive standing of Coca-Cola's lemon-lime drink and of its orange drink. Coca-Cola has asserted as one of **[*5]** its defenses that Coca-Cola products, and Coca-Cola products alone, are sold at the stadium because they are the most popular in the Atlanta area. The plaintiff merely seeks information regarding this claim. Question (2) requests information regarding a conversation Mr. Horsey had with one of the defendants regarding Coca-Cola's TV/radio sponsorship of the Braves' games. Even though such conversation was held after the date that the instant case was filed, the subject discussed pertained to a matter material to the instant litigation.

Questions (3) and (6) are relevant in that they request information regarding the impact on interstate commerce.Questions (4) and (5) request information regarding general practices of exclusive contracts and of excluding competitors' products where defendant's products are sold.

Thus, all questions asked Mr. Richard Horsey are relevant and reasonable, and he is ordered to respond.

Royal Crown Cola v. Automatic Retailers of America

Defendant Automatic Retailers of America, hereafter referred to as ARA, has objected to plaintiff's Interrogatories Nos. 3(f), 19, 20, 23 and 24.

Interrogatory No. 3(f) requests information regarding any inducement **[*6]** given by defendant ARA to the defendant Atlanta Braves in order to obtain the right to act as concessionaire. Defendant ARA objects to this question on the ground that the information sought is clearly irrelevant.The alleged irrelevancy is not so clear to the court. The inducement could well have been in the nature of an agreement that the Braves could dictate the products to be sold without regard to competitiveness, and, as such, could represent a tying agreement in violation of the antitrust statutes. The plaintiff has alleged a conspiracy among the defendants; the Court is of the opinion that the inducement could have entered into the promulgation of such conspiracy. Thus, Interrogatory No. 3(f) seeks relevant information which could lead to the discovery of admissible evidence and, as such, must be answered.

Before proceeding to a specific examination of the remaining objections, there is one point which is of a recurring nature and which should be disposed of at this time. The defendants have objected to numerous attempts at discovery by the plaintiff on the basis that the information sought relates to a time subsequent to the time the instant action was filed.

The **[*7]** Court is aware of the line of decisions which state the general principle that ***HN5***[] because a plaintiff's right to recover must be determined as of the time of institution of the suit, discovery is necessarily so limited to the time prior to the institution of such suit. However, the Court is also aware that the above-enumerated principle is not a rule which must be strictly followed even in instances where such adherence would be contrary to simple reason.

In the instant case, the plaintiff has alleged a continuing conspiracy and has requested injunctive relief. Further, it has made clear to the Court its intention of requesting leave to amend prior to trial in order to allege accrued damages. Under these circumstances, the Court is of the opinion that the objections of the defendants regarding the time period subsequent to the filing of the instant action are without merit.See *Conmar Products Corp. v. Lamar Slide Fastener Corp. , 2 F.R.D. 154 (1941)*; *Radio Corporation of America v. Rauland Corp. , 18 F.R.D. 440 (1955)*.

Interrogatories Nos. 19 and 20 request the names and addresses of all suppliers to ARA and of all products supplied. Such information is relevant in that it may **[*8]** lead to the discovery that producers and suppliers of other goods have been excluded because of their failure to contract for advertising time or for some other reason which could constitute a violation of ***antitrust law***. In essence, how the defendants dealt with other prospective suppliers may be indicative of the course of dealing with the plaintiff. The defendant ARA is ordered to respond to Interrogatories Nos. 19 and 20.

Interrogatory No. 23 requests information regarding inducements given ARA by suppliers whose goods are handled at the stadium, and for the reasons stated above such information may lead to admissible evidence.

The Court is aware that at an oral hearing it concluded that the scope of discovery should exclude information regarding inducements received from suppliers other than soft drink manufacturers; however, after careful reconsideration, the Court has concluded that information concerning such inducements may well lead to admissible evidence concerning a course of business or method of dealing utilized by the defendant. Thus, the Court overrules its order made at the oral hearing, and the defendant is ordered to respond to Interrogatory No. 23.

Interrogatory **[*9]** No. 24 requests the name, address and job title of the individuals who have custody or control over certain business records, and, as such, the defendant's objection that the information sought is confidential is without merit. Defendant ARA is ordered to respond to Interrogatory No. 24.

With regard to the contract between the Braves and ARA which has been given to the plaintiff with certain deletions, the defendant is ordered to produce the deleted material regarding the loan arrangement, as such agreement is relevant in that it shows the relationship between ARA and the Braves, the degree of influence or control the Braves have over ARA, and is relevant with regard to the inducement given. The remaining deleted portions need not be provided.

Royal Crown Cola v. Coca-Cola Company

Defendant Coca-Cola Company has objected to two interrogatories and has objected to several other lines of discovery. Interrogatory No. 27 asks for information regarding the gross sales of each of the products sold by the Coca-Cola Company. This interrogatory has been objected to on the ground that the information sought is irrelevant and confidential.

As the Court noted previously, there is **[*10]** no absolute privilege which protects trade secrets or business information labeled confidential from discovery. With regard to relevance, it has been alleged that Coca-Cola products are sold in the Atlanta Stadium because of their local and national popularity. The plaintiff has a right to challenge the validity of such a defense. Naturally, the Coca-Cola Company is in a position to know whether or not it is the dominant factor in all lines of soft drinks, but neither the plaintiff nor the Court is in a position to know if the defendant's diet cola, lemon-lime drink, etc., are truly the most popular.

Thus, the figures sought by Interrogatory No. 27 are relevant and the defendant is ordered to answer Interrogatory No. 27. In view of the confidential nature of the information sought, the Court will entertain a motion for an appropriate protective order if filed by the defendant. See United States v. National Steel Corp. , 26, F.R.D. 599 (1960).

Interrogatory No. 29 requests information regarding the advertising expenditures of the defendant. One of the basic thrusts of the plaintiff's complaint is that the defendant utilized its vast resources to exclude competition in the **[*11]** Atlanta Stadium, and these resources include advertising expenditures. As the information sought is relevant to the instant case, the defendant is ordered to respond to Interrogatory No. 29. Here, again, the Court will consider an appropriate protective order.

The plaintiff seeks to obtain a copy of the contract the defendant has with the Schlitz Brewing Company regarding sponsorship of the Houston baseball club. The plaintiff has made no motion for production pursuant to *Rule 34*, and, thus, the matter is not formally before the Court. The Court is of the opinion that, assuming the proper motion under *Rule 34* is made along with a showing of good cause, the contract is discoverable. However, ***HN6***[] absent the proper motion, the Court may not issue an order to that effect at this time.

The final point of contention between the plaintiff and the defendant Coca-Cola Company is the refusal of the defendant's employees to state what portion of the national soft drink market they believe the defendant has. The same reasoning applicable in the Court's order to respond to Interrogatory No. 29 is applicable here. Thus, the employees in question have been erroneously instructed to refuse **[*12]** to respond.

Royal Crown Cola v. Atlanta Braves, Inc.

The defendant Atlanta Braves, Inc., has objected to numerous interrogatories and a large portion of the plaintiff's motion to produce. May of the objections, particularly those to certain interrogatories, are at best frivolous and, as such, represent an unwarranted and unnecessary drain on the Court's time and patience. For example, plaintiff's Interrogatory No. 3 requests information concerning the existence and nature of certain documents. The defendant has objected to this interrogatory on the basis that it seeks production of documents absent a showing of good cause pursuant to *Rule 34*.

Clearly, the interrogatory in question seeks information regarding the existence and nature of certain documents; it does not seek their production.

The Court feels that the objection used as an example above is illustrative of many of the Braves' objections, and for that reason will not deal at length nor explore the specific rationale behind its decision to uphold or overrule each specific objection.

The Braves are ordered to respond to Interrogatories Nos. 3, 4, 6, 7, 12, 13, 15, 16, 17, 20 and 21. Interrogatory No. 9 asks **[*13]** whether the Braves will produce certain documents without a *Rule 34* motion, and, as the answer is obvious, the Braves need not respond. The foregoing is true with respect to the portion of Interrogatory No. 14 which asks the same question; however, the Braves are ordered to answer the remaining portion of Interrogatory No. 14.

One of the defendant's most adamant objections to the plaintiff's motion to produce is that the documents sought are not described with sufficient particularity, yet the defendant objected to the interrogatories which sought information regarding the nature and description of particular documents.Thus, the Court is reluctant to concur with the rationale of the defendant's objections.

A large majority of the documents sought by the plaintiff in its motion for production are business records and materials. ***HN7***[] Though good cause cannot be equated with relevancy in the general case, in instances where the documents sought are business records, the applicable test often becomes one of relevancy. According to Moore,

". . . while there may be wide variation in the appraisal of practical considerations in particular cases, these considerations resolve themselves **[*14]** into a judgment as to the extent to which the moving party's not having the documents will embarrass it in its preparation for trial. Inevitably this judgment must turn upon the party's ability to explore fully the facts of the case through other sources or by other means. In the case of business records, this two-factor test, relevancy plus need, often resolves itself into a question of simple relevancy, for the exclusive possession of the information through which the claim or defense must be established is so plain as to make the requirement of a showing little more than a requirement of a recitation." Moore's Federal Practice , Vol. 4, P34.08, pp. 2479-2482. This position has been adopted and recognized as proper even by the Courts which have insisted on a strong showing of good cause. E.g. *Guilford National Bank v. Southern Rwy. , 297 F.2d 921 (1962)*.

Accordingly, the following objections are overruled and the defendant is ordered to produce the documents called for in the following paragraphs of the plaintiff's motion for production: all documents requested in Paragraphs 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 37, 39 and 40. The defendant **[*15]** is also ordered to produce the documents requested in Paragraph 36 with the exception of the information requested for the years 1957 and 1958.

The objection to the material sought in Paragraph 38 is upheld, as the plaintiff may readily obtain such material from other sources.

The final question concerns a letter which the plaintiff contends is privileged and which is in the hands of the defendant. Inasmuch as the letter obviously has been read by the defendants, the matter would appear to be moot with regard to discovery. The question of privilege would properly arise at a later date in regard to admissibility as evidence.

In conclusion, all parties are directed to act in accordance with the orders contained in this opinion.

It is So Ordered.

Holmes v. Struthers Scientific & International Corp.

United States District Court for the Western District of Pennsylvania

May 25, 1967

No. 16-67 Erie

Reporter

268 F. Supp. 122 *; 1967 U.S. Dist. LEXIS 11274 **; 155 U.S.P.Q. (BNA) 167 ***

Alton B. HOLMES doing business as Alton B. Holmes & Co., Plaintiff, v. STRUTHERS SCIENTIFIC AND INTERNATIONAL CORPORATION, a Delaware corporation, Defendant

Core Terms

patent, infringement, machines, anti-trust, autoclaving, declaratory judgment action, cause of action, purchasers, standing to bring, concrete block, manufacturing, litigating, customers

LexisNexis® Headnotes

Civil Procedure > Judgments > Declaratory Judgments > General Overview

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

Patent Law > Remedies > Declaratory Judgments

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

Patent Law > Originality > Joint & Sole Inventorship

HN1[] **Judgments, Declaratory Judgments**

The requisite standing to bring a declaratory judgment action challenging the validity of a patent is determined by traditional notions of cases and controversies.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Patent Law > Remedies > Declaratory Judgments

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN2[] **Judgments, Declaratory Judgments**

Allegation and proof by a vendor that it is engaged in a course of conduct, the sale of machinery, which has brought and must bring purchasers from it into conflict with the owner of the patent is sufficient to support a suit for declaratory judgment by the vendor.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

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

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN3[] **Case & Controversy Requirements, Actual Controversy**

An actual controversy exists although the patentee exerts every effort to avoid entanglement in litigation with a particular alleged infringer seeking the declaration.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Remedies > Declaratory Judgments

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Patent Law > ... > Specifications > Definiteness > Precision Standards

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN4[] **Regulated Practices, Intellectual Property**

A cause of action based on fraudulent procurement of a patent may be pleaded if other elements of an anti-trust cause are also pleaded.

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

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

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

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

Civil Procedure > Pretrial Matters > Conferences > General Overview

HN5[] **Discovery, Methods of Discovery**

For further information necessary to form an answer or reply, the opposing party may look to the procedures provided for motions for more definite statement under *Fed. R. Civ. P. 12(e)*; discovery under *Fed. R. Civ. P. 26-35*; summary judgment under *Fed. R. Civ. P. 56*; and the pretrial conference procedure of *Fed. R. Civ. P. 16*.

Counsel: [1]** Blenko, Leonard & Buell, Pittsburgh, Pennsylvania, for plaintiff.

Webb, Burden, Robinson & Webb, Pittsburgh, Pennsylvania, for defendant.

Judges: Weber, District Judge.

Opinion by: WEBER

Opinion

[*167] [*122]** WEBER, District Judge.

The plaintiff has brought a declaratory judgment action requesting, among other things, that certain United States letters of patents Nos. 3,275,724 [known as '724], and 3,171,507 [known as '507] which are owned by the defendant be declared invalid. The plaintiff asks that it be declared that the use of the machines which it sells do not infringe upon defendant's above-named patents. In separate paragraphs, but under the same count, the plaintiff seeks a remedy based on the anti-trust laws, *15 U.S.C.A. §§ 1*, *2* and *3*, asking for treble damages based on defendant's conduct in acquiring and using the above patents.

The defendant has moved to dismiss the declaratory judgment action asserting that the plaintiff does not have the requisite standing to bring an action litigating patent '724. Apparently the defendant does not contest the plaintiff's **[*123]** standing to challenge the validity of patent '507.

The patents in question here relate to the manufacture **[**2]** of concrete blocks. Patent '724 covers a "method of autoclaving concrete blocks." Patent '507 related to a "muffler for fired heater **[***168]** autoclave system." In short, patent '507 is a patent covering the construction of certain machinery which is used for autoclaving concrete blocks and patent '724 covers the process of using the machinery in autoclaving concrete blocks.

The plaintiff is in the business of manufacturing and selling autoclaving equipment. Customers of the plaintiff use this equipment to produce finished concrete blocks. Defendant is a competitor of the plaintiff in manufacturing and selling autoclaving equipment.

The defendant has neither brought suit nor threatened suit against the plaintiff for infringement of patent '724. The defendant has brought suit against two of plaintiff's customers (in the Western District of New York) for infringement of defendant's patents in the use of plaintiff's autoclaving equipment in their manufacturing processes.

The defendant asserts that plaintiff has no standing to litigate the validity of patent '724. Defendant's position in their brief is that "* * * there is no allegation in this complaint that plaintiff is engaged in the **[**3]** manufacture of any other article requiring the performance of any method of autoclaving. Nor does the plaintiff allege that he has any interest in or control over any process carried out by the purchaser of equipment purchased from him." In short, the defendant contends that plaintiff has standing to bring a declaratory judgment action only when it is in a position to be sued for infringement or for contributory infringement of the patent, by the owner.

The plaintiff offers a threefold argument to support its standing to bring this action. (1) Purchasers of plaintiff's equipment have been sued for infringement of patent '724. Those suits are pending trial in the Western District of New York. (2) The present record does not exclude a contention that the plaintiff is a contributory infringer, in which case, standing would be established under *35 U.S.C. § 271(c)*. (3) The plaintiff gave its customers a warranty of title under *Uniform Commercial Code 2-312(3)*, and for this reason contends that it has an interest in the machines that its customers purchased which are the object of the defendant's infringement actions in the Western District of New York.

HN1[] The requisite standing to **[**4]** bring a declaratory judgment action challenging the validity of a patent is determined by traditional notions of cases and controversies. See *Dewey & Almy Chemical Co. v. American Anode, 137 F.2d 68 at 70 (3rd Cir., 1943)*.

In *Alfred Hofmann, Inc. v. Knitting Machines Corp., 123 F.2d 458 (3rd Cir., 1941)*, a declaratory judgment action was brought challenging the validity of five patents controlled by the defendant. The plaintiff in that action sold the machines using the patented parts after the patents came under the defendant's control. The defendant had never threatened the plaintiff with an infringement action but had threatened purchasers of the plaintiff's machines with such suit. The Court held that the plaintiff had the requisite standing to bring the action.

> "While it is true that Knitting Machines Corporation cannot maintain a suit for infringement of the last two Miller patents against Alfred Hofmann, Inc., because the plaintiff had not sold a Schubert and Salzer knitting machine after the issuance of the patents, none the less, Knitting Machines Corporation can maintain a suit for infringement of these patents against any purchaser of Schubert and Salzer machines **[**5]** * * * who uses the machines after the issuance of the patents." (p. 460)

On the general question of standing:

> "We are of the opinion that the ***HN2***[] allegation and proof by a vendor that it is **[*124]** engaged in a course of conduct, the sale of machinery, which has brought and must bring purchasers from it into conflict with the owner of the patent is sufficient to support a suit for declaratory judgment by the vendor." (p. 461).

The factual situation in *Aralac, Inc. v. Hat Corporation of America, 166 F.2d 286 (3rd Cir., 1948)*, is different from either the present case or that in *Alfred Hofmann, Inc., supra.* In *Aralac* the plaintiff sold a staple commodity which did not necessarily have to be used by purchasers in a process that infringed upon defendant's patent. In the present case it appears that the only uses the plaintiff's machines may be put to practical use is in a manner which infringes upon the defendant's patent '724. Furthermore, neither the plaintiff nor the plaintiff's customers in Aralac were even threatened with litigation charging infringement.

Under the defendant's theory of standing it would be possible for the defendant to avoid pressing **[**6]** an infringement suit directly against the plaintiff but cause it severe economic hardship by other such suits without giving the plaintiff the opportunity to litigate the validity of defendant's patent. **[***169]** Such a narrow interpretation of the case or controversy is not favored.

> "Certainly the fact that Anode had never made any direct threat to sue Dewey & Almy is not conclusive of the problem. *E. W. Bliss Co. v. Cold Metal Process Co., 6 Cir., 1939, 102 F.2d 105*, ***HN3***[] an actual controversy was held to exist although it was evident that the patentee was exerting every effort to avoid entanglement in litigation with the particular alleged infringer seeking the declaration. * * *". *Dewey & Almy Chemical Co. v. American Anode, 137 F.2d 68, at p. 70 (3rd Cir., 1943)*.

The defendant also moves under *Fed.R. of Civ.P., Rule 12(f)* to strike paragraphs numbered 16 and 17 of plaintiff's complaint. These paragraphs contain the allegation on which the plaintiff bases its anti-trust action. The defendant contends that these allegations are impertinent, immaterial, scandalous, and relate to an equitable defense which are not properly raised in a complaint for Declaratory Judgment litigating **[**7]** the validity of a patent.

The plaintiff's position is that paragraphs numbered 16 and 17 relate solely to an anti-trust cause of action which is separate and apart from the declaratory judgment action litigating the validity of the patent. Under the liberal federal rule of joinder of several causes of action in one complaint the plaintiff contends that the pleading is proper, even though the anti-trust cause of action is not brought under a separate count in the complaint.

While Walker Process Equipment, Inc. v. Food Machinery, etc., 382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247, did not pass specifically on the merits of an anti-trust cause of action based on fraudulent procurement of a patent, it did hold that such ***HN4***[] a cause of action may be pleaded if other elements of an anti-trust cause are also pleaded.

The plaintiff should have properly pleaded his anti-trust action under a separate count. However, as the pleading now stands, the defendant is fully aware that the plaintiff is bringing an anti-trust cause of action along with the Declaratory Judgment action on the patent. If the defendant wants a more precise and definite statement of the plaintiff's anti-trust cause **[**8]** of action he may proceed as suggested in 24 Moore's Federal Practice, § 8.17 [3], p. 1752:

> "For ***HN5***[] further information necessary to form an answer or reply, the opposing party may look to the procedures provided for motions for more definite statement under *Rule 12(e)*; discovery under Rules 26-35; summary judgment under *Rule 56*; and the pretrial conference procedure of *Rule 16*."

Defendant's motion to dismiss and motion to strike denied.

Denver & R. G. W. R. Co. v. United States

Supreme Court of the United States

March 16, 1967, Argued ; June 5, 1967, Decided

No. 305

Reporter

387 U.S. 485 *; 87 S. Ct. 1754 **; 18 L. Ed. 2d 905 ***; 1967 U.S. LEXIS 2783 ****; 1967 Trade Cas. (CCH) P72,116

DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. v. UNITED STATES ET AL.

Prior History: [**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

Disposition: 255 F.Supp. 704, reversed and remanded.

Core Terms

stock, public interest, railroads, carrier, Clayton Act, anticompetitive, shares, acquisition, issuance, antitrust, transport, consolidations, approving, district court, defer, stockholders, acquire, circumstances, deferral, controlling issue, additional share, questions, immunity, effects, merger, lawful object, authorize, ownership, proposed transaction, anti trust law

LexisNexis® Headnotes

Securities Law > ... > Registration of Securities > Exemptions > Exempt Classes of Securities

Transportation Law > Interstate Commerce > Federal Powers

HN1[] Exemptions, Exempt Classes of Securities

49 U.S.C.S. § 20a.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN2[] Regulated Industries, Transportation

49 U.S.C.S. § 5(2)(a)(i) authorizes any carrier, with the approval and authorization of the Interstate Commerce Commission, to acquire control of another through ownership of its stock or otherwise.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Civil Procedure > Judgments > Relief From Judgments > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

15 U.S.C.S. § 18, provides in pertinent part that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of another corporation engaged also in commerce, where in any line of 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.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN4[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, § 5(11), 49 U.S.C.S. § 5(11), provides that any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized shall be and they are relieved from the operation of the antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN5[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act § 11, *15 U.S.C.S. § 21*, provides in pertinent part that: (a) authority to enforce compliance with the Clayton Act § 7 by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; and (b) whenever the Commission shall have reason to believe that any person is violating § 7, the Commission shall issue a complaint containing a notice of a hearing. The person so complained of shall have the right to show cause why an order should not be entered by the Commission requiring such person to cease and desist from the violation.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN6[] **Regulated Industries, Transportation**

The Interstate Commerce Commission is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances.

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] **Antitrust & Trade Law, Clayton Act**

A company need not acquire control of another company in order to violate the Clayton Act.

Lawyers' Edition Display

Summary

An express company and a motor carrier entered into an agreement, subject to Interstate Commerce Commission approval, whereby the express company agreed to issue 500,000 shares of its stock to the motor carrier at $ 20 per share and the motor carrier offered, for 60 days following its acquisition of the 500,000 shares, to purchase an additional 1,000,000 shares of the express company's outstanding stock at the same price. The Interstate Commerce Commission approved the issuance without hearing, ruling that investigation of the "control" and "anticompetitive" issues would be deferred. A three- judge United States District Court for the District of Colorado sustained the Commission's order. (*255 F Supp 704*.)

On direct appeal, the Supreme Court of the United States reversed. In an opinion by Brennan, J., expressing the views of six members of the court, it was held that while the possibility that the motor carrier might not increase its holdings within the 60-day period might justify deferring resolution of the control issue, it did not justify delay in considering the anticompetitive effects of the acquisition of the 500,000 shares.

White, J., concurring in part and dissenting in part, stated his agreement that a hearing as to competitive factors should have been held before approval of the stock issuance, but also stated that the Commission may approve a carrier's stock issuance even if there would be a probable lessening of competition.

Harlan, J., joined by Stewart, J., dissented on the grounds that antitrust matters are inapposite in a proceeding for approval of a stock issuance, and that in any event consideration of the antitrust issues was properly postponed.

Headnotes

INTERSTATE COMMERCE COMMISSION §41 > issuance of securities -- investigation -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Under 20a of the Interstate Commerce Act (49 USC 20a), which forbids any carrier to issue capital stock until investigation by the Interstate Commerce Commission of the purposes and uses of the proposed issue and the proceeds thereof and issuance of a Commission order authorizing the issue after findings that the issue is for some "lawful object" and is compatible with the "public interest," the Commission's consideration is not limited to an inquiry into fiscal manipulation; the Commission is not required to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws, and must give at least some degree of consideration to control and anticompetitive consequences when suggested by the circumstances surrounding the particular transaction.

INTERSTATE COMMERCE COMMISSION §39 > merger -- authorization -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

The Interstate Commerce Commission is required to weigh anticompetitive effects in approving applications for merger or control under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Commission to grant such applications only if "consistent with the public interest."

INTERSTATE COMMERCE COMMISSION §41 > stock issues -- duties -- > Headnote:
LEdHN[3][] [3]

The foundations of the Interstate Commerce Commission's obligation under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Commission to grant applications for merger or control only if "consistent with the public interest," are largely applicable as well to 20a of the statute (49 USC 20a), which empowers the Commission to permit stock issues only for some "lawful object" compatible with the "public interest."

INTERSTATE COMMERCE COMMISSION §39 > mergers -- stock issues -- > Headnote:
LEdHN[4][] [4]

Both 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to grant applications for merger or control only if "consistent with the public interest," and 20a of the statute (49 USC 20a), which empowers the Commission to permit stock issues only for some "lawful object" compatible with the "public interest," must be read in the context of overall Commission responsibilities, including the responsibility under 11 of the Clayton Act (*15 USC 21*) to enforce that statute's provisions and the responsibility to advance the National Transportation Policy.

INTERSTATE COMMERCE COMMISSION §41 > stock issue -- principles -- > Headnote:
LEdHN[5][] [5]

In a proceeding before the Interstate Commerce Commission under 20a of the Interstate Commerce Act (49 USC 20a) for approval of an issuance of stock, the same broad principles apply as in a proceeding under 20a(12) for authority for an interlocking directorate and under 5 (2) for authority for a merger.

INTERSTATE COMMERCE COMMISSION §13 > stock issuances -- hearing -- review -- > Headnote:
LEdHN[6][] [6]

Under the general rule that the Interstate Commerce Commission must, before approving stock issuances pursuant to 20a of the Interstate Commerce Act (49 USC 20a), consider the control and anticompetitive consequences of the issuance, the Commission need not grant a hearing in every case and may defer consideration of issues whicht arise when special circumstances are present, but when the Commission exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the Commission's statutory obligations to protect the public interest and to enforce the antitrust laws.

INTERSTATE COMMERCE COMMISSION §179 > discretion -- stock issuance -- > Headnote:
LEdHN[7][] [7]

In a proceeding under 20a of the Interstate Commerce Act (49 USC 20a) for Interstate Commerce Commission approval of a stock issuance, the question whether the Commission has abused its discretion in approving an issuance without first considering important control and competition issues depends upon the transaction approved, its possible consequences, and any justifications for the deferral.

INTERSTATE COMMERCE COMMISSION §39 > control -- > Headnote:
LEdHN[8][] [8]

Under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve applications for merger or control only if consistent with the public interest, control must be judged realistically, and is a matter of degree.

INTERSTATE COMMERCE COMMISSION §39 > control -- deferral -- > Headnote:
LEdHN[9][] [9]

When a carrier's application for Interstate Commerce Commission approval of its issuance of 500,000 shares of its stock to a second carrier, which agrees that within 60 days of its acquisition of the 500,000 shares it will offer to purchase an additional 1,000,000 shares of the first carrier's outstanding stock at the same price, the Interstate Commerce Commission does not exceed its discretion in deferring consideration, for the 60-day period, of the question whether control of the first carrier's operations might pass to the second carrier.

INTERSTATE COMMERCE COMMISSION §39 > control -- public interest -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

Under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve applications for merger or control only if "consistent with the public interest," resolution of the "public interest" issue, requiring consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established.

INTERSTATE COMMERCE COMMISSION §39 > control -- tentative stock acquisition -- > Headnote:
LEdHN[11][] [11]

The Interstate Commerce Commission reasonably concludes that allowing a motor carrier tentatively to acquire a 20 percent stock interest in a railroad express service and motor common carrier whose other stock is entirely owned by railroads will not prejudice protestors to the transaction as to the issue of the acquiring carrier's acquisition of control of the other carrier, where the railroad stockholders refuse to sell any stock to the acquiring carrier and the acquiring carrier is unable to control the board of directors of the other carrier.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive effects -- > Headnote:
LEdHN[12][] [12]

On a carrier's application for Interstate Commerce Commission approval of an issue of stock for sale to another carrier, the Commission's action in deferring consideration of the anticompetitive issues under 7 of the Clayton Act (*15 USC 18*), which forbids stock acquisitions substantially lessening competition, stands on a different footing from the control issue under 5 of the Interstate Commerce Act (49 USC 5), which requires Commission authorization before one carrier may acquire control of another; the Commission's responsibility under 5 and under the Clayton Act differ markedly, the reasons which support an exercise of discretion as to the control issue are wholly inapplicable to the anticompetitive questions, and there is no reasonable justification for deferring the Clayton Act questions.

INTERSTATE COMMERCE COMMISSION §41 > stock acquisitions -- anticompetitive effect -- > Headnote:
LEdHN[13][] [13]

No preliminary finding of control need be made to trigger the Interstate Commerce Commission's duty under the Clayton Act to prevent stock acquisitions which may have the effect substantially to lessen competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > control -- > Headnote:
LEdHN[14][] [14]

A company need not acquire control of another company in order to violate the Clayton Act.

INTERSTATE COMMERCE COMMISSION §39 > control -- antitrust immunity -- > Headnote:
LEdHN[15][] [15]

Section 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve a carrier's application for merger or control, is designed to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the antitrust laws.

INTERSTATE COMMERCE COMMISSION §39 > consolidations -- > Headnote:
LEdHN[16][] [16]

The carrier must initiate consolidations under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve a carrier's application for merger or control.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > stock acquisitions -- carriers -- > Headnote:
LEdHN[17][] [17]

Section 7 of the Clayton Act (*15 USC 18*), forbidding stock acquisitions the effect of which may be substantially to lessen competition, requires that a carrier's acquisition of 20 percent of the stock of another carrier be stopped in its incipiency if the result is likely to be immediate and continuing co-operation between the carriers which would be detrimental to competitors and against the public interest.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- factors -- > Headnote:
LEdHN[18][] [18]

On an application under 20a of the Interstate Commerce Act (49 USC 20a) for approval of an express company's issuance of stock to be purchased by a motor common carrier, where it is shown that the domination of the express company by railroads has led to operation of the express company and the railroads' own interests without regard to the express company's best interests or the public interest, the Interstate Commerce Commission must at least consider whether the special action to be approved may operate to the detriment of the express company or the public interest before using the express company's need for funds and for independence from the railroads to justify a diversification of ownership.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive issues -- > Headnote:
LEdHN[19][] [19]

Considerations of administrative convenience do not support the Interstate Commerce Commission's deferral of anticompetitive issues in a proceeding for Commission approval of a carrier's issuance of 500,000 shares of its stock to be acquired by another carrier under an agreement whereby the purchasing carrier agrees to offer within 60 days following the acquisition to purchase an additional 1,000,000 shares of the first carrier's outstanding stock at the same price.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive impact -- > Headnote:
LEdHN[20][] [20]

In a proceeding for Interstate Commerce Commission approval of a carrier's issuance to another carrier of 500,000 shares of the first carrier's stock at $ 20 per share under an agreement whereby the second carrier offers to buy an additional 1,000,000 shares of the first carrier's stock at the same price, the offer to be open for 60 days following the acquisition of the 500,000 shares, the possibility that the second carrier may not increase its holdings within the 60-day period may justify deferral of resolution of the control issue but it does not justify delay in consideration of the anticompetitive effects of the acquisition of the 500,000 shares.

Syllabus

Railway Express Agency (REA) applied to the Interstate Commerce Commission (ICC) for authorization under § 20a of the Interstate Commerce Act to sell 500,000 authorized but unissued shares of its stock to Greyhound Corporation. Greyhound agreed, upon acquisition of these shares, to offer for 60 days to purchase up to 1 million shares of outstanding REA stock, all of which is owned by railroads which have the right of first refusal. REA and Greyhound had entered into a "Memorandum of Understanding" which contemplated efficiencies and savings through consolidation of terminal facilities, garages, communications, advertising, and sales forces. Section 20a (2) of the Act provides for ICC authorization of a carrier's stock issuance if "for some lawful object within [the applicant's] corporate purposes, and compatible with the public interest." Finding the issuance of the 500,000 shares for sale to Greyhound to be urgently needed, the **[****2]** ICC authorized the issuance under § 20a without a hearing, and declined to decide, pending the outcome of Greyhound's 60-day offer, the questions of control under § 5 of the Interstate Commerce Act or anticompetitive effect under § 7 of the Clayton Act. A three-judge District Court sustained the ICC order. *Held*:

1. The ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider control and anticompetitive consequences before approving a stock issuance under § 20a (2) of the Interstate Commerce Act. Pp. 492-498.

2. The ICC did not exceed its discretion in deferring consideration of the issue of REA's control by Greyhound, as radical changes in the relevant facts might take place in the 60-day period, and it is highly unlikely that any harm could flow to appellants or to the public interest from a deferral limited to that issue. Pp. 499-501.

3. The ICC exceeded its discretion in deferring consideration of the anticompetitive issues. Pp. 501-507.

(a) While the ICC's duty to consider anticompetitive issues under the public interest standard of § 5 of the Interstate Commerce **[****3]** Act arises only after a threshold finding of control, no such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. P. 501.

(b) With respect to at least some of the anticompetitive issues presented by REA's application the relevant facts will not change significantly during the 60-day period. Pp. 502-503.

(c) With Greyhound's holding of 500,000 shares (20%) of REA's stock there is likely to be immediate and continuing cooperation between the companies, which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If such an alliance would in fact be against the public interest, § 7 of the Clayton Act requires that it be stopped in its incipiency. P. 504.

(d) Before the ICC can justify a diversification of ownership on the grounds that REA has an urgent need for funds and would be better off more independent of the railroads, it must consider whether the action approved would operate to the detriment of REA or the public interest. Pp. 505-506.

(e) There is little merit to the Government's contention that deferral of the anticompetitive issues is strongly supported by considerations of administrative **[****4]** convenience. Pp. 506-507.

Counsel: William H. Dempsey, Jr., argued the cause for appellants. With him on the briefs were Jeremiah C. Waterman, Royce D. Sickler, C. W. Fiddes, David Axelrod, Eugene T. Liipfert, Benjamin W. Boley, Martin J. Flynn, Giles Morrow, Peter T. Beardsley, Harry Jordan and R. Edwin Brady.

Robert S. Rifkind argued the cause for the United States et al. With him on the brief were Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and Betty Jo Christian. Thomas D. Barr argued the cause for appellees Railway Express Agency, Inc., et al. Mr. Barr filed a brief for Railway Express Agency, Inc. Owen Jameson filed a brief for appellee Greyhound Corp.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

Opinion by: BRENNAN

Opinion

[*487] **[***909]** **[**1756]** MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether the Interstate Commerce Commission complied with its statutory responsibilities under § 20a of the Interstate Commerce Act [1] when it approved without consideration of control or anticompetitive consequences the issuance to appellee Greyhound **[****5]** Corporation of 500,000 shares of the common stock of appellee Railway Express Agency, Inc. (REA).

[**6]** REA provides railroad express service and is also a motor common carrier. The approximately 2,000,000 shares of REA common stock outstanding are entirely owned by railroads and no railroad stockholder may dispose of its shares without first offering them to the other railroad stockholders. REA also is authorized, however, to issue 500,000 additional shares of common stock without first offering them to its stockholders. **[**1757]** Greyhound, which operates an express carrier service through its wholly owned subsidiary Greyhound Lines, Inc., a motor carrier of passengers and express subject to the Interstate **[*488]** Commerce Act, agreed to purchase these 500,000 **[***910]** shares. REA thereupon applied to the ICC for an order under § 20a approving the transaction. Minority railroad REA stockholders, motor bus competitors of Greyhound, motor carriers, and freight forwarders intervened in the proceeding to protest against approval of the transaction. They alleged, among other things, the necessity of a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a "lawful object" as those terms are used in § 20a. The ICC approved **[****7]** the acquisition without a hearing. A three-judge District Court for the District of Colorado sustained the ICC order. *255 F.Supp. 704*. We noted probable jurisdiction. *385 U.S. 897*. We reverse with direction to the District Court to enter a new judgment remanding the case to the ICC for further proceedings consistent with this opinion.

I.

REA was organized in 1929 and until 1961 operated on a nonprofit basis under a pooling agreement with the railroads. See *Securities and Acquisition of Control of Railway Express Agency, Inc*., 150 I. C. C. 423. Financial

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[1] Section 20a of the Interstate Commerce Act, as amended, 41 Stat. 494, 49 U. S. C. § 20a, provides in pertinent part:

"(2) ***HN1***[] It shall be unlawful for any carrier to issue any share of capital stock . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the Commission by order authorizes such issue . . . . The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Common carriers by motor vehicle are made subject to the provisions of § 20a (2) by § 214 of the Act, as amended, 49 Stat. 557, 49 U. S. C. § 314.

difficulties forced abandonment of the nonprofit operation and REA was converted to a profit and loss basis in order to effect more efficient and economic operation. See *Express Contract, 1959*, 308 I. C. C. 545, 549-550. In addition, REA was released from restrictions against use of carriers other than railroads. In 1963 REA's bylaws were amended to eliminate a limitation against stock ownership except by railroads; the disposition of shares by a railroad, however, was made subject to the right of first refusal of the other railroad stockholders. The issuance of 500,000 **[****8]** additional shares not subject to the right of first refusal was also authorized, but only upon the consent of two-thirds of the railroad stockholders.

[*489] Greyhound, principally a passenger carrier, became interested in expanding its growing express business. In January 1964 Greyhound offered to purchase, subject to ICC approval, at least 67% of REA's stock, of which Greyhound intended to offer 16% to major airlines. Greyhound also agreed to finance part of REA's capital requirements as part of a plan to coordinate the express services of both companies. This proposal was defeated by railroad stockholders.

REA and Greyhound persisted in their efforts to coordinate their operations. Greyhound proposed to acquire a 20% interest in REA through acquisition of REA's 500,000 authorized but unissued shares, stating that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services." Greyhound offered to pay $ 16 per share if permitted to name one-fifth of the REA Board of Directors and if the REA Board would declare its intention "to consider seriously **[****9]** and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities . . . ," and if, further, the REA Board would agree "to consider seriously at a later time . . ." the sale of REA stock to airlines and the general public. Finally, Greyhound offered, if permitted to acquire the 500,000 shares, to purchase enough additional shares at $ 25 each to give it 50% of the stock of REA, the offer to remain open for 60 days following Greyhound's **[***911]** acquisition of the 500,000 shares. It expressed willingness, however, to purchase the 500,000 shares and leave "to the future the question of the acquisition of additional shares by Greyhound and **[**1758]** giving the railroads an opportunity to reconcile their views on this question."

REA countered with an offer to sell the 500,000 shares at $ 20 per share provided Greyhound would agree to **[*490]** offer within the 60-day period to purchase an additional 1,000,000 shares of the outstanding stock at the same price. The agreement was consummated on this basis subject to ICC approval.

REA's application to the ICC sought approval only of the issuance to Greyhound of the 500,000 shares. **[****10]** The application was supplemented with detailed data reviewing the negotiations, a statement of REA's financial condition and a statement of the purposes to which the $ 10,000,000 realized from the sale of the 500,000 shares would be applied. The burden of the protests of numerous intervenors was that the transaction was not in the "public interest" and for a "lawful object," but rather was the first step toward establishing a virtual monopoly of express transportation, and would result in "control" by Greyhound of REA, necessitating a hearing under § 5 of the Act. [2] **[****11]** The Department of Justice also intervened. It urged the ICC to conduct a hearing to determine whether the transaction would violate § 7 of the Clayton Act, [3] suggesting that, while a § 5 proceeding might be

[2] Section 5 (2) (a) (i) of the Act, as amended, 41 Stat. 480, 482, 49 U. S. C. § 5 (2) (a) (i), ***HN2***[] authorizes any carrier, with the approval and authorization of the Commission, "to acquire control of another through ownership of its stock or otherwise . . . ." Upon application of a carrier seeking such authority, the Commission "shall afford reasonable opportunity for interested parties to be heard," and if "the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) . . . and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ." § 5 (2) (b).

[3] Section 7 of the Clayton Act, as amended, 38 Stat. 731, *15 U. S. C. § 18*, ***HN3***[] provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of 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."

[*491] unnecessary, one might be instituted and consolidated with the recommended Clayton Act § 7 proceeding, since the anticompetitive issues involved would be virtually identical.

Division Three of the ICC approved the application without hearing, ruling that investigation into the "control" and "anticompetitive" issues "would not be appropriate at this time . . . ." After the ICC denial of petitions for reconsideration this action to enjoin and set aside the ICC order was filed. The full Commission meanwhile reconsidered and affirmed the action of Division Three but postponed the effective date of the order pending the conclusion of judicial proceedings.

In the District Court the parties adhered basically to the positions **[****12]** maintained before the ICC, except that the Department of Justice abandoned its position urging a hearing on the § 7 question and declined either to support or to oppose **[***912]** the ICC order. In sustaining the order the District Court reasoned that, while the ICC might be required in some circumstances to consider "control" and "anticompetitive" issues before approving a stock issuance under § 20a, the ICC properly exercised discretion to defer consideration of such questions in this case until after it was determined whether and to what extent Greyhound would succeed in purchasing additional shares from railroad stockholders; only then would the "chain of events started by the stock issuance . . . [be] ascertainable **[**1759]** rather than conjectural." *255 F.Supp. 704, 709*.

In this Court the Government concedes, and the other appellees assume *arguendo*, that important issues of "control" and "anticompetitive" effects were involved in the application before the ICC. The Government has completely reversed its position from what it was before **[*492]** the ICC, arguing here that § 20a was designed to accomplish only the limited objective of protecting **[****13]** stockholders and the public from fiscal manipulation, and that, in any event, postponement of consideration of "control" and "anticompetitive" issues was justified in this case because the facts relevant to both issues might be wholly different at the end of the 60-day period, and because no prejudice to any party's interests could result from the delay.

II.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. [4] Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC **[****14]** and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applications **[*493]** only if "consistent with the public interest." *McLean Trucking Co. v. United States, 321 U.S. 67*. And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E. g., National Broadcasting Co. v. United States, 319 U.S. 190, 224*; *FCC v. RCA Communications, Inc., 346 U.S. 86, 94*; *California v. FPC, 369 U.S. 482, 484-485*.

[**15]** ***LEdHN[3]***[] [3] ***LEdHN[4]***[] [4]It is true that the requirement **[***913]** that the ICC consider anticompetitive effects is more readily found under § 5, since § 5 (11) enables the ICC to confer immunity from the antitrust laws for transactions approved under § 5 (2). [5] But the foundations of the ICC's obligation under § 5 are

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[4] Section 20a was originally § 437 (1) of H. R. 10453, 66th Cong., which was almost identical to earlier legislation passed by the House in 1910 and 1914. See 58 Cong. Rec. 8317-8318 (1919). The 1910 version led to a study which condemned as a "public evil" intercorporate holdings of railroad stock. Report of the Railroad Securities Commission, H. R. Doc. No. 256, 62d Cong., 2d Sess., 21 (1911). These findings were part of the background against which Congress eventually passed § 20a, along with the Federal Trade Commission and Clayton Acts.

largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act [6] to enforce **[**1760]** that Act's provisions is one of them. The responsibility to advance the National Transportation Policy, read into the "public interest" standard of § 5, is another persistent and overriding duty, equally applicable to § 20a. In sum, as we said in *McLean Trucking, supra*, while transportation "legislation constitutes the immediate frame of reference within **[*494]** which the Commission operates . . . and the policies expressed in it must be the basic determinants of its action . . . , in executing those policies the **[****16]** Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." *321 U.S., at 80*.

[**17]** In proceedings under § 20a (2), the ICC itself has not acted as though it lacks the power or responsibility to weigh anticompetitive consequences. In *Columbia Terminals Co. -- Issuance of Notes*, 40 M. C. C. 288, 293, an application to issue notes under § 20a (2) was granted in part only on the condition that the notes be made the subject of competitive bidding. The ICC explicitly rejected the argument that § 10 of the Clayton Act, *15 U. S. C. § 20*, requiring competitive bidding in certain situations, was superseded by § 20a. In *Stock of New Jersey, I. & I. R. Co.*, 94 I. C. C. 727, 729, the Commission said, in considering an application to issue stock: "It can not be said that in the performance of the broad duty imposed upon us by the statute we must confine our investigation and consideration to the effect of proposed issues upon the carrier immediately involved. In any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected."

LEdHN[5][] [5] **[****18]** This "broad duty" was significantly adhered to in *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5. There, the C & O sought modification of an earlier order so as to enable it to acquire and exercise 400,000 shares of New York Central, and two of C & O's directors sought authority under § 20a (12) to hold seats simultaneously on the Central **[***914]** Board. C & O and its directors alleged, in terms strikingly similar to the claims in this case, that Central **[*495]** needed funds and new management, and that the two companies were contemplating plans of mutual advantage and ultimately a merger under § 5 (2). The ICC took a broad view of its power and responsibility. It found, as to the § 20a (12) issue, that an insufficient showing had been made that "neither public nor private interests . . ." would be adversely affected by the proposed interlocking directorate, citing its own cases to the effect that authority would be granted under § 20a (12) only where no lessening of competition or independence occurred, 271 I. C. C., at 18, and pointing out that, even if the Central were strengthened, an interlocking directorate might injure other railroads **[****19]** in which the "public has just as great an interest . . . ," 271 I. C. C., at 40. In treating the request that it approve the stock acquisition, the ICC referred in great detail to the facts that (1) the acquisition, when considered along with long-range plans, would result in C & O control of Central; (2) extensive competition between C & O and Central would be eliminated; and (3) cooperation between C & O and Central would **[**1761]** pose a substantial threat to another railroad, 271 I. C. C., at 24-29. It refused to authorize the acquisition, concluding that it was in effect being asked "to sanction a violation of the provisions of section 5 (4) [requiring carriers to request authority under § 5 (2) before acquiring control of another carrier] and also a violation of section 7 of the Clayton Antitrust Act." 271 I. C. C., at 39, 43. It stated that, if the applicants were so confident that their long-run aims would be in the public interest, they should seek authority for control under § 5 (2). These principles and arguments relied upon by the ICC in rejecting C & O's application are equally applicable here. The

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[5] Section 5 (11), 49 U. S. C. § 5 (11), ***HN4***[] provides that "any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized . . . shall be and they are relieved from the operation of the antitrust laws . . . ."

[6] Section 11 of the Clayton Act, *15 U. S. C. § 21*, ***HN5***[] provides in pertinent part: "(a) Authority to enforce compliance with . . . [§ 7] by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . . . (b) Whenever the Commission . . . shall have reason to believe that any person is violating . . . [§ 7] it shall issue . . . a complaint . . . containing a notice of a hearing . . . . The person so complained of shall have the right to . . . show cause why an order should not be entered by the Commission . . . requiring such person to cease and desist from the violation . . . ."

economic consequences **[****20]** do not differ because we are concerned here with the issuance of stock rather than an acquisition on the open market.

[*496] Appellees argue, with some ambivalence, that it would be anomalous to require the ICC to consider anticompetitive issues under § 20a (2). The ICC is authorized under § 5 to grant antitrust immunity for consolidations. No such power exists under § 20a, [7] and the Government contends therefore that to require consideration of § 7 issues under § 20a would lead to the "anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations." REA advances a variant of this argument pointing out that the Sixty-sixth Congress, which passed both § 5 and § 20a, would not have "adopted the erratic policy of relaxing enforcement of the antitrust **[***915]** laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur."

[**21]** First, it is by no means true that greater competitive harm necessarily results from consolidations than from stock issuances under § 20a. A particular consolidation may be in the public interest because it increases competition in some respects, while a stock issuance, even though not involving control, may have no similar redeeming feature. Second, any anomaly which may be created by the juxtaposition of §§ 5 and 20a stems, not **[*497]** from the fact that no immunity may be granted under § 20a, but from the ICC's special power under § 5. The obligation to enforce the Clayton Act is the rule, and § 5 is the exception. Finally, there are good reasons upon which Congress may have relied in providing that immunity might be conferred under § 5 but not under § 20a. Congress recognized in the Transportation Act of 1940, 54 Stat. 898, as it had in the Act of 1920, that railroad consolidations often result in benefits for the national transportation system as well as for the railroads involved. Consequently, it authorized the ICC to approve consolidations and to immunize them from the antitrust laws when they were found to be in the public interest. The special benefits sometimes **[****22]** realized from carrier consolidations are less likely to come about through the mere issuance of stock, unless the issuance results in control or merger; and when control or merger does result, the party acquiring control may invoke the Commission's **[**1762]** power under § 5 to immunize the consolidation from the antitrust laws.

Appellees' reliance upon *Alleghany Corp. v. Breswick & Co., 353 U.S. 151, 355 U.S. 415*, is misplaced. That litigation stands at most for the proposition that the ICC has discretion in some circumstances to consider § 20a issues without coming to grips with the question whether control of one carrier by another may be unlawful. Alleghany had acquired control of the New York Central without ICC approval. It applied to the ICC rather than to the Securities and Exchange Commission for approval of an issue of preferred stock. The ICC took jurisdiction on the ground that, while Alleghany was an investment company normally under the jurisdiction of the SEC, its control of Central made it a carrier subject to ICC regulation. The District Court set aside the order approving the issuance on the ground **[*498]** that ICC jurisdiction to **[****23]** act under § 20a could not rest upon a control it had not approved. This Court reversed, pointing out that it would be contrary to the policy of the statute to oust the ICC of regulatory jurisdiction because a noncarrier had failed to abide by the law. On remand the District Court considered the illegality of Alleghany's control as relevant to the merits of the issuance under § 20a, and we reversed again, stating simply that the only issue left open on remand was whether the stock issue "as approved" was unlawful. *355 U.S. 415, 416*. However this litigation may be interpreted, it wholly fails to support the proposition that, because § 20a was designed primarily to protect against fiscal manipulation, the ICC is relieved of the necessity of considering other issues germane to the transaction.

LEdHN[1B][] [1B] ***LEdHN[6]***[] [6] ***LEdHN[7]***[] [7]We conclude, therefore, that ***HN6***[] the ICC is required, **[****24]** as a general **[***916]** rule, under its duty to determine that the proposed transaction is in the "public

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[7] In *Pan American World Airways v. United States, 371 U.S. 296*, we held that Congress had entrusted the narrow questions there presented to the CAB; but the violations alleged were of the Sherman Act, which unlike the Clayton Act, *15 U. S. C. § 21*, *supra*, n. 6, contains no provision imposing an affirmative duty upon the agency to enforce the Act's provisions. The industry there was one "regulated under a regime designed to change the prior competitive system," *id., at 301*, and the CAB could have retained power and granted antitrust immunity for the actions involved had they occurred after passage of § 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, *id., at 312*.

interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral. We turn now to this question, first with respect to the deferral of the control issue, and second with respect to the deferral of the anticompetitive issues.

[*499] III.

LEdHN[8][] [8]REA's proposed issuance of a 20% stock **[****25]** interest to Greyhound undoubtedly raised a serious question whether control of its operations might pass to Greyhound. Control under § 5 must be judged realistically, and is a matter of degree. See *Rochester Tel. Corp. v. United States, 307 U.S. 125*. Even the 20% acquisition standing alone might raise an issue of control necessitating greater consideration than given it by the ICC, but it is clear from REA's own evidence that the purpose of its negotiations with Greyhound was to bring the two companies into a joint alignment. The 20% stock issuance was treated by both as the first step of a more ambitious project, and as evidence of the seriousness of each other's intentions to that end.

LEdHN[9][] [9]What the ICC has done must, however, be placed in perspective. It has **[**1763]** not denied that a substantial issue of control is present, and it has not refused to consider the issue. It has held only that consideration should be deferred for the 60-day period during which Greyhound has agreed to extend to REA stockholders an offer to purchase up to 1,000,000 shares. We have stressed the **[****26]** unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations. *United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510*. We might also observe that the ICC apparently could have avoided the deferral by requiring REA and Greyhound to reform their contract so that all the facts relevant to the control issue could be ascertained before approval was given under § 20a (2). [8] Nevertheless, we cannot say that the **[*500]** ICC exceeded its discretion when it deferred consideration of the control issue; radical changes in the relevant facts may take place during the 60-day period, and it is highly unlikely that any harm can flow to appellants or to the public interest from a deferral limited to that issue.

[**27]** *LEdHN[10A]*[] [10A]Resolution of the "public interest" issue under § 5, requiring **[***917]** consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established. But in this case, even assuming that the 20% purchase may amount to "control" under the existing stock distribution, events may occur during the 60-day period which might negate this possibility. Some railroads have indicated their intention to sell their REA holdings, but whether Greyhound or the dissident railroads wind up in a controlling position may depend on the extent to which the latter exercise their right of first refusal. The dissident railroads have made clear their intention to prevent Greyhound from acquiring any additional shares, but even if they obtain one-third of REA's stock they will be able to determine the composition of REA's Board of Directors. In either case, the added power in the hands of the dissident roads may, depending on the circumstances, lead the ICC to find that Greyhound had not acquired control. [9] Thus the control question can more realistically be resolved **[****28]** with finality after the 60-day period.

LEdHN[11][] [11]Moreover, the ICC reasonably concluded that allowing Greyhound tentatively to acquire the 20% stock interest would not prejudice appellants as to the control issue **[*501]** in light of the dissident railroads'

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[8] A change in the agreement providing that Greyhound should offer to purchase the stock held by the railroads before the issuance of the 500,000 shares would have developed the relevant facts, and made unnecessary postponement of the determination of either the control or competition issue.

[9] If the dissident REA railroad stockholders exercised their right of first refusal to buy the 1,000,000 shares the other railroad stockholders might sell, their combined stockholdings would be increased to over 50% of the REA shares. See Brief for the United States and ICC, p. 18, n. 9.

position that Greyhound would not acquire "one additional share under the offer to purchase up to one million shares . . . ," and because Greyhound would be unable under REA's bylaws to control the board, since its five directors would be faced by 18 railroad directors, any 13 of whom would have the power to prevent any action proposed by Greyhound.

IV.

LEdHN[12][] [12] **[****29]** The action of the Commission in deferring consideration of the anticompetitive issues stands on a different footing. The Commission's responsibility under § 5 and under the Clayton Act differs markedly, and the reasons which support an exercise of discretion as to the control issue are wholly inapplicable **[**1764]** to the anticompetitive questions. There is, in short, no reasonable justification for deferring the Clayton Act questions.

LEdHN[1C][] [1C] ***LEdHN[2B]***[] [2B] ***LEdHN[10B]***[] [10B] ***LEdHN[13]***[] [13] ***LEdHN[14]***[] [14] ***LEdHN[15]***[] [15] ***LEdHN[16]***[] [16]The Commission is, of course, required to consider anticompetitive issues under the public interest standard of § 5, just as it must under the public interest standard of § 20a. But the duty **[****30]** under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. ***HN7***[] A company need not acquire control of another company in order to violate the Clayton Act. See, *e. g., United States* v. *du Pont & Co., 353 U.S. 586*; *American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387 (D. C. S. D. N. Y. 1957)*, aff'd, *259 F.2d 524 (C. A. 2d Cir. 1958)*. Section 7 proscribes acquisition of "any part" of a company's stock where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. Section 5 is designed **[***918]** to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the antitrust **[*502]** laws. When a carrier effects a consolidation without ICC authority, the Commission can of course act under § 5 (4). But, as the Commission has often held, **[****31]** the carrier must initiate consolidations under § 5, and it is reasonable to expect that carriers will seek the benefits of that provision. In contrast, the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing . . . ." *15 U. S. C. § 21 (b)*. Section 16, *15 U. S. C. § 26*, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, this provision underscores the ICC's responsibility to act when such violations are brought to its attention.

One of the principal justifications advanced for the ICC's deferral of the control issue is that the facts relevant to that issue may change so significantly during the 60-day period that the control question could be settled **[****32]** either way. No such possibility exists with respect to at least some of the anticompetitive issues presented by REA's application. We need not accept the argument of appellants, based upon the distinction between "express" and other forms of transport, see, *e. g., Railway Express Agency, Inc., Extension -- Nashua, N. H.*, 91 M. C. C. 311, 322, sustained *sub nom. Auclair Transportation, Inc. v. United States, 221 F.Supp. 328 (D. Mass.)*, aff'd, *376 U.S. 514*, that the 20% stock acquisition would itself violate § 7 because REA controls 88% and Greyhound 7% of the "express" market. For if appellees REA and Greyhound are correct that, because of the increasing cross-competition among groups carrying **[*503]** transport, it is impossible to categorize REA as a carrier of "express," then the claims of appellant truck lines, freight forwarders and trucking associations take on added significance. It is precisely the increasing diversification of REA's transport activity, together with Greyhound's considerable capacity and the economies and efficiencies the two companies intend to effectuate jointly, that concerns these appellants.

[**33]** It is clear that REA and Greyhound contemplate major changes in their operation which could have a significant impact upon competition for express and other types of transport which they seek to carry. The "Memorandum of Understanding" into which the companies entered about three weeks before REA **[**1765]** agreed to Greyhound's 20% stock acquisition contemplates efficiencies and savings through consolidation of facilities for terminal service, of garages, and of communications, advertising and sales forces. These changes might therefore realize large savings for both REA and Greyhound, and in this way and other ways significantly strengthen their competitive position. And the Memorandum expresses a determination to engage in aggressive action to capture larger shares of express and transport business, especially by utilizing Greyhound's bus operations as a complement to **[***919]** REA's air and rail service. "The consolidation of effort by the two companies," the Memorandum states, "would create a new market with revenue opportunity arising from a complete package express service to the public." The "new ability" of the air express service to reach off-airline points would **[****34]** add significantly to REA and Greyhound revenues, and the new market would have an estimated growth potential of 10% per year. Similarly, rail-bus service was expected to generate millions in "new business," and to "create a new capability for the two carriers to compete in the ltl [less-than-load] market. The only foreseeable limitation to the **[*504]** growth of this service would be the physical space limitations of Greyhound's fleet."

There is nothing in the record to rebut the allegations of many of the appellants that cooperation between Greyhound and REA of the sort contemplated by the Memorandum aided by the 20% stock acquisition will result in serious harm to appellants individually and to the public interest which they serve. The freight forwarders fear a great reduction in their business, as do the bus companies. Some of the bus companies, which engage in commuter transport, claim that Greyhound-REA cooperation would deprive them of their express business, and that, since that business makes economically feasible their commuter operations, would compel the termination of services essential to the public interest.

LEdHN[17][] [17] **[****35]** It cannot be said with assurance that deferral of consideration of the anticompetitive issues will in no way prejudice appellants or the public interest. The fact that the railroads presently control the REA Board of Directors is hardly relevant to that question. It is not the possibility of control that may prejudice appellants and the public interest, but simply the fact that with Greyhound holding 20% of REA's stock there is likely to be immediate and continuing cooperation between the companies, cooperation which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If appellants are correct, and if such an alliance would in fact be against the public interest, then § 7 of the Clayton Act requires that it be stopped in its incipiency. Cf. *FTC v. Dean Foods Co., 384 U.S. 597, 606, n. 5*.

We are told that REA is in need of funds, and that ICC approval of the 20% stock acquisition assures that REA will obtain capital and gain a measure of independence from the railroads. There is certainly support for the position that REA needs to free "itself from the **[*505]** control and domination previously **[****36]** exercised by its railroad shareholders over its operations." 80 ICC Ann. Rep., p. 22 (1966). The strong ties between REA and the railroads led to the operation of REA in the railroads' own interests, without regard to their coincidence with REA's best interests or the public interest. Prior to a 1959 agreement, generated in large part by REA losses, see *Express Contract, 1959, supra*, 308 I. C. C., at 546, REA was required to distribute traffic among carriers on the basis of existing traffic patterns, and the consent of rail carriers operating between given points was required before REA could utilize carriers other than railroads between those points. Changes in these limitations have enabled REA to finance **[**1766]** some improvements and steadily to increase its corporate surplus. Study of REA Express, **[***920]** Staff Liaison Group V-C, CAB, FMC & ICC 24-26 (1965). But it does not follow that REA will be any better off in the long run, or that the public interest will be advanced, if its ownership shifts in part or entirely to Greyhound.

LEdHN[18][] [18]While the history of **[****37]** REA does not in itself provide a blueprint for its future, it does "afford a basis for considering the lawfulness of REA's status and activities, and the economic desirability of its apparent direction of growth." Study, *op. cit. supra*, at 3. That history indicates that there may be some relationship between REA's depressed state and its close ties with railroads. Before acting on this premise, however, the ICC must at least consider the question whether a given course of action will in fact alleviate the problem. If railroad ownership operated in the past to deprive REA of an opportunity to prosper and serve the public interest, it is not inconceivable that partial ownership by Greyhound will have the same result. Greyhound, presumably, is no less likely to act in its own interest. If the railroads operated REA, as appellees contend, to minimize competition for **[*506]** transport generally between REA and the railroads, and for express between the railroads themselves and between railroads and other modes of transport, how will partial or complete ownership by Greyhound change things? Even if only partial ownership results, may Greyhound and the railroad owners operate **[****38]** REA so as to minimize competition between REA and themselves for transport generally? What effect, for example, would partial ownership by Greyhound have upon the recent efforts of REA to add to its express operations the hauling of larger and more varied volumes of freight, efforts which bring it into competition with Greyhound and other bus lines as well as with truck lines and freight forwarders? Moreover, what assurance is there that REA will not tend to route shipments via Greyhound in preference to more efficient or economical carriers or modes, just as the railroads bound REA to use their lines as opposed to other modes, absent their approval? We assume that REA needs funds and would be better off more independent from the railroads, but before the ICC can use these reasons to justify a diversification of ownership it must at least consider whether the specific action approved may operate to the detriment of REA or the public interest.

LEdHN[19][] [19]There is, finally, little merit to the Government's argument that deferral of the anticompetitive issues is strongly supported by considerations of administrative **[****39]** convenience. The only circumstance in which the anticompetitive issues may be eliminated from the case is if Greyhound, thwarted at the end of the 60 days in its plans to control REA, were to dispose of its 20% interest. But the ICC can hardly justify deferral of consideration of the consequences of a transaction on the possibility that the problems its approval creates may shortly vanish by a reversal of the transaction itself. Of course, if, as appellees claim, it is most likely that Greyhound will **[*507]** acquire no further stock, then consideration of those consequences now would not be wasted effort. And the argument of wasted effort is still less persuasive if appellees are proved wrong and Greyhound does acquire more stock. For the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, **[***921]** and specifically by Greyhound. Once this question is resolved as to the 20% stock acquisition, and the consequences of that acquisition are fully weighed, the ICC's task in any subsequent proceeding if Greyhound enlarges its stock interest will be far more manageable.

LEdHN[20][] [20]We therefore conclude that, although the possibility that Greyhound may not increase its holdings within the 60-day **[**1767]** period may justify deferral of resolution of the control issue, it does not justify delay in consideration of the anticompetitive effects of the 20% transaction. The Government was correct in its position before the ICC that this record placed "before the Commission serious questions under section 7 of the Clayton Act," requiring a hearing.

The judgment of the District Court is reversed with direction to enter a new judgment remanding the case to the Interstate Commerce Commission for further proceedings consistent with this opinion.

It is so ordered.

Concur by: WHITE (In Part)

Dissent by: WHITE (In Part); HARLAN

Dissent

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of the Court's opinion, with its holding that competitive factors must be considered in a § 20a proceeding and with its ruling that a hearing should have been held by the Commission in this case before approving the issuance of the securities by Railway Express Agency, Inc., to Greyhound Corporation. **[****41]** **[*508]** But I am doubtful about those parts of the Court's opinion which indicate that although the public interest requires the consideration of competitive factors in connection with the issuance of stock under § 20a, the public interest also demands that if a lessening of competition is found or threatened within the meaning of § 7 of the Clayton Act, the issuance must be disapproved. Under § 5 of the Interstate Commerce Act, competitive factors must also be considered in determining the public interest, but there a balanced view of the public interest permits the approval of a merger or consolidation despite any actual or probable competitive impact. Mergers which would violate § 7 are thus permissible under § 5 if found in the public interest but only those acquisitions of stock which are not suspect under § 7 of the Clayton Act are permissible under § 20a.

In the last analysis the Court rests this rather odd distinction on the Act itself -- that is, Congress is said to have intended this very result because it provided in § 5 (11) that the approval of a transaction under § 5 relieves the parties from antitrust liability and did not so provide in connection with **[****42]** § 20a transactions. I do not think, however, that this ends the matter, and I find unconvincing the speculative reasons the Court gives for suggesting that Congress intended any such result.

Much more persuasive to me is the approach of *Pan American World Airways v. United States, 371 U.S. 296*. That case involved the Civil Aeronautics Act of 1938, 52 Stat. 973, re-enacted as the Federal Aviation Act of 1958, 72 Stat. 731, *49 U. S. C. § 1301 et seq.*, which provided antitrust immunity for transactions approved by the Civil Aeronautics Board under §§ 408, 409, and 412. The course of conduct attacked by the United States under § 1 of the Sherman Act in *Pan American* was not, however, within any of these sections. **[***922]** The Court, nevertheless, held that the conduct was clearly of the kind **[*509]** specifically committed to regulation by the Board under other sections of the Act and was unassailable in an independent civil action brought by the United States under § 1 of the Sherman Act.

In the case before us, § 20a (2) provides that it shall be unlawful for any carrier to issue securities unless approved by the Commission **[****43]** after finding that the issuance:

"(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[1768]** The Commission may grant an application under § 20a in whole or in part with such modifications and on such terms and conditions as the Commission may deem appropriate, and it may from time to time make such supplemental orders with respect to the transaction as it may deem necessary. § 20a (3). Moreover, it is expressly provided that "the jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." § 20a (7).

Having these powers conferred upon it in the name of the public interest, the Commission may, in my view, approve the issuance of stock **[****44]** by a carrier if it deems the public interest requires it even though there may be a probable lessening of competition which otherwise would violate § 7 of the Clayton Act. This seems to be precisely what Congress intended by expressly providing in § 7 of the Clayton Act itself that "Nothing contained in this **[*510]** section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission . . . ." *15 U. S. C. § 18*.

It makes very little sense to me to hold that a stock acquisition involving control may be approved if the public interest requires it, despite any actual anticompetitive impact, and yet to forbid the approval of an acquisition which falls short of control but which "may" injure competition within the meaning of the Clayton Act.

Thus while I agree that a hearing should be required before the Commission approves the issuance of the securities in this case, I would make it clear that competitive considerations are only some of the factors to be weighed in reaching a decision concerning the public interest, much as the Court **[****45]** has viewed the proceedings under § 5. *McLean Trucking Co. v. United States, 321 U.S. 67*. At the very least I would not now decide that the Commission is powerless to approve the issuance of securities under § 20a if it determines that the impact on competition would otherwise be barred by the Clayton Act.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

This case involves a proposed stock issue by appellee Railway Express Agency, Inc. (REA), of 500,000 **[***923]** shares of previously authorized but unissued shares of its common stock. Under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), this type of stock transaction must be authorized by the Interstate Commerce Commission, which must determine whether the issue is "for some lawful object within . . . [the applicant's] corporate purposes, and compatible with the public interest . . . ."

[*511] Under the proposed transactions REA contracted to sell this block of shares for $ 10,000,000 to the Greyhound Corporation, which would then offer to purchase within a 60-day period an additional 1,000,000 shares from existing stockholders, all of whom **[****46]** are railroads and all of whom hold rights of first refusal as to the sale of existing REA shares. Some of these railroad-stockholders have been opposed to Greyhound's entry into REA and have expressed their intention to exercise their pre-emptive rights. It is undisputed that if Greyhound nevertheless succeeds in purchasing these additional shares it would be in a position to exercise a substantial degree of control over REA, cf. *Rochester Tel. Corp. v. United States, 307 U.S. 125, 145*, and that such control would require the approval of the ICC under § 5 (2) of the Interstate Commerce Act, 49 U. S. C. § 5 (2). It was also alleged by the United States as an intervenor before the ICC that the possible exercise of control by Greyhound over REA and an anticipated **[**1769]** co-ordination of certain services by the two carriers [1] raised serious antitrust questions under § 7 of the Clayton Act, *15 U. S. C. § 18*, which the ICC is bound to enforce as to regulated carriers, Clayton Act § 11, *15 U. S. C. § 21*.

[**47]** The Interstate Commerce Commission did not deal with the substance of these "control" and "antitrust" issues. It found that REA "urgently needs the proceeds of $ 10,000,000 . . . ," [2] and that it was not necessary, given **[*512]** the uncertainty as to the future relationship of Greyhound and REA, to deal with the control issue at that time. The Commission noted specifically that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition . . . ."

[**48]** On review, a three-judge District Court for the District of Colorado sustained the Commission's order, *255 F.Supp. 704*. It read the ICC's decision, as does this Court, as saying only "that in the circumstances presented the public interest requires the issuance of the stock and **[***924]** that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural." *Id., at 709*. The District Court then held that "in the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers." *Id., at 710*.

I would affirm this judgment of the District Court, and therefore must dissent from today's decision. The Court holds that "the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the 'public interest' and for a 'lawful object,' to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2)." *Ante*, p. 498. The Court notes, however, that "this does not **[*513]** **[****49]** mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present," *ibid*., but concludes that while it was not an abuse of discretion to defer consideration of the "control" question raised by the intervenors, it was improper to refuse to deal with the "anticompetitive" issues at this stage. I believe that this decision misapplies the relevant statutes and seriously impedes sound administrative practice.

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[1] The Commission found that REA had agreed "to consider seriously and work toward a long-term agreement between applicant [REA] and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage . . . ." A "Memorandum of Understanding" between an official of each of the two companies contained some suggested methods for achieving these goals.

[2] The ICC's order dealing with the legitimacy of this transaction said: ". . . applicant urgently needs the proceeds of $ 10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $ 20 per share is fair and reasonable; and that the expenses of the issue are estimated at $ 15,000 . . . ."

I.

Section 20a (2) of the Interstate Commerce Act is concerned with new stock issues. Congress' dominant concern was "to maintain a sound structure for the . . . support of railroad credit," **[**1770]** 1 Sharfman, The Interstate Commerce Commission 190 (1931), [3] and nothing in the legislative background of the section indicates that the words "for some lawful object within its corporate purposes, and compatible with the public interest" were intended to encompass issues of ***antitrust law***. Of course the phrase "the public interest" is broad, and in the context of other legislation comparable terms **[*514]** have been held to embrace antitrust matters. *E. g*., Federal Communications Act, **[****50]** *§ 307*, 48 Stat. 1083, *47 U. S. C. § 307*, as construed in *FCC v. RCA Communications, Inc., 346 U.S. 86*. But the mere inclusion of such language in this instance is not the end of our inquiry, for § 20a must be read in its entirety and interpreted in conjunction with other sections of the Act.

[**51]** In contrast to § 20a, which by its detailed and explicit terms deals only with the problem of fiscal responsibility, [4] **[****52]** § 5 of the Act, enacted **[***925]** at the same time, [5] deals specifically with problems of "control." Indeed, the standards laid out in § 5 are directly relevant to the various factual issues hypothesized by the Court in Part IV of its opinion. Section 5 does not deal solely with transfers of shares, but with any lease or contract between two carriers for the operation of their properties, §§ 5 (2) (a)(i), 5 (4); see **[*515]** *Gilbertville Trucking Co. v. United States, 371 U.S. 115, 125*. It would thus appear that any type of agreement between Greyhound and REA for the integration of their operations would -- with or without the sale of shares -- fall within the purview of § 5.

Section 5 not only deals explicitly with problems of control, but it establishes the public interest criteria which the ICC is bound to use in making that type **[**1771]** of inquiry. For example, the Commission must consider "(1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2) (c). This Court has recognized that standards of market control in the transportation industry are different from those governing other business transactions: the ICC must take account of antitrust policy in judging the control questions under § 5, *McLean Trucking Co. v. United States, 321 U.S. 67*, but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction. § 5 (11); **[****53]** *Seaboard Air Line R. Co. v. United States, 382 U.S. 154*; *Minneapolis & St. L. R. Co. v. United States, 361 U.S. 173*; *McLean Trucking Co. v. United States, supra.* Section 5 thus covers fully the problems of control; likewise, the antitrust issues are dealt with

[3] The "public interest" of concern to Congress was the problem of watered stock. See, *e. g*., statement of Congressman Rayburn: ". . . if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application." 58 Cong. Rec. 8376 (1919). See also statement of Congressman Esch, *id*., at 8317-8318. See generally MacVeagh, The Transportation Act of 1920, at 486-492 (1923).

[4] Section 20a (2) reads in its entirety: "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[5] Both sections were parts of the Transportation Act of 1920, 41 Stat. 480, 494.

specifically in § 11 of the Clayton Act, which authorizes the ICC to enforce § 7 of that Act, forbidding the acquisition of stock the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Hence these sections, and not § 20a, are the substantive provisions governing the Commission's jurisdiction in respect to the anticompetitive aspects of this case.

[*516] For procedural reasons, too, § 20a seems inappropriate as a vehicle to **[***926]** replace or augment § 5 of the Interstate Commerce Act and §§ 7 and 11 of the Clayton Act. When a carrier applies for authorization to issue stock, the Commission must give notice to the various States in which the carrier operates so that relevant state regulatory agencies, which also supervise the finances and corporate structure of these companies, may raise objections to the proposed **[****54]** transaction. The Commission need not, however, hold a hearing before approving the transaction. § 20a (6). In contrast, when the ICC deals with problems of control under § 5, it is bound not only to notify the various state authorities but also to "afford reasonable opportunity for interested parties to be heard." § 5 (2)(b). And § 11 of the Clayton Act requires the Commission to notify the Attorney General if it believes that any carrier is violating § 7, and the Attorney General has the statutory right to intervene in the mandatory hearing on the question.

Given the complexities of control and antitrust problems in the transportation field, and given the specific and detailed provisions of the statute in § 5, and in § 11 of the Clayton Act, devoted particularly to them, it seems to me quite evident that the sounder view of the statutory scheme is to regard § 20a as being limited to matters of corporate financing and § 5 and § 7 as being the source of the Commission's authority and duty to deal with these other matters.

None of the Commission cases cited by the Court in support of its position that § 20a was envisioned as also encompassing control and antitrust considerations **[****55]** is apposite. *Columbia Terminals Co. -- Issuance of Notes*, 40 M. C. C. 288, dealt, as the Court notes, with § 10 of the Clayton Act, *15 U. S. C. § 20*, which specifically requires common carriers in certain situations to sell securities "by competitive bidding under regulations to be prescribed by **[*517]** rule or otherwise by the Interstate Commerce Commission." The ICC merely held that this statute had not been repealed by § 20a. The general language cited by the Court from *Stock of New Jersey, I. & I. R. Co*., 94 I. C. C. 727, was written in a case in which the issue was whether the applicant railroad could pay an indebtedness to its sole stockholder, another railroad, through a distribution of stock as a dividend. The ICC held this method of financing acceptable; antitrust considerations were in no way involved.

[1772]** The third ICC decision cited by the Court, *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5, would seem, if anything, inconsistent with its view of § 20a. There the Commission was requested to approve an interlocking directorate, which is forbidden unless authorized by the Commission **[****56]** pursuant to § 20a (12) of the Interstate Commerce Act, 49 U. S. C. § 20a (12). In making its decision the Commission did not incorporate § 5 control standards into § 20a (12). Quite the contrary, it noted that "the policy of the Congress as to consolidations, mergers, and other forms of corporate unification and association is now to be found in the provisions of section 5," *id*., at 12; that no application under § 5 (2) had been filed; and that "it follows that the evidence pertaining to control of the New York Central or ultimate unification of the two carriers is irrelevant to the principal issues before us, and may not be considered in disposing of those issues." *Ibid*. The Commission then determined, under its established standards for judging the acceptability of an interlocking **[***927]** directorate, *id*., at 18, that such an authorization would be improper, but observed that "if the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is **[****57]** no reason why they should not **[*518]** file an application for some form of association under section 5 (2) of the act." *Id*., at 41-42.

The lack of authority for the Court's view of § 20a is not limited to administrative decisions. In the complex *Alleghany Corp*. litigation, summarized by the Court, *ante*, pp. 497-498, this Court sustained the ICC's determination that it could act upon a § 20a application without involving itself in difficult issues of intercorporate control as the District Court had ordered. The protracted and tangled character of that litigation, until resolved in the interests of simplicity by this Court's affirmance of the ICC's approach, should be a warning of the unfortunate consequences that may follow judicial requirements complicating and proliferating administrative hearings in unfamiliar fields; this is especially so where there are, as here, numerous parties some of whom have a strong interest in achieving delay.

II.

Although not accepting the reading of the Act which I have urged, the Court nonetheless appears to recognize that the issue of "control" *is* a separate one from that of financial regularity, and one that **[****58]** can appropriately be dealt with in a separate and subsequent proceeding. Since the Court also acknowledges, as it must, that at this later hearing REA and Greyhound may request a § 5 (11) exemption, and thus bring into play all the standards of § 5, I find the Court's insistence that this issue falls within the purview of § 20a rather than § 5 essentially an academic one. The ICC will still be able to conduct its hearings just as it wished to do here, except that its subsequent "§ 5 proceeding" will henceforth be labeled a "§ 20a and § 5 proceeding."

Given the Court's recognition that the ICC has discretion to postpone the "control" determination, I find **[*519]** it difficult to accept its argument that "antitrust" factors may not similarly be postponed.

It should be recalled that the only matter raised in this application is REA's desire to issue 500,000 shares of its stock to "a non-railroad purchaser," which concededly would bring to the issuer capital funds required for investment purposes. Under the proposed transaction, after Greyhound purchases these shares it will extend an offer to purchase within 60 days an additional 1,000,000 shares, as to which other shareholders **[****59]** hold rights of first refusal. All parties are in agreement that control and antitrust problems will be raised if Greyhound is ultimately successful in effecting these **[**1773]** additional purchases. The only question is whether the Commission can leave these questions for a later determination. Because of the uncertainty as to the outcome of the further stock purchase offer, the Court agrees that postponement of the control issue was proper. But this uncertainty is equally crucial to the Clayton Act issues. The likelihood of a Clayton Act violation will of course be increased if Greyhound obtains these additional shares and is in a position to control, and to consolidate operations with, REA. On **[***928]** the other hand, if the shares are bought by some of the appellants whose interests appear to be adverse to Greyhound, the possibility of substantial harm to competition will be minimal. The core of the Clayton Act question, then, is inexorably tied to the control question, and the Court does not deny that these problems overlap. In these circumstances I find it impossible to follow the Court in holding, on the one hand, that the control hearing was permissibly postponed, **[****60]** but, on the other, that the ICC abused its discretion in similarly deferring any Clayton Act hearing.

To require such a proliferation of hearings as to a single transaction -- one involving a straightforward business **[*520]** transaction negotiated in terms of existing market conditions and the existing needs of the parties -- is bound to obstruct the smooth workings of the administrative process. The penetrating observations of Professor Jaffe seem to me especially pertinent in this situation:

"I gather the impression that some judges who quite insistently display a 'correct' attitude of deference on substantive issues apply a different standard to procedural decisions: they do not hesitate to protract and to complicate the administrative process. Their premise may be that the considerations that dictate deference to substantive decisions are inapplicable to procedural ones. This is only partly true. . . . Since procedural decisions should be made to serve the substantive task, it follows that expertness in matters of substance are relevant to the exercise of procedural discretion.

". . . [An agency] must ration its limited resources of time, energy and money. It **[****61]** must devote them to those exigent and soluble problems which are most nearly related to its core responsibility. What problems *are* most exigent, how they can best be solved . . . are questions the solution to which peculiarly demands a feeling for the whole situation. . . . If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjected criticism disperses accountability, how much more is this true where the deployment of forces is involved." Jaffe, Judicial Control of Administrative Action 566-567 (1965).

The courts have traditionally permitted busy agencies substantial flexibility in formulating their internal procedures, and encouraged their efforts to eliminate duplicative action and repetitive hearings. See, *e. g., Chicago & N. W. R. Co*. v. *Atchison, T. & S. F. R. Co., ante*, pp. 341-343; **[*521]** *Federal Power Comm'n v. Tennessee Gas Co., 371*

U.S. 145, 153-155, where the Court approved a "two-step procedure" as "not only entirely appropriate but in the best tradition of effective administrative practice"; *United States v. Pierce Auto Lines, 327 U.S. 515, 534-536*; **[****62]** *Baltimore & O. R. Co. v. United States, 386 U.S. 372, 459* (dissenting opinion); cf. *Fahey v. Mallonee, 332 U.S. 245*; *Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-154*; *United States v. Illinois Central R. Co., 291 U.S. 457*.

[1774]** The allowance of such flexibility, and the exercise of prudence by the courts, is especially appropriate where, as here, the issue is not **[***929]** *whether* to hold a hearing but *when* to do so, and where there has been no showing that harm would come from deferring consideration of the antitrust issues. This is not a case in which a merger is about to be consummated, and in which it might be feared that the integration of two businesses will be impossible to "unscramble" at some future time. Compare *FTC v. Dean Foods Co., 384 U.S. 597*. These issues concern, as the Court's parade of speculative examples indicates, *ante*, pp. 505-506, the implications of a possible future co-ordination of some carrier services between REA and Greyhound. But these matters will only crystallize for purposes of legal analysis when it is ascertained **[****63]** (1) what type of control, if any, Greyhound will have over REA; and (2) what type of co-ordinated activities are planned. None of these issues has been prejudged, and provisional relief can be granted by the Commission, if necessary, §§ 5 (2), (7), (9); cf. *Gilbertville Trucking Co. v. United States, 371 U.S. 115, 129-131*. The district courts likewise have authority to grant injunctive relief on application of the Commission. § 5 (8).

In these circumstances I do not believe it was an abuse of discretion for the ICC to authorize the issuance **[*522]** of stock, postponing consideration of the control and antitrust issues until the transaction was completed some 60 days later. It is regrettable that the Court's preoccupation with the future antitrust possibilities of this situation, fully acknowledged by all but still entirely speculative, should have led it to interfere, so unnecessarily, with the obviously sensible course of procedure adopted by the Commission.

I would affirm the judgment of the District Court.

References

13 Am Jur 2d, Carriers 36

US Digest Anno, Interstate Commerce Commission 39, 41

ALR **[****64]** Digests, Interstate Commerce Commission 2, 5-8

L ed Index to Anno, Interstate Commerce Commission

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Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act (*15 USC 18*), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

United States v. Reed Roller Bit Co.

United States District Court for the Western District of Oklahoma

June 22, 1967

Civil No. 66-248

Reporter

274 F. Supp. 573 *; 1967 U.S. Dist. LEXIS 9347 **; 1967 Trade Cas. (CCH) P72,146

United States v. Reed Roller Bit Co., American Machine & Foundry Co. and AMF American Iron, Inc.

Core Terms

drilling, manufacturer, merger, drill pipe, joints, sales, markets, collars, bit, expendable, drill collar, fluid, acquisition, lines, divestiture, rock, products, houses, seller, rigs, effective, commerce, reveals, drilling equipment, steel company, parties, producers, oil well, domestic, rescission

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

In an action brought under § 7 of the Clayton Act, 15 U.S.C.S. §18, the basic questions are: (1) the relevant geographic market or "section of the country"; (2) the relevant product market or "line of commerce"; (3) the effect on competition within those relevant markets where the effect "may be substantially to lessen competition"; and (4) where violation is found, the appropriate relief to be ordered.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN2[] **Antitrust & Trade Law, Clayton Act**

A horizontal merger should be condemned if it produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market in the absence of evidence clearly showing that the merger is not likely to have anticompetitive effects.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

To come within the failing firm doctrine, a defendant must meet the strict conditions for the failing condition of the acquired company. When a corporation's resources are so depleted and the prospect of rehabilitation so remote that it faces the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants are operated, the purchase of its capital stock by a competitor where there is no other prospective purchaser, not with a purpose to lessen competition, but to facilitate its business and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of § 7 of the Clayton Act, *15 U.S.C.S. § 18*. The failing company must be bankrupt or on the brink of bankruptcy.

Civil Procedure > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] **Civil Procedure, Remedies**

The key to the whole question of an antitrust remedy is, of course, the discovery of measures effective to restore competition. The effectiveness of the remedy is the paramount consideration. The practicability and equitableness of the remedy may be considered and may be influential in selecting between two or more equally effective remedies. However, consideration of these factors will not permit a substitution of a less effective remedy for a more effective one. Courts of equity have broad remedial powers and are clothed with the large discretion to model their judgments to fit the exigencies of the particular case. Just as a merger must be viewed in the context of the particular market involved, its structure, history, and probable future, these considerations must also be taken into account in determining the appropriate relief.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

Procompetitive consequences in one market cannot be considered so as to outweigh the anticompetitive consequences in another market. At the same time, the fact that a merger has beneficial effects on competition in some markets is material to the type of relief to be decreed, where permitting the acquiring company to keep the assets relating to the market where competition has been increased will at least be as effective in restoring competition in the other markets that have been adversely affected by the merger.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

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

The absence of an intent to violate the ***antitrust law*** does not prevent a merger from violating § 7 of the Clayton Act, *15 U.S.C.S. §18*, but the awareness of the parties that the merger is likely to be attacked has been considered relevant to the possibility of involving the seller in the order of relief.

Judges: [1]** Luther B. Eubanks, United States District Judge.

Opinion by: EUBANKS

Opinion

[*574] Opinion or Memorandum of Decision

EUBANKS, United States District Judge.

On June 21, 1966, the United States instituted this action pursuant to section 15 of the Act of Congress of October 15, **[*575]** 1914 (38 Stat. 736; *15 U.S.C. § 25*), as amended, commonly known as the Clayton Act, against Reed Roller Bit Company, American Machine & Foundry Company, and AMF American Iron, Inc., and alleged that the acquisition of AMF American Iron, Inc., by Reed Roller Bit Company violated section 7 of the Clayton Act (*15 U.S.C. § 18*). Section 7 provides in pertinent part as follows:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged in commerce, where in any line of 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.

Simultaneously with the filing of this suit **[**2]** the Government sought a preliminary injunction pursuant to Section 15 of the Clayton Act (38 Stat. 736; *15 U.S.C. § 25*) to preliminarily enjoin defendant Reed Roller Bit Company and its agents from taking any actions which would alter in any way either the production facilities or the labor and management staff and which would enjoin defendant American Machine & Foundry Company from taking any action which would render it more difficult for AMF American Iron, Inc., to resume its operations.

On the motion of defendant Reed Roller Bit Company pursuant to *Rule 65(a)(2) of Federal Rules of Civil Procedure*, the Court, with the Government's consent, consolidated the hearing on the Government's motion for a preliminary injunction and the trial on the merits. The trial of the case on the merits began on September 21, 1966, and after a recess concluded on November 8, 1966. At the conclusion of this trial, on motion of defendant Reed Roller Bit Company the Court, with the consent of defendant American Machine & Foundry Company and the Government, appointed a Special Master to inquire into and report on numerous features of this case. The report of the Special Master was filed with this **[**3]** Court on March 16, 1967.

The Defendants

Reed Roller Bit Company (now G. W. Murphy Industries, Inc., but hereafter referred to as "Reed") is a corporation organized and existing under the laws of the State of Texas, and maintains its principal office and plant in Houston, Texas. As a manufacturer of certain oil well drilling equipment, Reed's primary product is rock bits. In 1965 Reed's rock bit sales amounted to $11,189,000 and accounted for approximately 12.6% of this market, making Reed the nation's fourth largest rock bit manufacturer. In the oil well drilling equipment field, Reed also manufactures tool joints and drill collars. In addition, Reed manufactures pneumatic tools and accessories, cast tungsten carbide products and oil metering devices. In addition to its principal plant, Reed maintains warehouse and service plants in Arkansas, Kansas, Oklahoma, California, Louisiana, Texas, Illinois, New Mexico, Wyoming, Mississippi, Edmonton (Alberta) Canada, Leiden (Netherlands), and Salvador, Bahia (Brazil). In 1965 Reed's total sales amounted to approximately $41,140,000.

American Machine & Foundry Company (hereafter referred to as AMF) is a corporation organized **[**4]** and existing under the laws of the State of New Jersey, is a manufacturer of products including automatic pin spotting bowling machines, bicycles, bakery machinery, beverage dispensers, water purification systems, and various recreational supplies and equipment, food and tobacco processing machinery, and railroad tank and hopper cars. In 1955, AMF acquired American Iron & Machinery Works Company, a manufacturer of oil field drilling **[*576]** and production equipment, located in Oklahoma City, Oklahoma, which thereafter operated as a wholly owned subsidiary of AMF under the name "AMF American Iron, Inc." In 1965, AMF consolidated sales and rentals totaled approximately $385,000,000.

AMF American Iron, Inc. (hereafter referred to as " American Iron") was a corporation organized and which existed under the laws of the State of Delaware until it was dissolved on January 18, 1966. American Iron's 1964 total sales amounted to approximately $6,400,000. American Iron's product line included fluid end expendable parts (including pistons, rods, and liners), catheads (a type of winch), fishing tools, rig equipment, and various types of production tools. American Iron also manufactured **[**5]** and sold tool joints and drill collars. While American Iron was named as a defendant, it was not served and did not answer, and it is not treated as a defendant in this case by the plaintiff.

THE ACQUISITION

AMF became dissatisfied with the economic performance of American Iron, and in 1959-60 AMF retained a business broker for the purpose of disposing of American Iron. Numerous prospects, including Reed, made studies of American Iron. However, there were no concrete offers. As will be discussed below, from AMF's standpoint, the economic performance of American Iron became increasingly unsatisfactory after 1959-60. Because of this condition, in 1965 Reed concluded that AMF would be receptive to offers to purchase the assets of American Iron. Reed's primary purpose in making the acquisition was to broaden its product line by the inclusion of the lines of oil well drilling equipment manufactured and sold by American Iron but not manufactured or sold by Reed. These non-competing lines accounted for approximately 50% of American Iron's gross sales and included primarily fluid end expendable parts. Although the fluid end expendable parts were the primary non-competing line that **[**6]** Reed desired to acquire, American Iron also had other non-competing lines such as catheads (a type of winch), tongs, (performing the functions of a large wrench), kellys (a device that turns the drill pipe), power slips (a pipe gripping device), fishing tools (used to recover lost objects from the drilling hole), and other rig equipment and production tools were manufactured and sold by American Iron and were not competitive with Reed's lines. American Iron was a competitor of Reed in two lines: tool joints and drill collars.

When AMF was notified by its bank that Reed was a prospective purchaser, it assumed that Reed was merely seeking to obtain confidential information concerning American Iron's operation. This assumption was based on the fact that when AMF had previously attempted to sell American Iron, Reed had made inquiries in order to engage in such a fishing expedition. When AMF concluded that Reed's overtures were sincere, negotiations were begun. On or about November 2, 1965, Reed agreed with AMF to acquire all of the assets of American Iron for the sum of $4,100,000. This agreement was consummated and final payment was made on or about December 16, 1965.

The acquisition, **[**7]** while not highly publicized, was not a secret transaction. It was well known to persons and companies involved in the drilling equipment and related industries and was reported in at least one trade publication. The evidence reveals that before making the purchase Reed discussed the acquisition with its customers in order to obtain their reaction. American Iron employees were notified of the proposed merger in November, 1965 and no suggestion was made that the transaction was secret.

HN1[] In an action brought under section 7 of the Clayton Act the basic questions are:

(1) The relevant geographic market (or "section of the country"); (2) the **[*577]** relevant product market (or "line of commerce"); (3) the effect on competition within those relevant markets (where the effect "may be substantially to lessen competition"); and (4) where violation is found the appropriate relief to be ordered.

RELEVANT MARKETS

The parties have agreed that the United States as a whole is the geographic market for the production and sale of both tool joints and drill collars and that in this nation-wide market the effects of the merger are to be measured.

The parties have also agreed that the two lines **[**8]** of commerce or relevant product markets in which competition may be injured are the manufacture and sale of tool joints and drill collars.

EFFECT OF THE ACQUISITION

The great bulk of oil drilling in the United States is now accomplished by rotary drilling rigs. These rigs generally include at the lower end, a rock bit, a number of drill collars, many sections of drill pipe connected by tool joints and a "kelly" rotary drive stem at the drill floor. Tool joints and drill collars are essential to the modern method of oil well drilling. As a practical matter, the oil well drilling industry provides the exclusive market for tool joints and drill collars.

A "tool joint" is a coupling by which the numerous 30-foot lengths of drill pipe are connected. There are two types of tool joints in this country today - flash welded and threaded - the former accounting for the great bulk of the market.

Drill collars are heavy 30-foot lengths of heat treated alloy steel, drilled axially and integrally threaded, and joined in an assembly to furnish weight for the lower end of a rotary oil well drilling string, which weight forces the rock bit into the land formation and tends to stabilize the **[**9]** drilling string. Drill collars are manufactured by drilling a hole in a 30-foot length of heat-treated steel bar and by threading each end of the bar.

The determination of the section 7 legality of a horizontal merger requires an evaluation of the basic facts relating to the number of companies in the appropriate relevant geographic and product markets and percentage shares of the parties to the merger. Thus the Government introduced detailed evidence regarding concentration and percentage shares in the tool joint and drill collar lines of commerce and the effect of the acquisition on concentration and these shares.

The flash welding of tool joints requires special equipment. A new flash welding machine with appropriate equipment installed in suitable quarters costs from approximately $400,000 to $750,000. In 1965, the demand for tool joints required only five flash welding machines in the United States. These were owned as follows:

Number of Machines	Owner	Location
2	Hughes Tool Company	Houston, Texas
1	Reed Roller Bit Company	Houston, Texas
1	AMF American Iron, Inc.	Oklahoma City, Okla.

Number of Machines	Owner	Location
1	National Supply Division, Armco Steel Corporation	Ambridge, Pennsylvania

[10]** The 1965 sales of all tool joints in the United States of Hughes, Reed, American Iron, and National Supply Division of Armco Steel Corporation amounted to approximately $10,657,106 which was approximately 95% of all tool joints sold in the United States.

[*578] American Iron was the third largest producer and seller of tool joints in the United States. In 1965 American's sales in the United States and share of the total domestic industry sales were as follows:

	1965 Approximate Sales	Approximate Per Cent of Total Industry Sales
Flash welded tool joints	$ 1,356,000	14
Threaded and other non-flash welded tool joints	31,000	2
Total tool joints	$ 1,387,000	13

Reed was the second largest producer and seller of tool joints in the United States. In 1965 Reed's sales in the United States and share of total domestic industry sales were as follows:

	Approximate Sales	Approximate Per Cent of Industry Sales
Flash welded tool joints	$ 3,356,000	36
Threaded and other non-flash welded tool joints	392,000	26
	$ 3,748,000	35.2

In 1965 there were seven significant producers and sellers **[**11]** of drill collars in the United States whose sales in this country totaled approximately $7,752,670 or approximately 96 per cent of the total sales in this country. American Iron was the fifth largest producer and seller of drill collars in the United States. In 1965 American Iron's sales in the United States and share of total domestic industry sales were as follows:

	Approximate Sales	Approximate Per Cent of Industry Sales
Drill Collars	$ 842,000	10.4

Reed was the second largest producer and seller of drill collars in the United States. In 1965 Reed's sales in the United States and share of total domestic industry sales were as follows:

	Approximate Sales	Approximate Per Cent of Total Industry Sales
Drill Collars	$ 1,580,000	19.6

The controlling decision of the Supreme Court with regard to an analysis of such market data is *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. There the Court stated that ***HN2***[] a horizontal merger should be condemned if it:

> "produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in **[**12]** the **[*579]** concentration of firms in that market . . . in the absence of evidence clearly showing that the merger is not likely to have . . . anticompetitive effects."

In *Philadelphia National Bank* the Court condemned the merger of the second and third largest banks in the relevant market resulting in a combination controlling 30% of the commercial banking business in that market. Other decisions have demonstrated that where the industry is already concentrated or there are trends toward concentration, mergers resulting in even smaller market shares may be unlawful. .e.g., *United States v. Aluminum Company of America, 377 U.S. 271, 277-278, 12 L. Ed. 2d 314, 84 S. Ct. 1283 (1964)*; and *United States v. Von's Grocery Co., 384 U.S. 270, 277, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*.

In the present case the merger of the second and third largest producers and sellers of tool joints eliminates one of four flash welded tool joint manufacturers, and would rank the Reed-American Iron combination first in the industry with approximately 48% of the total market. Likewise, the merger of two of the largest five producers and sellers of drill collars eliminates one of seven significant **[**13]** producers and sellers of drill collars (having approximately 96% of the total U.S. sales), and produces a combination that would rank second in the industry with approximately 30% of the total United States market. Accordingly, this Court finds that the acquisition by Reed of the tool joint and drill collar operations of American Iron is unlawful.

Reed takes the position that there is evidence that prevents the merger from being unlawful. It urges that in the Supreme Court's landmark decision in *Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*, the Court balanced its finding of illegality with the conclusion that there may be "mitigating factors" that would save a merger:

> "[Such] as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position . . . [or] a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets." *370 U.S. 294 at 346, 82 S. Ct. 1502, 1535*.

Likewise, the Court had stated that the statute was not to impede a merger resulting in a concern that could **[**14]** compete more effectively, or "a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market." (*370 U.S. 294 at 319, 82 S. Ct. 1502, 1521*.) The Court further noted that the condemned merger did not produce "any countervailing competitive, economic, or social advantages" (*370 U.S. 294 at 334, 82 S. Ct. 1502, 1529)*. Reed further asserts that subsequent decisions of the Court such as *United States v. Philadelphia National Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*, have mentioned that defenses such as a "failing firm" could have application and noted that the parties were "healthy and strong; they are not undercapitalized or overloaded; they have no management problem; the Philadelphia area is not over-banked; ruinous competition is not in the offing." Emphasizing that the Supreme Court's decisions under section 7 have involved vigorous and healthy concerns operating in expanding industries, Reed argues that there are numerous economic benefits accruing from the merger of companies engaged in unhealthy and declining markets. In this connection, it asserts that the Supreme Court has not limited **[**15]** the often-mentioned "failing firm" defense to situations involving officially or clear-cut insolvent or bankrupt concerns. It argues that the principle of the considerations favoring the failing firm doctrine is equally applicable in a situation where a company has experienced very unsatisfactory performance, can no longer maintain its competitive position, and will **[*580]** not be a significant competitive factor in the market. In support of its broad failing or declining firm defense, Reed presented detailed economic evidence in an attempt to show that the acquisition in question has "mitigating factors." The following outlines the basis of Reed's contention and sets forth the facts that this Court believes are amply supported by the evidence.

A. *Decline of the Domestic Drilling Industry*.

Before 1955, AMF had no significant interest in the petroleum equipment industry. In that year, however, a decision was made to enter into the manufacture and sale of oilfield drilling equipment and AMF acquired the assets of American Iron, a company that was primarily engaged in the production of fluid end expendable parts, tool joints and drill collars. Virtually the entire demand **[**16]** for these products comes from oil and gas drilling contractors. Approximately 85% of American Iron sales were in the domestic market, and the success of the company depends upon the prosperity of the domestic drilling industry which, in turn, depends upon the health of the domestic oil and gas producing industry.

Neither party attempted to introduce evidence relating to industry sales for tool joints and drill collars over a period of years. Substantial amounts of evidence were, however, introduced relating to drilling activity. By and large, if productivity is taken into consideration, the trend in drilling activity is, in the opinion of the Court, persuasive evidence as to the trend in the sale of tool joint and drill collars - products that have practically their only use on the drilling rig.

In contrast to the general economic prosperity enjoyed in the last decade by the nation as a whole, drilling activity has suffered sharp declines in recent years both in terms of the number of wells completed and the total footage drilled. For example, in 1966, 9,466 exploratory wells were drilled. This may be compared with 13,178 exploratory wells drilled in 1959, 16,207 in 1956, and **[**17]** 13,100 in 1954. Additionally, there were 28% fewer development wells drilled in 1966 than were drilled in 1954. The decrease in rig activity is even more substantial. In 1957 there were 2,429 rotary rigs active in the domestic drilling market. This figure has steadily declined: In 1958 there were 1,923 rigs; in 1959 there were 2,074 rigs; in 1960 there were 1,750 rigs; and in 1962 there were 1,636 rigs; in 1964 there were 1,502 rigs; and in 1966 there were 1,273 rotary rigs active in the United States. This diminished drilling activity is also reflected in the total footage drilled. In 1957 there were 223,087,000 feet drilled as compared with 190,703,000 in 1960, 184,357,000 in 1963, and 159,377,000 in 1966. The decline in domestic drilling activity is a result, largely of substantial increases in oil imports and the industry opinion that the price for oil and gas is too low to justify continuation of past levels of exploration activity. Without respect to the merits of the justifications given for the decline in drilling activity, there can be no doubt that this has occurred, and that there is no basis for predicting an increase in drilling activity.

The effect of this decline **[**18]** has necessarily been to decrease the demand for tool joints and drill collars. Simultaneous with this decrease in demand, the productivity of these products has been considerably increased by the tool joint and drill collar manufacturers. The evidence reveals that in the last ten years the economic life of a string of drill pipe with tool joints attached has increased 100 to 150%.

At the same time that the domestic drilling activity has suffered the decline described above the midcontinent area, which American Iron was best able to serve, has experienced even greater decreases in drilling activity. From 1956 to 1965 the number of wells completed in the midcontinent area has decreased 46%. During the same period of time the number of exploratory wells completed **[*581]** has declined approximately 57%. In 1965 there were 141 operating rotary rigs in Oklahoma as compared to 243 rigs in 1957. The rig count today is less than 100. Decreased exploratory activity will be followed by decreased drilling of development wells. While the midcontinent area has experienced the above-described decline in drilling activity, the Texas-Louisiana Gulf Coast area has experienced relatively **[**19]** stable drilling activity and in some recent years there have been small increases.

B. *The Position of American Iron*.

In 1955 when AMF acquired American Iron, American Iron had a sales volume of approximately $9.5 million. In 1956 its sales had increased to about $10 million. As a result of the decline in drilling activity described above, American Iron suffered loss years in 1958 and 1960. In 1962, the company had earnings of $27,480 on $6,178,072 total sales. In 1963 it incurred a loss of $70,037 on $6,081,387 total sales; in 1964 it had a profit of $166,091 on $6,412,069 total sales; and in the first ten months of 1965 American Iron had earnings of $104,001. The tool joint and drill collar operations have been particularly unsuccessful. For example, the drill collar operation produced a $157,699 loss in 1964 and $126,840 loss during the first ten months of 1965. The tool joint operations produced profits of $10,908 in 1964 and produced a loss of $6,790 during the first ten months of 1965. Thus, in 1962 American Iron's pretax return on assets employed was.5%; in 1963 this return was a loss of 1.5%; in 1964 this return was 4.3%; and for the ten months ended October 31, **[**20]** 1965, the rate of return was 3.1%.

The decline in American Iron's performance was attributable in large part to the decline in drilling activity - the industry providing the sole market for tool joints and drill collars. Because of its geographical location American Iron has suffered much more from diminished drilling activities than have the other manufacturers in these markets. American Iron definitely does not have as good a location to serve the Texas-Louisiana Gulf Coast markets as do most other manufacturers of the products here involved. The same is true with respect to foreign sales. At a minimum, American Iron incurred annual freight absorption costs of $25,000.

As a consequence of its unsatisfactory performance, American Iron began a program of "retrenchment". The number of sales personnel was reduced to 25 and more importantly its research and development efforts were practically eliminated.

The aspect of American Iron's operation that has been given most emphasis by defendants is the absence of an adequate supply of drill pipe. In order to understand this contention it is necessary to briefly review the marketing process relating to tool joints and drill pipe. **[**21]** Drill pipe is, of course, the equipment to which tool joints are attached. The major manufacturers of drill pipe are the major steel companies. Prior to 1966, the steel companies sold the drill pipe to supply houses which are the major sellers of drilling equipment to the driller. The supply houses maintained the stock of drill pipe that they had acquired in the storage yards of the various tool joint manufacturers. When a supply house received an order for drill pipe it would notify a tool joint manufacturer (the one specified by the driller if one was specified) of the order. The tool joint manufacturer having possession of the supply houses' drill pipe would attach its tool joints to the drill pipe. The drill pipe with tool joints attached would then be shipped from the plant of the tool joint manufacturer. The availability of an adequate supply of each manufacturer's drill pipe was thus necessary to the operation of a tool joint manufacturer. Ordinarily, time is of the essence in the sale of drill pipe and tool joints and accordingly the sales must be made by a tool joint manufacturer having immediate access to a supply of drill pipe.

[*582] Not long before the merger, **[**22]** a change in the system of marketing occurred. The major steel companies began marketing the pipe by storing the pipe themselves in the yards of the tool joint manufacturers in Houston. From the standpoint of the tool joint manufacturer, this was essentially the same arrangement as existed under the earlier practice when the supply house owned the drill pipe. As a practical matter, the only difference is that the steel companies owned the drill pipe stored in the yards of the tool joint manufacturer, rather than the supply houses.

The critical difference between the present system of marketing and that existing prior to 1966 is that the major steel companies - United States Steel, Pittsburgh Steel Company, Armco Steel Corporation, Youngstown Sheet and Tube Company, and Jones & Laughlin Steel Company - concluded that the demand for drill pipe in the Oklahoma City area was not sufficient to justify storing drill pipe with the tool joint manufacturer there, American Iron. The steel companies arrived at this decision on the basis of the same economic data discussed above relating to diminished drilling activity in the area. Their experience was that the very low turnover rate on drill **[**23]** pipe could not economically justify the maintenance of pipe inventories in Oklahoma City.

As a result, the American Iron tool joint operation in Oklahoma City, which had always had difficulty gaining access to an adequate supply of drill pipe, was faced with the prospect of losing practically all of its sales. Without the supply of drill pipe in its yards, supply houses in the area selling drill pipe would order the pipe through Houston, Texas, where the drill pipe was located. There the Houston tool joint manufacturers would attach the tool joints to the drill pipe and ship them into the midcontinent area. The supply houses in the midcontinent area, many of which are owned by the steel companies manufacturing drill pipe, would continue to sell the drill pipe of the manufacturers electing to maintain supplies of drill pipe only in Houston, Texas. They will not buy the drill pipe since this would be an unnecessary inventory expense.

As noted earlier, the decision of the steel companies was based on the substantial decline in drilling activity and the absence of any prospects for improvement. Should the demand for drill pipe increase substantially, steel companies would of course **[**24]** react by storing drill pipe in Oklahoma City. The evidence reveals, however, that at the present time the steel companies do not foresee an improvement in the drilling activity and do not plan to store drill pipe in Oklahoma City. Thus, because of conditions beyond its control - the availability of a supply of drill pipe - American Iron was faced with the loss of most of its tool joint sales. Since the acquisition and during the period of continuation of the American Iron plant, on several occasions Reed has unsuccessfully tried to induce the steel companies to stock drill pipe in Oklahoma City by offering to defray their freight charges.

During the trial the most serious factual disagreement between the Government and the defendants related to the availability of drill pipe in Oklahoma City and the ability of the American Iron operations to be maintained there. The Government took the position that the tool joint operations could be and should be maintained in Oklahoma City. Its evidence in that regard was not persuasive. Since the trial, the Government has altered its position and now "concedes that the [lack of an adequate stock of drill pipe in Oklahoma City] would probably **[**25]** necessitate transfer of the tool joint operations to the Houston area." Thus the Government conceded the undesirability of Oklahoma City as a locale for tool joint and drill collar operations and agreed to the removal of the American Iron tool joint and drill collar facilities to Houston, Texas.

In contrast to Reed's position, the Government makes a number of contentions, and the following facts are amply **[*583]** supported by the evidence. Although the profits were small at the time of the acquisition, American Iron was earning a profit. While the company has experienced losses, it did have a net income in most years since AMF's acquisition. There is no doubt that the low return was not one that would attract capital, but at the same time there was not a net loss. In the five years preceding the acquisition American Iron had not found it necessary to borrow funds from the parent organization. While American Iron sales dropped rather drastically from the mid 1950's to the early 1960's, during the 1960's American Iron sales remained relatively constant. The number of hourly employees of American Iron actually increased from December 31, 1961, to December 31, 1965, and the **[**26]** number of salaried employees decreased only slightly. As earlier discussed, AMF had attempted to sell American Iron in 1959-60. There was no showing that AMF attempted to sell American Iron after 1960 until Reed expressed its interest. This was probably because American Iron conditions had grown steadily worse and AMF had concluded that there was no basis for trying to sell the business, particularly in light of the undesirable effect the earlier attempt had had on employee morale. Although it is not particularly surprising or important, AMF's annual reports fail to disclose critical comments concerning American Iron. The only comments made generally tended to be complimentary. The evidence reveals that American Iron's labor force was sufficient, its products were well regarded in the trade, and its general manager, Elmer Rueback, was regarded as a capable executive. In short, the evidence generally reveals that the primary difficulty with American Iron's operations were external and not attributable to the internal operations of the company.

The most significant disparity in the views of the parties is with regard to the scope of the failing firm defense. The Government rejects **[**27]** Reed's broad failing or declining firm defense and asserts that ***HN3***[] to come within the failing firm doctrine, a defendant must meet the strict conditions for the failing condition of the acquired company as set out in *International Shoe v. Federal Trade Commission, 280 U.S. 291, 74 L. Ed. 431, 50 S. Ct. 89 (1930)*. In that case the failing company had sustained a $6 million loss in the year prior to the acquisition leaving a net treasury deficit of over $4,382,000. In the year of the acquisition, the company had debts in excess of $17 million, had suffered about 15% decline in production, had halted dividend payments on common and second preferred stock, and was discontinuing dividends on its first preferred stock, and would under Massachusetts law have to file an annual financial statement that would disclose a condition of official insolvency. The officers of the company had concluded that the only alternatives were liquidation through a receiver or outright sale. The Company could no longer pay its debts as they became due. Thus the Supreme Court held:

> "In light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote **[**28]** that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act." *280 U.S. 291 at 302, 50 S. Ct. 89, 93*.

The Government further cites *United States v. Diebold, Inc., 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*, the only case called to my attention decided by the Supreme Court involving the failing **[*584]** company doctrine since *International Shoe*. There the Supreme Court overturned a district court ruling that the defendant was entitled to a summary judgment under the failing firm doctrine because the Court found the record raised genuine issues of fact on two key findings that: (1) The acquired company was hopelessly **[**29]** insolvent and faced with imminent receivership and that (2) the acquiring concern was the only bona fide prospective purchaser for the acquired business.

Subsequent lower court decisions have demonstrated the necessity that the failing company be bankrupt or on the brink of bankruptcy, *United States v. Maryland & Virginia Milk Producers Association, Inc., 167 F. Supp. 799 (D.D.C. 1958)*, rev'd in part on other grounds *362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960)*, and the fact that the company had decided to liquidate is not enough to create a "failing company" situation unless the company's economic condition was as a practical matter beyond the prospect of rehabilitation. *Erie Sand & Gravel Co. v. FTC, 291 F.2d 279 (3d Cir. 1961)*.

In the opinion of the Court, Reed's "failing firm" defense must fail. Although it is true that American Iron's poor performance made it a most unattractive subsidiary, it was not near bankruptcy, and it does not appear that it would have been in the absence of merger. The question is a close one, particularly in light of the fact that the tool joint operation would not have been able to continue in Oklahoma City and AMF had earlier decided it **[**30]** could not justify the capital outlay required to move it to Houston, Texas. Nevertheless, the case does not fit the traditional mold. While it is true that AMF had been unsuccessful in its earlier attempt to sell American Iron, the evidence does not show that Reed was the only prospective purchaser of the company. In summary, Reed has failed to carry its burden of showing that American Iron came within the strict test of *International Shoe*. Until the Supreme Court actually approves a merger on facts such as are involved in the present case, this Court is constrained to hold that the failing firm defense asserted by Reed is not applicable here. [1]

[31]** This is not to say that the evidence submitted with regard to the condition of the industry and the particular problems of American Iron is not important to this case, and it should be noted that it has important application to the question of relief.

Relief

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[1] Thus, it is unnecessary to decide whether the failing company doctrine extends to the sale of an unprofitable subsidiary of a prosperous parent company. It would seem that most of the justifications for the doctrine would be equally applicable to such a situation and that the doctrine if otherwise applicable should be applied, but see In the *Matter of Farm Journal, Inc., 53 FTC 26 (1956)*, affirmed by the *Commission, 53 FTC 52 (1956)*, where the hearing examiner found that a publication sold by Curtis Publishing Company to a competitor had been a losing venture while Curtis was making money from other ventures, and concluded that the merger was not protected by *International Shoe*. The examiner stressed the fact that Curtis could have "modernized" the publication or could have found other purchasers.

The fact that Reed's primary objective in acquiring American Iron was to obtain the fluid end expendable portion of the business has no relevancy to the legality of the merger or, for that matter, to the type of relief to be ordered.

Having determined that the effect of the merger may be substantially to lessen competition in the tool joint and drill collar markets, the Court now turns to a determination of the appropriate relief. In the section 7 case of *United States v. Du Pont de Nemours & Co., 366 U.S. 316 at 323-324, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)*, the Supreme Court stated:

> "The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For **[*585]** the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it . . . If this decree accomplishes less than the Government has won a lawsuit and lost a cause."

Thus, the Court stated the standard to be followed in rectifying a section 7 violation.

> ***HN4***[] "[The] key to the whole question of an antitrust remedy is, of course, the discovery **[**32]** of measures effective to restore competition."

Under the Court's decision, the effectiveness of the remedy is the paramount consideration. The practicability and equitableness of the remedy may be considered and may be influential in selecting between two or more equally effective remedies. However, consideration of these factors will not permit a substitution of a less effective remedy for a more effective one.

Keeping in mind the above mandate of the Supreme Court, it is appropriate to note that courts of equity have broad remedial powers and "are clothed with 'the large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt v. United States, 332 U.S. 392, 400-401, 92 L. Ed. 20, 68 S. Ct. 12, 17 (1946)*." See also *Hecht Co. v. Bowles, 321 U.S. 321, 329, 88 L. Ed. 754, 64 S. Ct. 587 (1944)*. Moreover, it would seem that just as "[A] merger must be viewed in the context of the particular market involved, its structure, history, and probable future," *United States v. Continental Can Co., 378 U.S. 441, 458, 12 L. Ed. 2d 953, 84 S. Ct. 1738, 1748 (1964)*, these considerations must also be taken into account in determining the appropriate **[**33]** relief.

This case involves a merger of two companies that did not compete in all of the markets in which each was engaged. A discussion of the treatment that may be accorded a merger that is inoffensive with respect to some of the markets that are involved may be found in the Supreme Court's decision in *Brown Shoe Co. v. United States, 370 U.S. 294, 335-338, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. There the court discussed the possibility of an acquisition where the competitive overlap of the merging companies is not complete. The absence of overlap discussed there related to geographical markets while in the present case the absence of competitive overlap relates to product markets. However, the principle expressed there should apply equally to this case. The court stated:

> "The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place the merger outside the scope of § 7. That section speaks of 'any indicated * * * section of the country,' and if anticompetitive effects of a merger are probable in 'any' significant market, the merger - at least to that **[**34]** extent - is proscribed. (*370 U.S. 294 at 337, 82 S. Ct. 1502 at 1530)*
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> "To illustrate: If two retailers, one operating primarily in the eastern half of the nation, and the other operating largely in the West, competed in but two midwestern cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed. Cf. *U.S. v. Jerrold Electronics Corp. 187 F. Supp. 545 (E.D. Pa. 1960)*, aff'd, *365 U.S. 567, 5 L. Ed. 2d 806, 81 S. Ct. 755 (1961)*." (*370 U.S. at 337 n. 65, 82 S. Ct. 1502, 1530)*

The Court seems to leave room for the possibility that the merger would be proscribed only to the extent of the competing lines - here tool joints and drill collars. However, regardless of the manner of describing the violation it would seem that the question raised by the Court's language is: How, or in what **[*586]** manner, should the fact that some markets involved herein are not adversely affected be "properly considered" in determining the **[**35]** equitable relief to be decreed?

There is no doubt that under the E. I. *du Pont II* decision, 366 U.S. 316, 6 L. Ed. 2d 318, 81 S. Ct. 1243, proper consideration of the fact that a merger may not have anticompetitive effects in some markets would mean that divestiture may be confined to the operations in the markets adversely affected only where this form of divestiture is at least equally effective as any other form of relief. If it is equally or more effective, such divestiture of part of the assets may be appropriate. There are other reasons, as are discussed below, that support the granting of a partial divestiture, but these can have weight and are given weight only because partial divestiture on the facts of this case is equally as effective as the alternative remedies available. [2]

In the present case, the evidence shows and this Court is of the firm opinion that the inclusion of the "noncompeting" lines of commerce in the order of divestiture would not aid the restoration of competition in the tool joint and drill collar industries. Divestiture by Reed of the tool joint and drill collar operations will restore competition in these markets and is the form of relief **[**36]** best suited to this end.

[37]** The Government brought this action alleging anticompetitive effects in the tool joint and drill collar markets. Although American Iron was also engaged in other markets, principally the fluid-end expendable parts market, no allegation has ever been made that this aspect of the merger is undesirable. Thus the question of relief turns largely on the practicability and desirability of divesting only the tool joint and drill collar operations.

There are probably some advantages and economies that result from the manufacture and sale of tool joints and drill collars together with the manufacture and sale of American Iron's other products. In fact it definitely appears that the sale of tool joints and drill collars are facilitated when they are marketed with other oil well drilling equipment. However, the record reveals no reason to believe that the tool joint and drill collar operations can be or must be best utilized with the particular product lines previously engaged in by American Iron. The evidence is to the contrary. Numerous other companies engaged in the manufacture of oil well drilling equipment other than fluid-end expendable parts can obtain the same advantages and economies **[**38]** derived from the marketing of multiple products. The fact that the manufacture of these products need not be in conjunction with the manufacture and sale of fluid-end expendable parts is demonstrated by the fact that the only three firms of the top fifteen firms, which three firms hold 22.5% of the market, are engaged in **[*587]** the sale of fluid-end expendable parts and/or tool joints and drill collars. If the sale of the tool joint and drill collar facilities were for some reason limited to a firm not already in the old well drilling equipment industry the effectiveness of this relief would be highly questionable. However, there are a very substantial number of companies engaged in the oil well drilling equipment industry that are potential purchasers and that can utilize their previously established businesses to profitably manufacture and sell tool joints and drill collars. These companies are presently incurring many costs that can be allocated or spread to tool joints and drill collars operations. Such a company will have an established reputation and expertise as a manufacturer and marketer in the oil field drilling equipment industry. Thus, the manufacture and sale **[**39]** of tool joints and drill collars by such a company will benefit from these attributes.

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[2] Partial divestiture has been ordered by both the courts and the Federal Trade Commission. Decisions of the Commission are especially illustrative of the use of the doctrine since the FTC is required to order divestiture whenever it finds a violation of section 7. See United States v. Continental Can Co., 1964 TRADE CASES para. 71,264 (S.D.N.Y. 1964); Union Carbide Corp., TRADE REGULATION REPORTS (Transfer Binder, 1961-1963) para. 15,503 (1961); Brillo Mfg. Co., FTC Docket No. 6557, 3 CCH TRADE REGULATION REPORTS para. 16,543 (1963); Ekco Products Co., 3 CCH TRADE REGULATION REPORTS para. 16,956 (FTC Docket No. 8122 (1964)); Lone Star Cement Corp., TRADE REGULATION REPORTS (Transfer Binder, 1953-55) para. 17,183 (1965); United States v. Hilton Hotels Corp., TRADE CASES P68,523 (N.D. Ill. 1956); *Scoville Mfg. Co., 53 FTC 260 (1956)*; *United States v. Meremount Automotive Products, 1960 CCH TRADE CASES P69,881 (1960)*; *United States v. Hertz Corp., 1960 CCH TRADE CASES P69,762 (1960)*; Continental Baking Co., TRADE REGULATION REPORTS (Transfer Binder, 1961-1963) P15,886 (1962); Procter & Gamble Co., TRADE REGULATION REPORTS P17,858 (Consent Order February 9, 1957); United States v. Aluminum Ltd., 1966 TRADE CASES, (Consent Decree Nov. 4, 1966).

In addition, the evidence does not reveal that the operations of American Iron are so interrelated and noncompartmentalized that a divestiture of the tool joint and drill collar facilities would not be workable. The Special Master, who thoroughly studied American Iron's operations, found that the tool joint and drill collar operations were segregated from other American Iron operations and are susceptible to being separately divested. Moreover, subsequent to the trial of this cause, the plaintiff has agreed to a removal of both the tool joint and drill collar facilities to Houston, Texas. Plaintiff's concession to the removal of the tool joint and drill collar facilities is very significant. Earlier it had strenuously opposed this move, and much of the time the Government used in the trial of the case was devoted to showing that removal of these facilities was not required. Now it recognizes that "the necessities of the market" require this adjustment. While AMF has no Houston operations with which the tool joint and drill collar operations could be mixed, the Houston area is the primary business **[**40]** location for most of the many drilling equipment manufacturers that are prospective purchasers.

It is true that the sale of products other than tool joints and drill collars has accounted for about 42% of American Iron's total business, and the gross profit margin on the sales of products other than tool joints and drill collars has been considerably in excess of the profits margin on these items. This evidence does not show that another company already engaged in related lines of commerce will not find it desirable to manufacture and sell tool joints and drill collars. It has been suggested that it is necessary to include the most profitable lines in order to sell the less profitable lines. Such reasoning, however, ignores the fact that the attractiveness of the lines of commerce offered for sale will be determined largely by its price which in turn will depend largely on the anticipated profitability of the lines. Thus an order requiring sale at their market price will, by definition, be a price that is attractive to the buyer. Adding lines with greater profitability will thus not increase the attractiveness of the purchase.

In addition to the fact that divestiture of the **[**41]** tool joint and drill collar operations acquired from American Iron will eliminate the undesirable features of the Reed-American Iron merger found by this Court, there are other reasons supporting the order of partial divestiture.

Requiring divestiture of only the tool joint and drill collar operations will leave intact Reed's ownership of the American-Iron fluid end expendable parts operations - the acquisition of which was not alleged to have been harmful. American Iron's 1965 sales of fluid end expendable parts amount to $1,313,000 and accounted for approximately 10% of this market. The fluid end expendable parts market is dominated by one concern that has sales approximately four times greater than any other competitor. As discussed earlier, American Iron had made several attempts to cut down on expenditures in an effort to improve its profitability. **[*588]** Its research and development program was substantially limited and its efforts during the 1960's were described as being defensive only. Additionally, American Iron had reduced its sales force to 25 salesmen. The testimony of persons employed by other firms in the fluid end expendable parts market reveal that Reed **[**42]** is definitely considered a much more formidable competitor in this field than was American Iron. Reed has a sales force of over 125 persons engaged in the selling of oil well drilling equipment. Additionally, it is engaged in substantial research and development efforts.

While the Government did not contend that Reed's acquisition of the "noncompeting" lines of commerce might lessen competition, exclusively for purposes of rebuttal it made an attempt to show that competition in the fluid end expendable parts market would not be enhanced. A review of the evidence regarding the absence of pro-competitive effects in the fluid end expendable parts market reveals that, if anything, competition will be increased.

It was asserted that Reed's entry into the fluid end expendable industry "sets the stage for distributor favoritism." This contention is based on an argument that Reed, as a manufacturer of rock bits, would, because of certain "leverage" attributable to its rock bits, have substantial advantages in the marketing of fluid end expendable parts through supply houses. There was some testimony to the effect that a 7 1/2% discount is given to supply houses on rock bits sales, for **[**43]** which the supply houses perform little or no function. Thus, this Court is asked to conclude that a manufacturer of both rock bits and fluid end expendable parts, will be able, because of an unearned discount on rock bits, to force supply houses to stock their fluid end expendable parts rather than those of other manufacturers that do not also manufacture rock bits. There are several reasons that independently eliminate the basis of this allegation. In the first place, the contention assumes that for many years without any reason, the rock bit manufacturers have, by giving a 7 1/2% discount bestowed an unearned windfall upon the supply houses. It is difficult to believe that these companies have made any such gifts. Secondly, and independent of this assertion, is the fact that the testimony of the Government's witnesses revealed that the rock bit manufacturers did not determine which particular supply house received the discount on the rock bit. The drillers, to whom the rock bits are shipped directly from the manufacturer, designate the particular supply houses that will perform the credit and billing function and receive the discount. The manufacturer of the rock bit decides **[**44]** only the amount of the particular discount, not the distribution of the discounts among supply houses. Thus, the rock bit manufacturer would not be in a position to exercise favoritism by giving unearned discounts to certain supply houses and not to others. Third, the evidence reveals that the discount paid by the bit manufacturers is fully earned. The supply houses perform a credit and billing function. The supply houses generally are in a far better position to assume the credit function than are the rock bit manufacturers since they already have liens and mortgages upon the equipment of the various drillers. In this connection, it should be noted that the Government witness stated that in the case of certain of its own products, a ten percent discount is given for performing precisely the same functions for which bit manufacturers give 7 1/2%. Finally, the evidence reveals that Reed had serious difficulties getting the supply houses to handle at least one of its products, a fact which rebuts the presence of leverage.

It was also alleged that the Reed-American Iron merger might set off a series of mergers between companies engaged in the rock bit and fluid end expendable parts **[**45]** markets. Aside from the fact that the evidence reveals no reason to believe that this would be harmful the testimony would seem highly speculative at best. **[*589]** Two Government witnesses made references to a fear of trends of mergers, but on cross examination they admitted they knew of no other mergers in these markets.

It was asserted by the Government that "technological innovations may be resisted by the larger companies." There was testimony offered that this merger would increase the likelihood that there would be less research, development and innovation in the fluid end expendable parts market, apparently on the theory that larger firms do not engage in as much innovation. Aside from the merits of this theory, if anything, the Reed-American Iron merger has substituted a relatively small company, Reed, for a much larger company, AMF. Further, the fluid end expendable parts industry already has a number of companies far larger than Reed. For example, the United States Steel Corporation and the Armco Steel Corporation own major companies engaged in this market. Finally, the evidence clearly shows that Reed's research and development program is far larger and more active **[**46]** than was American Iron's.

It was also suggested that "large integrated producers, such as Reed, would have a financial advantage in the consignment marketing of oil equipment." This contention ignores two factors. As discussed above, Reed is far smaller than AMF and if the Government considers the risk to be one of a large company throwing money away in order to crowd out competitors, the risk becomes less likely as a result of the merger. On the other hand, if the allegation is based on the theory that Reed will sell fluid end expendable parts in the same manner that it sells rock bits, the evidence reveals that Reed considers this to be an economically unsound practice in which it has no intention of engaging.

Finally, the Government takes the position that the fluid end expendable parts market is not "oligopolistic" and for this reason the procompetitive effect in this market that Reed foresees will not occur. The Government's contention in this regard seems highly inconsistent with the position it has taken in other merger cases. While admittedly there are fourteen competitors in the business, three companies have 61% of the business, five have 79%, and eight companies have **[**47]** well over 90%.

A review of the testimony of the Government's two witnesses testifying as to the absence of a procompetitive effect on the fluid end expendable parts market reveals that they seem more afraid of increased competition in this market than a lessening of the competition. The primary witness in this regard admitted that Reed would be a much more formidable competitor than American Iron had been. Accordingly, this Court concludes that this merger will probably result in increased competition in the fluid end expendable parts industry.

This Court recognizes that ***HN5***[] procompetitive consequences in one market cannot be considered so as to outweigh the anticompetitive consequences in another market. *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. At the same time the fact that a merger has beneficial effects on competition in some markets is material to the type of relief to be decreed where permitting the acquiring company to keep the assets relating to the market where competition has been increased will at least be as effective in restoring competition in the other markets that have been adversely affected by the merger.

[48]** A divestiture of the tool joint and drill collar lines of commerce has another advantage in that the task involved will be only one-half of a divestiture of the entire business. By concentrating efforts on the sale and reestablishment of the offending lines of commerce Reed will be able to perform a more efficient and successful job. Additionally, since this is a situation where divestiture of part of the assets is at least as effective as a divestiture of all of the assets it is appropriate to take into consideration at least to some degree the hardship imposed on the defendants. **[*590]** In this case there can be no doubt that divestiture of the offending lines of commerce will be easier for the parties.

Partial divestiture has a further advantage of decreasing the size of the purchase that must be made by another firm. Since less money will be involved it would seem reasonable to think that the number of potential buyers should be increased. Additionally, by permitting Reed to stay in the fluid end expendable parts market a number of fluid end expendable parts manufacturers, probably not qualified to acquire all of American Iron's operations, would become unobjectionable **[**49]** potential purchasers. While these parties do not have a relative advantage over others because of their position in the fluid end expendable parts market, they would be important potential buyers.

In reaching its conclusion on partial divestiture, this Court has carefully considered the Government's "preferred" remedy of rescission of the original agreement of acquisition and requiring Reed to return to AMF the American Iron operations. The Government contends that AMF is a proper defendant and argues that AMF is a law violator. It points out that the Government has frequently named sellers as defendants and notes that in several cases where suit has been brought prior to the consummation of a merger the courts have enjoined defendant sellers from completing the sale. *United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964)*; *United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963)*, aff'd *320 F.2d 509 (3d Cir. 1963)*; United States v. Parent's Magazine Enterprizes, Inc., 1962 Trade Cas., Par. 70,437 (N.D. Ill. 1962). Alternatively, plaintiff asserts that, assuming *arguendo*, AMF is not a proper defendant to a section 7 charge, rescission would still be an **[**50]** appropriate remedy in accordance with the broad equitable powers of this court under section 15 of the Clayton Act. See *United States v. Pabst Brewing Co., 183 F. Supp. 220 (E.D. Wis. 1960)*; In re Dean Foods Co., 3 Trade Reg. Rep. Par. 17,765 (FTC Complaints, Orders, Stipulations, December 14, 1966.) It is urged that the rescission remedy fulfills and is consistent with the intent of Congress in that it would make clear to the business community that sellers of companies must respect section 7 and refrain from making sales, the result of which would substantially lessen competition.

In response the defendants emphasize that the language of section 7 does not make a sale unlawful and point out in the 52 years of section 7 enforcement no decision has sanctioned the relief now sought by plaintiff. Defendants argue that, assuming *arguendo* that utilization of such a remedy "accords with the intent of Congress to stem the tide of anticompetitive mergers," there is no congressional authority for this form of relief and that any number of unauthorized devices could be imagined that would discourage firms from making sales that would lessen competition. Defendants further point out **[**51]** that the *Dean Foods Co.* decision relied upon by the Government actually held that the seller was not a proper party to the section 7 charge and dismissed the complaint as to the seller with respect to that charge.

A choice between these positions is made unnecessary since this Court finds that practically none of the Government's arguments for rescission are particularly applicable to the present case and that the evidence reveals that rescission of the merger would be inconsistent with and unwarranted by the facts of this case. It is not the form of relief that will best restore competition in the tool joint and drill collar markets. Instead, divestiture of the tool joint and drill collar lines will best carry out the policies of section 7.

As noted earlier, American Iron had for sometime experienced very low profitability. Its performance had met none of AMF's profitability requirements. Testimony revealed that AMF is a highly leveraged company and one of its goals is that its subsidiaries and operating divisions achieve at least a 20% return before taxes on assets employed in the **[*591]** conduct of the particular business. American Iron had experienced an earnings **[**52]** record of.5%

in 1962, a loss return of 1.5% in 1963, a return of 4.3% in 1964, and a return of 3.1% for the first ten months of 1965. Rates of returns such as these would easily justify a liquidation of the assets and investment of the money elsewhere. AMF at one time attempted unsuccessfully to sell the American Iron operations and at another time considered moving American Iron from Oklahoma City to Houston, Texas, where the conditions are more favorable to a manufacturer and seller of drilling equipment. The latter proposal was, however, rejected on the ground that the cost was too great. Liquidation was also a seriously considered possibility since the company's salvage value was significant. On several earlier occasions AMF has liquidated its subsidiaries. In short, AMF has demonstrated that it is not suited for the running of the American Iron operation. AMF's ownership of other subsidiaries does not enhance its ability to be a parent of American Iron. One subsidiary, AMF, Tuboscope, Inc., has plants in Oklahoma City and Houston and is engaged in the protective coating of various types of tubular goods. It is true that drill pipe is frequently coated and that the availability **[**53]** of a coating plant would be helpful to the marketing of drill pipe. However, the coating of drill pipe amounts to only a very small percentage of the total coating business - the production phase of the oil and gas industry providing the largest market for coating. The evidence reveals that the existence of the Oklahoma Tuboscope plant would not appreciably help American Iron's operations. Even if it is assumed that the coating of drill pipe is essential to the marketing of drill pipe the availability of a coating plant does not give the tool joint manufacturer the needed drill pipe supply or the demand for its own products.

The testimony of AMF's executives convince this Court that the presence of AMF in the lines of commerce represented by the products of American Iron would be only temporary. The company has tried to succeed with American Iron, has failed, and is not interested in continuing its efforts. Moreover, the conditions now existing are even less satisfactory from AMF's standpoint than they were prior to the acquisition. Its employees and customers know that it is no longer interested in its oil well drilling equipment operations and are aware that a forced reentry **[**54]** would have no permanence. In light of these conditions it would be almost impossible to staff the American Iron's operations with the type of personnel that would be indispensable to the operations of a viable company. While it may be true that rescission would, notwithstanding these facts, result in setting an example that would discourage other concerns from making sales in violation of section 7, such a goal ignores the requirement that the relief to be ordered in the present case should be the most effective to restore competition. Rescission would not result in restoration of competition.

Restoration of the entire operation for return to AMF would be highly impracticable. The plaintiff has disregarded the tremendous task that would face the parties in reconstituting the American Iron operation. The difficulties of separating merged businesses are well known and have been a major factor in the development of the law of preliminary injunctions. Prior to the Government's investigation of the acquisition the Reed and American Iron operations were substantially integrated. American Iron's sales program was merged into and is now a part of Reed's sales effort. The sales force **[**55]** personnel and all but one of the top executives have resigned or have been transferred. Thus there is in no respect an independent entity operating from Oklahoma City, but rather only the production facilities and personnel.

Further, the impracticalities of rescission in the present case not only **[*592]** impede effective relief but would obviously be imposing a serious hardship upon the parties. In the present case the merger was not consummated in the face of an antitrust complaint. The evidence reveals that while the parties were aware of possible antitrust problems and Reed agreed with AMF to assume all responsibility in the event a violation were determined, they did not feel that the merger was violative of the antitrust laws. While it is plain that ***HN6***[] the absence of an intent to violate the ***antitrust law*** does not prevent a merger from violating section 7, *Brown Shoe Co. v. United States, 370 U.S. 294, 329 n. 48, 82 S. Ct. 1502 (1962)*, the awareness of the parties that the merger is likely to be attacked has been considered relevant to the possibility of involving the seller in the order of relief. Dean Foods Co., 3 Trade Reg. Rep. Par. 17,765 (FTC, Complaints, Orders, **[**56]** Stipulations, December 14, 1966); *United States v. Pabst Brewing Co., 183 F. Supp. 220 (E.D. Wis. 1960)*. To require a rescission of this merger would be to impose a substantial burden on the parties involved, without accomplishing the primary goal of antitrust relief: restoration of competition. Under the Supreme Court's decision in *du Pont*, economic hardship can influence the choice only as among two or more effective remedies. In the present case, in light of the facts described above, rescission would not be an effective remedy. In reaching this conclusion, a primary consideration of this Court is the fact that partial divestiture will restore and maintain competition in all the markets involved.

The Court concludes that a decree should be entered requiring Reed to divest itself of the tool joint and drill collar lines acquired in the American Iron acquisition.

The foregoing opinion of the Court is adopted as findings of fact and conclusions of law pursuant to *Rule 52, F.R.Civ.P.* Settle decree.

Old Dominion Box Co. v. Cont'l Can Co.

United States District Court for the Southern District of New York

July 17, 1967

No. 63 Civil 31

Reporter

273 F. Supp. 550 *; 1967 U.S. Dist. LEXIS 11266 **; 155 U.S.P.Q. (BNA) 70 ***; 1967 Trade Cas. (CCH) P72,308

OLD DOMINION BOX COMPANY, Inc., and Dacam Corporation, Plaintiffs, v. CONTINENTAL CAN COMPANY, Inc., Defendant

Core Terms

patent, cartons, machine, packaging, wrap-around, locking, closure, panels, catch, latching, folded, overlapping, tightening, invention, opening, license, pivotal, provisions, parties, prior art, containers, carrier, blank, flap, subject matter, manipulations, proceedings, termination, rotary, additional license

LexisNexis® Headnotes

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

HN1[] **Filing Requirements, Drawings**

Under the provisions of *35 U.S.C.S. § 111*, an application for a patent shall have a specification as prescribed by *§ 112*, and a drawing as prescribed by § 113.

Patent Law > ... > Specifications > Definiteness > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

HN2[] **Specifications, Definiteness**

See *35 U.S.C.S. § 112*.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > ... > Claims > Claim Language > General Overview

HN3[] Infringement Actions, Exclusive Rights

The claims of a patent constitute the measure of invention monopoly. Additionally, the claims of a patent are to be interpreted and read in the light of the specifications.

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Claims & Specifications > General Overview

HN4[] Specifications, Enablement Requirement

In meeting the patent description requirements under *35 U.S.C.S. § 112*, while vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to particularly point out and distinctly claim an identifiable invention or discovery.

Patent Law > ... > Claims > Claim Language > Combination Claims

Patent Law > Claims & Specifications > General Overview

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > ... > Utility Patents > Product Patents > Machines

HN5[] Claim Language, Combination Claims

Under patent law, the statutory requirement of distinctness and certainty in claims is important. Courts view claims to patents based on combinations of old elements with very close scrutiny; it is consistent with this strict interpretation of patents for machines that combine old elements to require clear description in combination claims.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Patent Law > US Patent & Trademark Office Proceedings > Interference Proceedings > General Overview

HN6[] Types of Contracts, Settlement Agreements

The provisions of *35 U.S.C.S. § 135(c)* require the filing of settlement agreements in connection with the termination of interference proceedings.

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Invention Date & Priority > General Overview

Patent Law > Invention Date & Priority > Reduction to Practice

HN7[] Defenses, Inequitable Conduct

In order for an individual to qualify as a prior inventor of a product under patent law, a party must prove: (a) that the individual conceived the invention and reduced it to practice before the patentee, or (b) that the individual was working diligently toward a reduction to practice at a time just prior to the date on which the patentee commenced his inventive activities, and that the individual continued to work diligently thereafter until he reduced the invention to practice.

Patent Law > Anticipation & Novelty > General Overview

HN8[] **Patent Law, Anticipation & Novelty**

Although numerous patents involving a combination of old elements have been held invalid, it is possible for a combination of old elements to give rise to patentable invention.

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN9[] **Nonobviousness, Elements & Tests**

See *35 U.S.C.S. § 103*.

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

HN10[] **Elements & Tests, Ordinary Skill Standard**

In determining whether a patent is void due to obviousness under *35 U.S.C.S. § 103*, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN11[] **Ownership & Transfer of Rights, Licenses**

Although an exclusive patent license may be valid, the United States Supreme Court recognizes certain limitations, and where such a license has for its purpose the suppressing of competition, it is held invalid.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Contracts Law > Contract Conditions & Provisions > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN12[] **Conveyances, Assignments**

The United States Supreme Court holds that a provision in a patent license agreement that requires the assignment of future development patents is not per se illegal and unenforceable.

Counsel: [1]** Harold James, of James & Franklin, New York, New York, for plaintiffs.

William K. Kerr of Fish, Richardson & Neave, New York, New York, for defendant.

Judges: Graven, Senior District Judge.

Opinion by: GRAVEN

Opinion

[*71] [*551]** MEMORANDUM

GRAVEN, Senior District Judge.

1. The plaintiffs, Old Dominion Box Company, Inc., and Dacam Corporation, are corporations organized and existing under the laws of the State of Virginia. The principal place of business of each is Lynchburg, Virginia. The defendant, Continental Can Company, Inc., is a corporation organized and existing under the laws of the State of New York. Its principal place of business is New York City, New York.

The defendant, as assignee, is the owner of United States Letters Patent No. 2,986,857 issued on June 6, 1961, to H. Ganz, which patent is entitled, "MACHINE AND METHOD FOR PACKAGING ARTICLES," and United States Letters Patent No. 2,990,997 issued on July 4, 1961, to A. J. Weiss, which patent is entitled, "PAPERBOARD CARRIER." Those patents are referred to as the defendant's patents.

The plaintiffs brought this action under the provisions of *Sections 2201* and *2202, Title 28 U.S.C.A.* They seek declaratory relief with **[**2]** respect to the two patents referred to owned by the defendant. An actual controversy exists between the parties. There is diversity of citizenship between the plaintiffs and **[*552]** the defendant. The amount in controversy is in excess of $10,000.00.

2. The plaintiff, Old Dominion Box Company, Inc., is now, and for a number of years has been, engaged in the business of manufacturing and selling cartons of various types, including paperboard cartons. The plaintiff, Dacam Corporation, is now, and for a number of years has been, engaged in the business of designing packaging machinery and equipment. It has been licensing its co-plaintiff to use the packaging machines designed and patented by it. The defendant, Continental Can Company, Inc., is now, and for a number of years has been, a competitor of the plaintiff, Old Dominion Box Company, Inc., in the packaging field. The plaintiffs allege that for some time the defendant has been asserting and claiming that the plaintiffs have been infringing its patents. The plaintiffs brought this action so that they might secure a judicial determination with respect to the validity, infringement and enforceability of those patents. **[**3]** The defendant filed a counterclaim. In its counterclaim it asked that its patents be held to be valid and that the plaintiffs be held to have infringed them. Because of this feature, the case was tried as a conventional patent case.

3. The issues between the parties as defined in the governing pretrial order are as follows:

(a) Are the defendant's patents valid or invalid?

(b) If valid, have the plaintiffs infringed them?

(c) Whether the defendant has been guilty of such conduct as to make its rights under the patents, or either of them unenforceable.

(d) Whether an award of attorneys' fees should be made to either the plaintiffs or the defendant.

4. Since around 1940 there have been two developments in the packaging field relating to products merchandised in cans, bottles, and other containers which furnish the background for this litigation. During that period there was in that field an increasing demand for packages which would securely hold multiple containers and which could be easily handled and readily unpacked. The other development was that of automation. There was an increasing use of cartons and packaging machines by means of which multiple **[**4]** containers were rapidly and automatically packaged for distribution purposes.

The patents involved in this case relate to the cartons and packaging machines used for what is referred to as wrap-around packaging. While cartons used in connection with wrap-around packaging are encompassed in the generic term of folding cartons, yet by common usage in the trade a distinction is made between wrap-around cartons and folding cartons. Folding cartons are known as cartons which are fed into a machine in flat form and made into a box-like shape and then filled with containers. Wrap-around cartons are known as cartons which are used in packaging operations in which the package comes into existence as it is being wrapped around the containers. It is a one-step operation rather than a two-step operation. The wrap-around **[***72]** system is used exclusively for the packaging of multiple containers.

5. Cartons used in connection with wrap-around packaging are, in general, made of paperboard. They are furnished in knockdown, flat form by the supplier to the packager. The carton blanks are precut to suit the particular containers to be packaged. Fold, or score, lines have been made in them where **[**5]** the blanks are to be folded as they are wrapped around the containers. When being wrapped, the carton is rectangular in form; has two side panels or walls; a top and a bottom wall; two overlapping enclosure panels forming either the top or bottom wall. Wrap-around cartons may have either open or closed ends. In wrap-around packaging, blank cartons in flat form are fed into a packaging machine. The carton blanks are then brought into connection with the containers which are to be packaged. The machine folds the side panels of the carton around the **[*553]** containers and then folds the closure panels into an overlapping relationship. Finally the overlapping panels are locked into position and completely wrapped packages emerge from the machine. It is a high speed operation and from 120 up to 200 packages a minute are made.

6. Prior to 1956 a corporation known as the Robert Gair Company was active in the packaging field. In that year it merged with the defendant, Continental Can Company, Inc., and the business formerly carried on by it since has been carried on by a division of the defendant, Continental Can Company, Inc. The defendant, Continental Can Company, Inc., has **[**6]** been and is engaged in, among other activities, the manufacture and sale of cartons for wrap-around packaging and the leasing out of machines designed for such packaging. The Robert Gair Company, during the period of its existence, and later the defendant, Continental Can Company, Inc., used or were attempting to use a number of different wrap-around systems. In some of those systems the cartons were made secure by

gluing the overlapping closure panels together. In one of those systems the cartons were made secure by stapling. In another system the cartons were locked into place by so-called punch locking. In that system synchronized moving machine parts punched small tabs into matching slots in other panels. The Robert Gair Company and the Continental Can Company, Inc., used the different systems referred to. They found unsatisfactory features in connection with all of them. The system making use of glue involved messy glue pots. The glued containers required time and space for drying, which features necessitated the availability of a substantial amount of floor space. The system using stapling met with poor customer response. The successful operation of punch locking required **[**7]** a high degree of synchronization of numerous moving parts which gave rise to difficulties when operated at high speeds. In the wrap-around packaging field, the packagers desire a system which is rapid in operation, which functions without breaking or tearing the cartons, and in which there is a minimum of interruptions for repairs and realignments. The packagers and the consumers also desire a package which holds the containers securely in the carton. This feature is of special importance in the case of open end cartons. The consumers desire a package which is easy to carry. They also desire a package which can be readily opened and closed. This latter feature is of importance in the case of multiple containers because it is the frequent practice of consumers to remove only part of the containers at a time and then close the carton.

7. Arthur J. Weiss, also known as A. J. Weiss, for many years prior to its merger with the defendant, Continental Can Company, Inc., had to do with designing cartons for the Robert Gair Company. After the merger he had to do with the designing of cartons for the merged company. Starting prior to 1958, he commenced work for the merged company (hereinafter **[**8]** referred to as the defendant) on a design for a wrap-around paperboard carton. On July 15, 1958, he filed an application for a patent on what is entitled, "PAPERBOARD CARRIER." The application was No. 7,248,728. On July 4, 1961, United States Letters Patent No. 2,990,997 was issued to him pursuant to his application. The defendant has at all times since the issuance of that patent been the owner thereof. It is the claim of the defendant and the plaintiffs have been and are infringing Claims 1, 2 and 4 of that patent.

8. The Ganz Brothers Machine Company is a corporation which was and is engaged in the building of special machinery. Henry Ganz, also known as H. Ganz, was and is the president of that corporation. In 1956, under arrangements with the Robert Gair Company, the Ganz Brothers Machine Company commenced work on the design of a machine for wrap-around packaging. That work was continued under arrangements with the defendant after its merger with the Robert Gair Company. Pursuant to those **[*554]** arrangements, the Ganz **[***73]** Brothers Machine Company designed and built wrap-around packaging machines of the punchlock type. Difficulties were encountered in the locking of **[**9]** the cartons when those machines were operated at a high speed. It was then sought to design and build a packaging machine that had a locking mechanism which operated more satisfactorily than the punch-lock mechanism. A machine was then designed and built which made use of the carton of Weiss Patent No. 2,990,997 and what is referred to as a slide-lock mechanism, which was designed to effectuate the carton lock in the Weiss carton. On June 26, 1958, H. Ganz filed an application for a patent for what was entitled, "MACHINE AND METHOD FOR PACKAGING ARTICLES." On June 6, 1961, United States Letters Patent No. 2,986,857 was issued to him. The defendant, Continental Can Company, Inc., has at all times since the issuance of that patent been the owner thereof.

9. The plaintiff, Dacam Corporation, is engaged in the business of developing machinery for the automatic packaging of cartons. It has designed and patented various machines intended for that purpose. It designed and patented, among other machines, a machine known as D-300. It licensed the plaintiff, Old Dominion Box Company, Inc., to use those machines. That latter company, in turn, sublicensed the machines. It is the claim **[**10]** of the defendant that the use of those machines infringes Claim 4 of its Patent No. 2,986,857 issued to H. Ganz, heretofore referred to.

10. The defendant's wrap-around packaging system making use of the Weiss carton and the Ganz machine is known as the JAK-ET-PAK system. That system has proved to be a very good system and has had substantial commercial success. That system has not dominated the field. Wrap-around cartons with punch locks were in commercial use before the JAK-ET-PAK system and are still in such use. What is referred to as the Mead-Atlanta "Cluster-Pak", making use of a type of punch lock, as an important factor in the industry, particularly where containers are packaged at low speeds. What is referred to as the Container Corporation's "Bikini" system, utilizing

two different kinds of glue, is also an important factor in the industry, particularly in the packaging of beer. However, it is clear that the JAK-ET-PAK system does excellent wrap-around packaging at very high speeds. In the JAK-ET-PAK system the carton is folded around the containers and then closed by locking. The parties are in agreement that the defendant's patents for that carton and machine **[**11]** are based on a combination of old elements. It is the contention of the defendant that the patentable invention claimed meets the tests and requirements for a valid combination patent and that such invention is disclosed by the patents. The patentable invention claimed by the defendant is the claimed tightening of the package allegedly occurring during the locking process when a Weiss carton is used in connection with the Ganz machine.

11. In the Weiss carton there is what is described by the defendant as the primary lock. That lock consists of an opening in one of the overlapping closure panels and a latching flap or catch as a part of the other overlapping closure panel. The latching flap is made integrally with a series of catches. After the overlapping panel is moved against the top or bottom of the container, the latching flap is bent back and the catches are inserted in the matching slots. Then by rotary action the latching flap rotates or pivots. A. J. Weiss, to whom the carton patent was issued, testified at the trial. The defendant in its brief stated:

> "* * * Weiss pointed out * * * that tightening of the package occurs as a result of rotary action when the latching **[**12]** catch of the primary lock hooks around the edge of the latch opening, creating lateral movement of the closure flaps to draw them to their position of greatest overlap. * * *"

[*555] In that connection, counsel for the defendant in his opening statement stated:

> "* * * That tightening effect is the result of what we call a camming action between these catches and the slots in which they are engaged. That camming action converts the rotary motion of the flap to a lateral motion so that the overlapping panels are drawn together to their maximum position of overlap. This is what provides the tight pack, which is so essential in open end wrap-around cartons."

12. In the Ganz machine patent, it is stated that the invention had special application to use with cartons of the type disclosed by the Weiss patent. In the matter of invention claimed by the defendant, those patents are closely intertwined. In a packaging operation making use of the JAK-ET-PAK system, the machine first folds the side panels of the carton downwardly. Then in a series of operations by means of stationary guiding bars or blades, the machine **[***74]** continues to fold the carton until it is rectangular **[**13]** in form. The machine then performs the locking of the carton. The locking operations as to the carton are performed by the locking mechanism of the machine. Those operations are performed by an arrangement of folding swords which are properly shaped and positioned for that purpose. There are no moving parts in the locking mechanism of the machine.

The locking mechanism of the machine is the particular part of the machine here in issue. By means of the locking mechanism, the primary lock of the carton is locked. That lock, as heretofore noted, consisted of a latching flap and its integral catch. In the locking operation, the latching flap is positioned with its integral catch. Then by means of rotary or pivotal action, the flap is locked into its integral catch. It is the contention of the defendant that such pivotal action "provides the essential tight pack."

13. In the Weiss carton Patent No. 2,990,997, the prior patents referred to are:

1,669,454	Close	May 15, 1928
1,996,997	Inman	Apr. 21, 1935
2,025,201	Graham	Dec. 24, 1935
2,102,497	Trogman	Dec. 14, 1937
2,140,932	Avery	Dec. 20, 1938
2,304,362	Huye	Dec. 8, 1942
2,572,159	Kells	Oct. 23, 1951
2,786,572	Gentry	Mar. 26, 1957
2,798,603	Grinspoon	July 9, 1957
2,857,048	Johnson	Oct. 21, 1958

[14]** The plaintiffs introduced into evidence on the matter of the anticipation of the Weiss patent the following in connection with the matter of prior art:

Calahan	575,775 of Jan.	26, 1897
Morrison	1,104,821 of July	28, 1914
Close	1,669,454 of May	15, 1928
Graham	2,025,201 of Dec.	24, 1935
Pergande	2,060,240 of Nov.	10, 1936
Trogman	2,102,497 of Dec.	14, 1937
Avery	2,140,932 of Dec.	20, 1938
Poe	2,316,362 of April	13, 1943
Lighter	2,395,558 of Feb.	26, 1946
Crary	2,419,391 of April	22, 1947
Kells	2,572,159 of Oct.	23, 1951
Tyrseck	2,586,886 of Feb.	26, 1952
Tyrseck	2,660,361 of Nov.	24, 1953
Gentry	2,786,572 of Mar.	26, 1957
Grinspoon	2,798,603 of July	9, 1957
Gentry	2,827,165 of Mar.	18, 1958
Andre	2,911,096 of Nov.	3, 1959
Currivan	2,922,561 of Jan.	26, 1960
Stone	2,975,891 of Mar.	21, 1961
French	1,063,058 of April	29, 1954

Those included the following patents referred to in the patent: Close, No. 1,669,454; Graham, No. 2,025,201; Trogman, No. 2,102,497; Avery, No. 2,140,932; **[*556]** Kells, No. 2,572,159; Gentry, No. 2,786,572; Grinspoon, No. 2,798,603.

14. In connection with the matter **[**15]** of anticipation of the Weiss patent and in connection with another issue related to that patent, reference will be made to some other matters relating to that patent.

The Federal Paper Board Company was and is engaged in the making of paper cartons and the packaging of those cartons. It was previously known as the Morris Paper Mills. It had in its employ Edwin L. Arneson whose position with the corporation was that of a structural design engineer. He is also referred to as E. L. Arneson. The plaintiffs contend that apart from the anticipation shown by the cartons covered by the prior art patents referred to there was direct anticipation of the Weiss carton by E. L. Arneson. On April 5, 1960, Patent No. 2,931,152 was issued to E. L. Arneson, a patent for a can packaging machine. The application for the patent was filed June 30, 1958. The machine which was the subject matter of the patent was designed by him. It was designed to be used for the packaging of paper cartons. In the patent are drawings, Figures 10 and 11, depicting what is described as a typical wrapper member which was adapted to be employed with the machine. It is the contention of the plaintiffs that the cartons **[**16]** depicted directly anticipate the carton which is the subject matter of the Weiss patent. Arneson first conceived the carton between May 7, 1957, and June 6, 1957. The earliest date claimed by Weiss for the conception of Weiss Patent No. 2,980,997 here in suit was October 8, 1957. It is the contention of the plaintiffs that the Arneson carton embodies and portrays a carton similar to and practically identical with the carton which is the subject matter of the Weiss patent and hence directly and completely anticipated that carton. It is the contention of the defendant that Arneson, at the time of the conception of his carton and at the time of his application for and the securing of his machine Patent No. 2,931,152, had no concept of a carton blank which might produce an automatic tightening of the blanks around its contents.

15. It was heretofore noted that the application for the Weiss patent was filed on July 15, 1958. On December 24, 1959, Arneson filed an application for a patent on an improvement on a carton for cylindrical articles. On October 24, 1961, he made an amendment to his application. In the amendment he set forth claims which incorporated Claims 1, 2 and 4 of **[**17]** Weiss Patent No. 2,990,997 here in suit. On May 15, 1962, **[***75]** the Patent Office declared an interference to exist between Arneson's application and the Weiss Patent No. 2,990,997. On October

17, 1962, Arneson filed with the Patent Office a concession of priority in favor of the Weiss patent. On October 31, 1962, the Patent Office sent the following communication to the inventor: "As required by Public Law No. 87-831, (76 Stat. 958) approved October 15, 1962, notice is hereby given the parties of the requirement of that law for filing in the Patent Office a copy of any agreement 'in connection with or in contemplation of the termination of the interference.'" The statute referred to appears as subsection (c) of *Section 135, Title 35 U.S.C.A.*, which provides that failure to file a copy of such agreement shall render permanently unenforceable any patent involved. On December 7, 1962, there was filed with the Patent Office a letter from counsel for Weiss stating that the concession of priority previously filed with the Patent Office set forth the only agreement or understanding of the parties to the interference made in connection with or in contemplation of the termination of such interference. **[**18]** On December 14, 1962, the Patent Office terminated the interference proceedings.

On June 18, 1962, during the pendency of the interference proceedings, the defendant, Continental Can Company, Inc., and the Federal Paper Board Company entered into an agreement under provisions of which the latter company was granted a license under the Weiss patent. That agreement was not filed with the Patent Office. It is the contention of **[*557]** the plaintiffs that the agreement was of such a character as to require the filing of it in the Patent Office under the provisions of *Section 135(c), Title 35 U.S.C.A.*, and that because it was not filed the defendant may not enforce any rights that it might have under the Weiss patent. The defendant controverts that contention.

16. It is the claim of the plaintiffs that Claim 4 of the Ganz patent was anticipated by certain prior patents. The prior art patents referred to in the Ganz patent are as follows:

2,751,730	Gentry	June 26, 1956
2,809,484	Gentry	Oct. 15, 1957
2,809,486	Gentry	Oct. 15, 1957

The plaintiffs introduced into evidence as prior art patents in connection with the Ganz patent the following:

Heybach	995,965 of June 20, 1911
Lane	1,624,257 of April 12, 1927
Pergande	2,060,240 of November 10, 1936
Banta	2,305,130 of December 15, 1942
Wood	2,625,778 of January 20, 1953
Monroe	2,780,900 of February 12, 1957
Tobey	2,823,501 of February 18, 1958
Arneson	2,931,152 of April 5, 1960
Galloway	2,979,876 of April 18, 1961
German	598,010 of June 4, 1934
Anness	2,817,197 of December 24, 1957
Arneson	2,860,461 of November 18, 1958
Murray	2,953,879 of September 27, 1960

[19]** 17. The carton which is the subject matter of the Weiss patent and the machine which is the subject matter of the Ganz patent are very closely related. It is the claim of the defendant that the plaintiffs are infringing Claims 1, 2 and 4 of the Weiss patent and Claim 4 of the Ganz patent. Claims 1, 2 and 4 of the Weiss patent are as follows:

> "1. A wrap-around carrier having overlapping closure panels, one of the panels having a latching extension disposed beyond a transverse pivot line located within the overlap of the closure, the latching extension being formed with a catch which, when the latching extension is brought toward the other panel, is received in a latch opening in the other panel, the base of the catch being tightly aligned with the adjacent edge of the latch opening when the overlapping panels are drawn into their positions of maximum overlap, the overlapping edge of the inner one of said overlapping panels being spaced from the fold line of the other of said overlapping panels and said overlapping panels being free to be drawn together as the catch is hooked around said adjacent edge of the opening and the latching extension is pressed against the other panel **[**20]** to bring the side walls of the carrier tightly against the contents of the carrier whereby the action of the catch will produce

an automatic tightening of the side walls against the contents as it cams or levers the closure panels into the fully closed overlapping position.

[*558] "2. A paperboard blank for forming a wrap-around carrier for cylindrical objects such as cans having chines at their ends, said blank being rectangular in form and having five transverse fold lines which define three body panels and a closure panel extending from the outer end of each of the outer body panels and a latching flap at the end of one closure panel, said closure panels being of a width such that they overlap when the carrier **[***76]** is in erected position, a catch in one of said closure panels and an opening in the other closure panel both of which are within the overlap when the carrier is in erected position so that the catch can be received within the opening, the transverse fold line which defines said latching flap being within the overlap of the closure panels when the carrier is in erected position, said catch extending from said latching flap across and interrupting said fold line in the **[**21]** closure panel so that, when the carrier is being erected and said latching flap is being folded back, the catch hooks around the edge of the opening to draw the overlapping panels together.

"4. A paperboard blank for forming a wrap-around carrier for cylindrical objects such as cans having chines at their ends, said blank being rectangular in form and having transverse fold lines which define body panels and a closure panel extending from the outer end of each of the outer body panels, the outer ends of said closure panels forming the outer ends of said blank, said closure panels being of a width such that they overlap when the carrier is in erected position, one of said closure panels having a latching extension disposed along the free end of the closure panel beyond a bending axis disposed in said one closure panel, a catch in said one closure panel and an opening in the other closure panel, both of which are within the overlap when the carrier is in erected position so that the catch can be received within the opening, the bending axis being within the overlap of the closure panels when the carrier is in the erected position, said catch extending from said latching extension with **[**22]** its base portion substantially in line with and interrupting said bending axis, so that when the carrier is being erected and said latching extension is being folded back about said bending axis, the catch hooks around the edge of the opening to draw the overlapping panels together."

Claim 4 of the Ganz patent is as follows:

"4. In a machine for applying to cans and the like arranged in rows, a wrap-around carton having closure panels one of which has a latch opening and the other of which includes a pivotal catch for engagement with said latch opening, the combination comprising means for folding the pivotal catch panel and for engaging the pivotal catch through said latch opening, and means for swinging the pivotal catch into substantially the plane of the folded closure panels."

18. It is the contention of the plaintiffs that the Ganz patent does not particularly point out and distinctly claim the claimed invention.

The plaintiffs, as to Claim 4 of the Ganz patent, in their brief state as follows:

"Claim 4 does *not* include any tightening action. It calls for means for producing three manipulations:

1. Folding the pivotal catch relative to its **[**23]** associated closure panel;
2. Engaging the pivotal catch through the latch opening; and
3. Swinging the pivotal catch into substantially the plane of the folded closure panel.

"Tightening action is not inherent in these manipulations, which may or may not produce a tightening action, depending upon the particular overlap relationship between the closure panels and the degree to which the pivotal catch is folded relative to its associated closure panel."

The plaintiffs contend that nowhere in the Ganz patent is the claimed invention **[*559]** as to the tightening particularly pointed out and distinctly claimed. They contend that because of that claimed situation the Ganz patent is invalid because of vagueness and indefiniteness as to the matter of the claimed invention.

In connection with Claims 1, 2 and 4 of the Weiss patent the plaintiffs contend that those claims are invalid because they are too vague and indefinite. In their brief the plaintiffs state:

"It is essential that the public be able to read the patent claims and determine with a reasonable degree of certainty what structures are and are not covered thereby. The claim interpretation which defendant **[**24]** presents, involving the question of whether or not the locking structure as actually manipulated has produced a 'tightening effect', makes it impossible for a competitor to determine whether his product infringes. * * * The only way one can tell is by knowing just how the carton was manipulated as it passed through the assembly machine. Anomalously, if it was manipulated as *actually disclosed* in the Ganz patent in suit, so that *no* tightening effect is produced by the locking structure, there would be *no* infringement. * * *"

The defendant contends that the Weiss patent is not vague and indefinite **[***77]** as to the matter of tightening. In that connection in its brief it states:

"The disclosure of the Weiss specification makes it clear that Mr. Weiss's objective was to design a wrap-around carton blank for simultaneously forming and filling a tight, open-ended package. * * *.

"* * *

"Insofar as the issues in this case are concerned, only the 'primary lock' of the Weiss patent requires consideration. This primary lock consists of an opening in one of the overlapping closure panels and a latching flap and catch as part of the other overlapping closure panel. This arrangement, **[**25]** in a properly designed and dimensioned carton blank, provides the rotary latching action, resulting in automatic tightening of the carton against the side walls of the cans (Weiss, Tr. 219). The 'secondary lock' is useful for keeping the primary lock in place after it has been completed (Weiss, Tr. 220-221).

"* * *

"Each of claims 1, 2 and 4 in suit includes reference to this crucial tightening action. Claim 1 states that 'the action of the catch will produce an automatic tightening of the side walls against the contents as it cams or levers the closure panels into the fully closed overlapping position.' Claims 2 and 4 refer to 'the catch [hooking] around the edge of the opening to draw the overlapping panels together.'"

The defendant contends that the Ganz patent is not vague and indefinite as to the matter of tightening. The defendant in its brief states as follows in that connection:

"* * * His [Ganz] machine was specifically designed for forming, filling, and locking wrap-around carton blanks of the Weiss patent in suit to produce multipacks. In this regard, the Ganz patent specification states (col. 1, ll. 12-23):

"'My invention has special application **[**26]** to use with paperboard cartons of the type disclosed in the copending application of Arthur J. Weiss, Serial No. 748,728, filed July 15, 1958, a continuation-in-part of Serial No. 613,935, filed February 7, 1958, now abandoned. Such cartons have overlapping closure panels, one of which has a latch opening and the other of which includes a pivotal catch for engagement with such latch opening. In applying such a carton to cans, the closure panels in the completed package are locked together. The catch of one panel is inserted within the latch openings of the other panel, and is then swung so as to lock the catch.'

"Mr. Ganz testified (Tr. 629) that one of the objectives he wanted to accomplish **[*560]** was to design a locking mechanism which would provide a tight package. Reference is made to this objective in the Ganz patent specification as follows:

"'The pivotal catch must be inserted and locked so as to maintain a tight finished package.' (col. 1, ll. 39-40)

"The machine of the Ganz patent, when properly adjusted, produces and maintains 'a tight finished package' (Ganz, Tr. 628, 633-35; Myers, Tr. 833-4; 862)."

19. The contentions and arguments of the parties **[**27]** referred to as to the matter of vagueness and indefiniteness require a consideration of certain statutes and decisions relating thereto. ***HN1***[] Under the provisions of *Section 111, Title 35 U.S.C.A.*, it is provided that an application for a patent shall have a specification as prescribed by *Section 112, Title 35 U.S.C.A.*, and a drawing as prescribed by Section 113, Title ***HN2***[] *35 U.S.C.A. Section 112*, Title 35 U.S.C.A., referred to provides, in part, as follows:

"The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

"The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. * * *"

HN3[] It is well established that the claims of the patent constitute the measure of invention monopoly. *Graver Tank & Mfg. Co. v. Linde Co. (1949), 336 U.S.* ***[**28]*** *271, 69 S. Ct. 535, 93 L. Ed. 672*. It is also well established that the claims of a patent are to be interpreted and read in the light of the specifications. *Schriber-Schroth Co. v. Cleveland Trust Co. (1940), 311 U.S. 211, 312 U.S. 654, 61 S. Ct. 235, 85 L. Ed. 132*.

In the case of *Graver Tank & Mfg. Co. v. Linde Co., supra*, the United States Supreme Court, in discussing that portion of a **[***78]** statute which appears as *Section 112, Title 35 U.S.C.A.*, requiring an inventor to separately state his claims and to particularly point out and distinctly claim what he regards as his invention, stated (p. 277 of 336 U.S. p. 538 of 69 S. Ct.):**HN4**[]

"* * * While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to 'particularly point out and distinctly claim' an identifiable invention or discovery. * * *"

It was heretofore noted that the two patents here in question are based on a combination of old elements. In the case of *Halliburton Oil Well Cementing Co. v. Walker (1946), 329 U.S. 1, 67 S. Ct. 6, 91 L. Ed. 3*, there was involved a patent based on a combination **[**29]** of old elements. The particular issue in the case was whether the inventor had particularly pointed out and distinctly claimed what he claimed was his invention under the provisions of the statute heretofore referred to and set out. The Court stated (p. 3 of 329 U.S. p. 7 of 67 S. Ct.): **HN5**[] "This statutory requirement of distinctness and certainty in claims is important in patent law." The Court, after stating that the courts have viewed claims to patents based on combinations of old elements with very close scrutiny, goes on to state (p. 10 of 329 U.S. p. 11 of 67 S. Ct.): "It is quite consistent with this strict interpretation of patents for machines which combine old elements to require clear description in combination claims."

20. In neither Claim 4 of the Ganz patent nor in any other claims therein is there any mention made of any tightening effect produced by the locking mechanism of the Ganz machine. In the specification references are made to a great many matters. Included in the references is a brief reference to the matter of maintaining a "tight finished package". It **[*561]** is the finding of the Court that the Ganz patent does not particularly point out and distinctly **[**30]** claim the invention presently claimed as required by *Section 112, Title 35 U.S.C.A.*

21. The situation is not the same as to the Weiss patent. In Claim 1 of that patent the matter of "automatic tightening" is particularly pointed out and is distinctly claimed. It is the finding of the Court that the Weiss patent does particularly point out and distinctly claim the invention claimed.

22. It was heretofore noted that it was the contention of the plaintiffs that the defendant could not enforce the Weiss patent because the provisions of *Section 135(c), Title 35 U.S.C.A.*, hereafter set out, were not complied with in regard to the matter of the filing of the agreement between the Federal Paper Board Company and the Continental **[***79]** Can Company, Inc., in connection with the termination of the interference proceedings between the Arneson carton and the Weiss carton. **HN6**[] *Section 135(c)*, requiring the filing of settlement agreements in connection with the termination of interference proceedings, was enacted on October 15, 1962, while the interference proceedings were still pending. The attorneys have cited no cases arising under that statute.

In the House Committee Report relating to that enactment, **[**31]** which appears in United States Code and Congressional and Administrative News, 87th Congress, Second Session, 1962, pp. 3286-3289, the following appears:

"PURPOSE

"The purpose of this bill is to amend the patent laws to require the filing in the Patent Office of agreements settling patent interference proceedings. When two or more applicants claim substantially the same invention

> an interference is declared in order to determine which applicant is entitled to priority. Interference proceedings may be terminated in a manner hostile to the public interest by using patent interference settlement agreements as a means of restricting competition. To make such a practice more difficult the bill requires the filing of such agreements in the Patent Office."

In material accompanying the Report it was stated that the United States Supreme Court had, in the absence of a statute, condemned a particular private interference settlement. *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co. (1945), 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381*.

In 1955 a license agreement had been entered into between Morris Paper Mills, the corporate predecessor of Federal **[**32]** Paper Board Company, and the Robert Gair Company, the corporate predecessor of the Continental Can Company, Inc. Various questions had arisen between the parties as to what extent the Federal Paper Board Company had rights to the JAK-ET-PAK developments of the Continental Can Company, Inc. Negotiations between the parties had extended for a considerable period of time prior to June 18, 1962. On June 18, 1962, the Federal Paper Board Company and the Continental Can Company, Inc., entered into the agreement heretofore referred to. The agreement was quite lengthy. Under it the Federal Paper Board Company secured an exclusive license for the Weiss carton and for the Ganz machine. On June 18, 1962, on the day the agreement was executed and while the interference proceedings were still pending, counsel for the defendant, Continental Can Company, Inc., wrote counsel for the Federal Paper Board Company, in part, as follows:

> "Obviously, the public use referred to in your letter of May 21, 1962 would constitute a bar to the allowance of any valid claims in the Arneson application which would cover the Weiss carton. However, the disclosures in the application and in patent No. 2,990,997 **[**33]** are not identical and possibly limited claims could be drawn which would not be generic. Whether any such claims, if obtained, would be of any value is questionable, particularly in view of the fact that the lock per se is broadly old as shown in Trogman patent No. 2,102,497, **[*562]** which we note is cited in 2,990,997.
> "If you feel the interests of both parties will best be served by abandoning the Arneson application, we are authorized to drop the prosecution of the same. * * *."

It is the contention of the defendant that by the time the agreement of June 18, 1962, was entered into Federal's patent counsel were of the view that the Arneson application could not prevail over the Weiss patent in the interference proceedings and for that reason a concession of priority was filed and that the agreement of June 18, 1962, was not an agreement in connection with or in contemplation of the termination proceedings.

The agreement of June 18, 1962, contained numerous provisions covering many matters. Some of its provisions related to the Weiss patent. In those provisions Continental granted Federal an exclusive license to manufacture and sell cartons under the Weiss patent. The **[**34]** agreement contained no specific provision for the termination of the interference proceedings as to the Weiss patent, yet the licensing of Federal under the Weiss patent, for all practical purposes, made it improbable that the interference proceedings would or could be continued. The parties to the agreement apparently recognized that fact, for on the very day the contract was entered into counsel for Continental wrote counsel for Federal in regard to the matter of terminating the interference proceedings, which was done.

Realistically, it is difficult to envision the agreement of June 18, 1962, other than as an agreement "in connection with or in contemplation of the termination of the interference." It seems clear that at the time the agreement was signed there was in the contemplation of the parties a termination of the interference proceedings. It is the finding of the Court that the agreement of June 18, 1962, did constitute an agreement within the purview of *Section 135(c), Title 35 U.S.C.A.*

23. The matter of the prior art relied on by the plaintiffs in connection with Claim 4 of the Ganz patent will next be considered. That claim is very short. For convenience in reference, **[**35]** it will be set out again:

> "4. In a machine for applying to cans and the like arranged in rows, a wrap-around carton having closure panels one of which has a latch opening and the other of which includes a pivotal catch for engagement with said latch opening, the combination comprising means for folding the pivotal catch panel and for engaging the

> pivotal catch through said latch opening, and means for swinging the pivotal catch into substantially the plane of the folded closure panels."

The prior art patents introduced into evidence by the plaintiffs are thirteen in number. Nine of them relate to machines for closing conventional folding cartons and four of them relate to machines for applying wrap-around cartons.

The plaintiffs make special reference to Heybach Patent No. 995,965, Banta Patent No. 2,305,130, German Patent No. 598,010, Wood Patent No. 2,625,778, Monroe Patent No. 2,780,900, and Tobey Patent No. 2,823,501. It is the contention of the plaintiffs that all of those patents disclose machines adapted to close and lock folding cartons, the cartons having a closing and locking structure which includes a pivotal catch which is adapted to be folded relative to the **[**36]** closure panel to which it is attached, then inserted through an opening in the other overlapping closure panel, and then swung into substantially the plane of the folded closure panels, the machines in question automatically performing the described manipulation steps. The defendant contends that those patents all relate to machines having to do with folding cartons and not with wrap-around packaging as to cans arranged **[***80]** in rows. Three of the prior art patents - Anness Patent No. 2,817,197, Arneson Patent No. 2,860,461, and Murray Patent No. 2,953,879 - do relate to machines designed for wrap-around packaging. The defendant **[*563]** contends that those machines are not pertinent because they are machines directed to the use of glue in the packaging.

The plaintiffs contend that the Ganz machine was directly anticipated by Arneson Patent No. 2,931,152 of April 5, 1960. About July, 1957, Arneson designed and built a carton carrier machine. It would appear that the earliest date of the conception of the Ganz machine was in October, 1957. It is the contention of the plaintiffs that Arneson's machine corresponds to Claim 4 of the Ganz patent. The plaintiffs contend that the Arneson **[**37]** machine wrapped cartons around groups of cans and locked the cartons where the cartons corresponded to and had locking arrangements virtually identical with the cartons involved in the Ganz patent.

Arneson filed an application for a patent on the machine designed by him on June 30, 1958, which was four days after Ganz had filed an application for a patent on his machine.

It is the contention of the plaintiffs that Arneson was a prior inventor. In that connection the defendant in its brief states as follows:***HN7***[]

> "In order for Arneson to qualify as a prior inventor, plaintiffs must prove:
>
> (a) That Arneson conceived the invention and reduced it to practice before Ganz did so, or
>
> (b) If plaintiffs are unable to establish the facts set forth in (a), they must establish that Arneson was diligently working toward a reduction to practice at a time just prior to October, 1957, the date on which Ganz commenced his inventive activities, and that Arneson continued to work diligently thereafter until he reduced the invention to practice."

It is the view of the Court that the plaintiffs are put to the proof of either (a) or (b).

The defendant further states that the Arneson machine **[**38]** was a single row machine and not directed to applying wrap-around cartons to "cans and the like arranged in rows" as was the Ganz machine.

The plaintiffs contend that Arneson had reduced his machine to practice before Ganz conceived his machine. They also contend that the difference between a one-row machine and one directed to the applying of wrap-around cartons to cans arranged in rows is not of significance.

Arneson testified that modification would have to be made to his single row machine to make it suitable for applying wrap-around carton blanks to double rows of cans as called for in the Ganz patent. He also testified that he did not know whether his machine, if so modified, would work.

It was heretofore noted that Arneson did not file his application until four days after Ganz filed his application.

In September, 1958, the Federal Paper Board Company caused the Arneson machine to be shipped to one T. Walter Kaestner, an outside engineering consultant relied on by it, to study and investigate the general functioning of the machine. Kaestner made trial runs on an experimental basis in which various cartons were folded into place and locked. He found that at low speeds **[**39]** the machine functioned very well. He experienced difficulty when he tried to fold cartons at high speeds. He was of the opinion that changes were necessary, perhaps costly in character, to make the machine operate at higher speeds in order to provide the versatility desired by the Federal Paper Board Company. In his report to Federal he suggested a number of changes which might be made in the machine to give it the versatility desired. The machine was returned by Kaestner to Federal. No changes were made in it. After its return it was in Federal's plant in New Haven, Connecticut, and not used thereafter.

The Court is of the view that the plaintiffs have not established either (a) or (b) heretofore set forth.

[*564] 24. There is for consideration the question as to whether Claim 4 of the Ganz patent discloses a patentable invention over the prior art. In the preamble to the patent it is stated: "The invention relates to the packaging of cans and the like in wrap-around paperboard carriers." In Claim 4 of the patent it is stated the machine involved is "a machine for applying to cans and the like arranged in rows, a wrap-around carton * * *." Claim 4 then calls for a means **[**40]** of producing three manipulations in relation to the carton: (1) folding the pivotal catch panel relative to the associated closure panel; (2) engaging the pivotal catch through the latch opening; and (3) swinging the pivotal catch into substantially the plane of the folded closure panels. Since, as heretofore noted, the patent does not particularly point out and distinctly **[***81]** claim the feature of tightening, the three manipulations made by the machine in connection with wrap-around packaging are what are involved in connection with the prior art patents. Heybach Patent No. 995,965, Banta Patent No. 2,305,130, German Patent No. 598,010, Wood Patent No. 2,625,778, Monroe Patent No. 2,780,900 and Tobey Patent No. 2,823,501 all disclose machines adapted to close and lock folding cartons, the cartons having a closing and locking structure which includes a pivotal catch which is adapted to be folded relative to the closure panel to which it is attached, then inserted through an opening in the other overlapping closure panel, and then swung into substantially the plane of the folded closure panels. The machines disclosed automatically perform the described steps. The language in Claim 4 **[**41]** of the Ganz patent relating to a wrap-around carton for cans "arranged in rows", or similar language, does not appear in the prior art patents referred to. The manipulations necessary to close and lock a carton, whether it is a wrap-around or nonwrap-around operation, would seem to be very closely related. In both instances the manipulations result in tabs being inserted into openings so as to close and lock the carton containing the cans or other containers. The locking structures employed in connection with wrap-around cartons and nonwrap-around cartons are very similar in the matter of manipulations. In view of the close relationship between the matters referred to, it would seem to be merely a matter of option and design on the part of those having ordinary skill in the art to adapt the Ganz machine to handle a wrap-around carton. It would seem that Claim 4 describes in machine terms nothing more than the functions and operations required to manually manipulate and lock cartons of the wrap-around type. It is to be noted that Lane Patent No. 1,624,257, Monroe Patent No. 2,780,900, Tobey Patent No. 2,823,501 and Wood Patent No. 2,625,778, all disclose machines adapted to close **[**42]** and lock folding cartons by means of stationary swords and guides which is a feature of the Ganz machine. It was heretofore noted that Anness Patent No. 2,817,197, Arneson Patent No. 2,860,461 and Murray Patent No. 2,953,879 all relate to machines designed for wrap-around packaging and that the defendant contends that the machines disclosed by those patents are not pertinent, among other reasons, for the reason they are directed to the use of glue in packaging. While the Ganz machine is not directed to the use of glue in packaging, in the preamble to the Ganz patent it is stated that the pivotal catch of the Weiss carton patent could be secured "after locking either by a tongue attached to the latching flap or by gluing the latching flap directly, or both".

Since the feature of tightening was not particularly pointed out and distinctly claimed in Claim 4 of the Ganz patent, it is clear that so far as patentable invention is involved the Ganz patent has to start or fall by the manipulations accomplished by means of stationary swords and guides in relation to a carton of the type set forth in the patent. It is the finding of the Court that such does not reach the level of patentable **[**43]** invention.

25. In the Weiss patent, different from the Ganz patent, the feature of **[*565]** tightening is particularly pointed out and distinctly claimed.

It is clear that the heart of the claimed patentable invention is that the structure of the Weiss carton is such that a tightening effect may be achieved by means of a rotary latching action. In the specification it is stated that such rotary latching action can "if desired" produce an automatic tightening of the package as it cams or levers the closure panels into fully closed overlapping position. In the cross-examination of A. J. Weiss, certain questions were directed to him as to the matter just referred to. Some of those questions and his answers thereto were as follows:

> "Q * * * My question has to do with the action of the locking structure in producing the tightness. As I read that sentence it says that the rotary latching can if desired produce an automatic tightening, and I am asking you if that does not imply that the rotary-latching action can be used without producing an automatic tightening?
> "A I would have to agree it does.
>
> "Q Now I ask you how can the rotary latching be used without producing a tightening **[**44]** action?
> "A By the dimensions of it, perhaps.
> "Q Would you be more specific on that point?
> "A Well, if I foreshorten dimensions in the bottom closure panels or increase them - as the case may be - I can make a loose closure or a tight closure with the rotary-latching action."

It appears that the locking structure in the Weiss carton may or may not produce a carton-tightening action, depending upon the spatial relationship of **[***82]** the overlapping panels at the time that carton lock structure is pivoted. If the pivotal axis of the lock structure is positioned inwardly beyond the lock-engaged edge of the opening in which the catch is received no tightening will result, but if the pivotal axis is positioned outwardly of that edge tightening action will result.

It was the testimony of witnesses for the defendant that in packaging a Weiss carton by the rotary action a 1/32nd of an inch of tightening may be achieved.

A. J. Weiss testified that the individual features of his locking arrangement were disclosed in the different prior art cartons. He further testified that he did not know of any wrap-around carton in which those individual features were combined as they were in his locking **[**45]** arrangement.

The prior art patents introduced into evidence in connection with the Weiss patent by the plaintiffs were twenty in number. Eleven of those patents related to folding cartons and boxes; six to wrap-around cartons; and three related to envelope fasteners, fruit basket liners, and disintegrated pots.

It is the contention of the plaintiffs that the cartons shown in Morrison Patent No. 1,104,821, Close Patent No. 1,669,454, Trogman Patent No. 2,102,497, Pergande Patent No. 2,060,240, Poe Patent No. 2,316,362, Crary Patent No. 2,419,391, French Patent No. 1,063,058 and Kells Patent No. 2,572,159 all would exhibit a tightening effect if appropriately manipulated. Further, it is their contention that the Robertson Paper Box and the Ray Paper Box cartons referred to would exhibit the tightening effect if appropriately manipulated. Further, it is their contention that the tightening effect is an inherent character of the prior art cartons referred to.

The defendant controverts those contentions of the plaintiffs. In that connection it also asserts that the cartons referred to were closed-end cartons as contrasted with the open-end of the Weiss carton. The plaintiffs contend **[**46]** that whether the cartons referred to are of the open-end or closed-end type is not of significance. It is the contention of the defendant that the tightening **[*566]** action, if any, which might be embodied in the prior art cartons relied on by the plaintiffs occurs as an incident to accomplishing the locks thereof and serves no usual purpose and may be undesirable. It points out that in none of those patents is there any direct reference made to the matter of tightening.

26. The prior art patents relating to wrap-around cartons were directed to closed-end rather than wrap-around cartons. There appears to be nothing in the Weiss patent which excludes closed-end cartons. Both closed-end and open wrap-around cartons were well known in the art prior to the Weiss patent.

Both the Ray Paper Box and the Robertson Paper Box in 1951 and 1954 made and sold wrap-around cartons which appear to be somewhat similar to the Weiss carton. In the packaging of containers in those cartons the product was placed on the flat carton blank and the carton blank was then folded or wrapped around the product with the overlapping outer closure panels locked in place by means of a structure similar **[**47]** to that of the Weiss carton.

Four of the six wrap-around prior art patents - Gentry No. 2,786,572, Gentry No. 2,827,165, Andre No. 2,911,096, and Stone No. 2,975,891 - relate to cartons held together by punch locks. One of the wrap-around patents - Grinspoon No. 2,798,603 - relates to cartons held together by tuck flaps. One of the wrap-around patents - Currivan No. 2,922,561 - relates to cartons held together by glue. The six following carton prior art patents - Trogman No. 2,102,497, Morrison No. 1,104,821, Pergande No. 2,060,240, Poe No. 2,316,362, Crary No. 2,419,391 and Lighter No. 2,395,558 - teach the use of overlapping panels, matching tongues, and openings in cartons which enclose their contents on all sides. In this connection the defendant in its brief states:

> "These prior art patents relating to wrap-around cartons are enlightening evidence of the state of the pertinent art, and confirm the novelty and patentability of the Weiss combination. These patents demonstrate, as Weiss testified, that wrap-around cartons having the general characteristics of his carton, but with different locking arrangements, were old and well known. But, more importantly, they show **[**48]** a high degree of activity in the field of wrap-around carriers during the four years immediately preceding the Weiss invention, and demonstrate that before Weiss, nobody had thought of the idea of using the Weiss locking arrangement to produce a tightening action in a wrap-around carton. This remained for Weiss to invent * * *."

27. The patentable invention claimed is, as noted, a combination of old elements. ***HN8***[] While numerous patents involving a combination of old elements have been held invalid, yet it is possible for a combination of old elements to give rise to patentable invention **[***83]** . In the case of *Copease Manufacturing Co. v. Cormac Photocopy Corporation (D.C.S.D.N.Y.1965), 242 F. Supp. 993*, this Court upheld the validity of a patent based on a combination of old elements.

HN9[] *Section 103, Title 35 U.S.C.A.*, provides:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in **[**49]** the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. * * *."

In the recent cases of *Graham v. John Deere Plow Co. (1966), 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545*, and *United States v. Adams (1966), 383 U.S. 39, 86 S. Ct. 708, 15 L. Ed. 2d 572*, the Supreme **[*567]** Court has considered and restated the principles applicable to patentability.

In the case of *Graham v. John Deere Plow Co., supra*, the Court stated (pp. 17-18 of 383 U.S. p. 694 of 86 S. Ct.):***HN10***[]

> "* * * Under *§ 103*, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy. * * *"

[50]** Prior to the conception of the Weiss carton there were cartons which met and have continued to meet the needs and wants of numerous users of wrap-around cartons. However, they had not met the needs and wants of other users. In the case of the Weiss carton, by means of a rotary latching action during the packaging operation, a tightening of the completed package up to 1/32nd of an inch is or can be brought about. Some users desire such tightening action.

28. The tightening effect in the Weiss carton packaging produced by rotary latching action represents a moderate but nevertheless commercially worth-while advance in the field of wrap-around packaging.

It is a close and troublesome question whether that advance amounted to patentable invention. That advance was made by combining certain well-known carton locking structures with a rotary latching action. It is the view of the Court that in light of all the prior art that advance was not such as to have been nonobvious to a person having ordinary skill in the art.

It is the finding of the Court that at the time the Weiss patent was obtained the differences between the subject matter of that patent and the prior art were such **[**51]** that the subject matter of the Weiss patent as a whole would have been obvious at the time to a person having ordinary skill in the art.

29. There is another issue between the parties. It is the contention of the plaintiffs that the defendant, Continental Can Company, Inc., was guilty of a violation of the anti-trust laws in connection with the Weiss carton patent and for that reason it may not enforce that patent.

It was heretofore noted that on January 18, 1962, the defendant, Continental Can Company, Inc., and the Federal Paper Board Company entered into an agreement covering a number of matters. In the agreement Continental granted Federal a license, but without the right to grant sub-licenses, for Weiss cartons. That license was to be exclusive, save as to Continental and its subsidiaries. After the execution of that agreement, both Continental and Federal sold cartons to their respective customers.

The agreement contained no provision for the granting of additional licenses. It is the contention of the plaintiffs that in practice the parties did exercise joint control over the granting of additional licenses and in connection therewith gave Federal what amounted to a **[**52]** veto power in connection with the granting of additional licenses.

In support of their contention, the plaintiffs cite and quote, as hereinafter set forth, from the case of *United States v. Crown Zellerbach Corporation (D.C.1956), 141 F. Supp. 118*, p. 127 in which it is stated:

> "* * * Here * * * it is alleged that the patentee ALSCO had agreed to confer with Crown before appointing as a distributor any paper jobber in the territory east of the Mississippi. The understanding fairly implied is that Crown's wishes will be given consideration. By serving the **[*568]** interests **[***84]** of Crown and not of ALSCO, the agreement presents a genuine and triable issue under the Sherman Act. In analogous circumstances, it has been held that an agreement by the patentee giving the licensee a veto power in the selection of additional licensees is invalid. * * *"

The plaintiffs also cite and rely on the case of *United States v. Besser Manufacturing Co. (D.C.1951), 96 F. Supp. 304*, affirmed *(1952), 343 U.S. 444, 72 S. Ct. 838, 96 L. Ed. 1063*. That case was a civil action by the United States under the Sherman Act against a number of defendants. There were a number of issues in the case, **[**53]** one of which had to do with the licensing of certain patents. In that case two of the defendants, Besser Manufacturing Company, referred to as Besser, and Stearns Manufacturing Company, referred to as Stearns, entered into an agreement with one Gelbman and one Andrus, the patentees of certain patents, under which Besser and Stearns became the exclusive licensees of the patents. The agreement provided for the granting of additional licenses only by joint consent. In that case, in the District Court opinion, it is stated (*96 F. Supp. p. 310*):***HN11***[]

> "Granting that an exclusive license may be valid * * *, the Supreme Court has recognized certain limitations, and where such a license has for its purpose the suppressing of competition, it has been held invalid. * * *
>
> "We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents. The contract even **[**54]** gives Stearns and Besser the power to restrict competition - present and future - by requiring their joint consent before licensing others. It is this combination requiring collective action that primarily invalidates the

agreement. We believe it clear that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated. * * *"

The exclusive license feature of the agreement here in question soon gave rise to difficulties for Continental. It had numerous customers who were large users of the Weiss cartons. Some of those customers claimed that an additional source of supply was needed to satisfactorily meet their needs and requested that additional licenses be granted to meet that situation. There were numerous conferences between Continental and Federal in connection with the matter of granting additional licenses. In some instances Continental, after conferring with Federal, granted additional licenses with the consent of Federal. In some instances Continental granted additional licenses without the consent of Federal. If Continental did not grant additional licenses to afford some of its major carton customers **[**55]** a second source of supply, there was the possibility of losing those customers. The granting of such licenses without the consent of Federal exposed it to liability to Federal for breach of the license agreement.

The situation in regard to the granting of additional licenses became increasingly unsatisfactory. To deal with that situation, Continental and Federal on December 16, 1963, entered into an agreement amending their previous agreement. Under the agreement as amended, Continental was given the right to grant additional licenses to third parties to supply Weiss cartons to companies for whom Continental was the major supplier of such cartons.

It was heretofore noted that in the cases relied on by the plaintiffs the agreements in those cases were regarded as having for their objective the suppressing of competition in violation of the anti-trust laws.

[*569] In the present case it does not appear that neither Continental nor Federal in their handling of requests for the licensing of third parties before their agreement was amended had as their objective the suppressing of competition or did suppress competition. In fact, it would appear that their handling of them made **[**56]** for greater competition.

It is the finding of the Court that the conduct of Continental and Federal in connection with the matter of dealing with requests for additional licenses did not contravene the anti-trust laws or constitute misuse of the Weiss patent.

30. In connection with the agreement of June 18, 1962, between Continental and Federal, the plaintiffs make an additional contention. They contend that the provisions of the agreement relating to the licensing of improvements constituted a violation of the anti-trust laws. Continental was the owner of the Weiss and Ganz patents. Federal was the owner of a patent comprising a machine referred to as the Mor-Can-Pak machine. Paragraph 3 of the agreement is as follows: **[***85]**

> "3. CONTINENTAL agrees that it will sell to FEDERAL such JAKET-PAK machines as FEDERAL shall order. The machines so sold shall include any improvements then incorporated in the then current JAK-ET-PAK machines of the series ordered."

Paragraph 6 of the agreement is as follows:

> "6. FEDERAL agrees that it will sell to CONTINENTAL such MOR-CAN-PAK machines as CONTINENTAL shall order. The machines so sold shall include any improvements then incorporated **[**57]** in the then current MOR-CAN-PAK machines of the series ordered."

Paragraph 9 of the agreement provides, in part:

> "9. CONTINENTAL hereby grants to FEDERAL a license * * * under CONTINENTAL'S within described Patent Rights, patents and patent applications * * * to manufacture and sell Cartons throughout the United States for use on JAK-ET-PAK machines and MOR-CAN-PAK machines. * * *."

Paragraph 11 of the agreement provides, in part, as follows:

> "11. FEDERAL hereby grants to CONTINENTAL a license * * * under FEDERAL'S within described Patent Rights, patents and patent applications to manufacture and sell Cartons throughout the United States for use on JAK-ET-PAK machines and MOR-CAN-PAK machines. * * *."

Paragraph 19 of the agreement, which is the provision relied on by the plaintiffs in support of their contentions, provides, in part, as follows:

> "19. (a) If and when either of the parties hereafter develops or acquires an Improvement of a patentable nature, it will promptly make a full disclosure of the same to the other party and as to the actual cost incurred by it in developing or acquiring the Improvement. The other party shall then have a period **[**58]** of 45 days in which to decide whether it wishes to acquire from the first party a royalty-free license * * * which shall be for the term of the patent * * * covering such rights as the first party may have in the Improvement in return for sharing one-half said cost. If it decides that it wishes to acquire the license it shall within said period so advise the first party and pay to the first party its share of said cost, whereupon the license on that particular Improvement shall become effective.
> "* * *."

Paragraph 22 of the agreement provides, in part, as follows:

> "22. (c) The term 'Improvement ' as used herein means (1) any modification of the Cartons or Carton applying machines; or (2) any modification of inventions which are within the scope of the Patent Rights. * * *
>
> **[*570]** "(d) The term 'Patent Rights' as used herein means (1) all issued United States patents now owned or controlled by either party relating to Cartons and Carton applying machines; (2) all pending applications for United States patents now owned or controlled by either party relating to Cartons and Carton applying machines; and (3) all United States patents which may issue on said pending applications **[**59]** or for any other inventions which either party has heretofore made or acquired relating to Cartons and Carton applying machines, which applications or patents may be made or acquired by either party after the date of this Agreement to the extent that the acquiring party has the right to grant licenses thereunder.
> "* * *"

Paragraph 21 of the agreement provides, in part, as follows:

> "21. Either party may terminate its obligations under Paragraph 19 hereof as to any future Improvement made or acquired by it, on the fifth anniversary of the date of this Agreement or on any anniversary thereafter, by giving the other party six (6) months' advance notice in writing of its decision to terminate. * * *"

The plaintiffs, in support of their contentions, rely on a number of cases. They cite the case of *United States v. Associated Patents, Inc. (D.C.1955), 134 F. Supp. 74*, affirmed *Mac Inv. Co. v. United States (1956), 350 U.S. 960, 76 S. Ct. 432, 100 L. Ed. 834*. They set out the following quotation from the District Court opinion in that case (p. 82 of 134 F. Supp.):

> "2. The API agreement of August 3, 1933, created an arrangement for the exclusive cross-licensing of the subject **[**60]** matter patents and future improvement patents therein through the pooling of these patents in API. The combined effect of the provisions of the API agreement was to impose the following unreasonable restraints:
> "(a) * * *
>
> "(b) Outside parties were restricted in their manufacture of machine tools by being foreclosed from obtaining licenses on the subject matter patents or improvements thereon for any of the types of machine tools included **[***86]** within the fields of use exclusively reserved to API members.
> "(c) Each of the parties was restricted in the licensing of improvement patents it developed by the requirements that all improvement patents be assigned to API.
> "(d) Invention and technological development have been discouraged by the limitations imposed on the members' rights to use and license improvement patents developed by them."

They also cite and quote from the opinion in the case of *International Nickel Company v. Ford Motor Company (D.C.1958), 166 F. Supp. 551, 565*:

"That license-back provisions are not illegal *per se* was established beyond cavil by *Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 1947, 329 U.S. 637, 67 S. Ct. 610, 91 L. Ed. 563*. True it is, **[**61]** that license agreements will not be upheld where they are used in violation of the anti-trust laws to perpetuate control over an industry long after the expiration of the basic patents or where 'through * * * patent pools or multiple licensing agreements the fruits of invention of an entire industry might be systematically funneled into the hands of the original patentee.' Similarly such agreements which tend to stifle research are antagonistic to the underlying policies of the patent laws."

They also cite and quote from the opinion in the case of *United States v. Besser Manufacturing Company, supra* (p. 311 of 96 F. Supp.):

"Still these contracts go further. The intent to restrain trade and the illegality is further augmented and evidenced **[*571]** by the provision in both the four-way agreement of 1942 and the Flam purchase contract granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn. Such conditions while not illegal, per se, cannot be justified as necessary to the enjoyment of or ancillary to the patent rights conveyed, *United States v. National Lead Co., D.C., 63 F. Supp. 513, 524*; *United States **[**62]** v. General Electric Co., D.C., 80 F. Supp. 989, 1005*; *Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 67 S. Ct. 610, 91 L. Ed. 563*, and read in conjunction with the rest of the contract provisions and other acts herein enumerated, makes the conclusion inescapable that the Besser-Stearns group had and achieved an obvious objective that cannot be reconciled with the restrictions of the Sherman Anti-Trust Act."

The defendant, in opposition to the contention of the plaintiffs, relies upon the case of *Transparent-Wrap Machine Corp. v. Stokes & Smith Co. (1947), 329 U.S. 637, 67 S. Ct. 610, 91 L. Ed. 563*. In that case there was under challenge under the anti-trust laws a patent license agreement. In that case the Transwrap Corporation was the owner of a patent on a machine which filled and wrapped certain articles. It entered into a patent license agreement with the Stokes & Smith Company under which it licensed the latter to manufacture and sell the patented machine. The contract provided that the licensee assign to the licensor any improvement patents applicable to the machine and suitable for use in connection with it. The licensor sought to enforce that provision. **[**63]** The licensee contended that the provision in question was illegal and unenforceable under the anti-trust laws. In a 5 to 4 decision the Supreme Court held as follows (p. 648 of 329 U.S. p. 616 of 67 S. Ct.): "We only hold that the inclusion in the license of the condition requiring the licensee to assign improvement patents is not *per se* illegal and unenforceable."

In one provision of the agreement involved in that case it was provided that if the licensee "shall discover or invent an improvement which is applicable to the Transwrap Packaging Machine and suitable for use in connection therewith" it would submit the same to the licensor which might at its option apply for Letters Patent covering the same, and if the licensor failed to apply for such Letters Patent the licensee might do so. It was also provided that during the term of the license all improvement patents, whether secured by the licensor or licensee, were to be included in the terms of the license without payment of an additional royalty. The plaintiffs in their brief herein state as follows:

"* * * Paragraph 19 provides that if at *any time* in the future either of the parties makes or acquires any patentable **[**64]** development in the field of wrap-around packaging the other party can obtain a *royalty-free exclusive* license thereunder by paying half of the development or acquisition costs. This is nothing more or less than a patent pool without time limitation. It provides in effect, as between these two competitors, that if either one ever develops or acquires something of value in the packaging field, it must **[***87]** share it fifty-fifty with the other party *and with no one else*.

"Not only does this destroy competition as between these two competitors with regard to things in being; competition is also destroyed in research and development for the future. In addition the future inventions are to be shared between these two concerns to the exclusion of all others."

The parties are in disagreement as to the extent the parties had and were making use of the provisions in their agreement as to future developments. Some, but not a great deal, use was made of those provisions but those provisions are apparently regarded by the parties as being operative.

Paragraph 23 of the agreement between Continental and Federal provides **[*572]** that the agreement shall be for five years with right **[**65]** of extension from year to year. Other provisions in that paragraph make it clear that it was not the intent of the parties to extend the provisions of the agreement beyond the patent period of the patents involved. Thus, the provisions relating to future developments in connection with the patents involved would be limited to the life of those patents. Thus, it cannot be said that the provisions as to future developments in connection with the Weiss and Ganz patents are unlimited as to time.

It was previously noted that in the case of *Transparent-Wrap Machine Corp. v. Stokes & Smith Co., supra*, the ***HN12***[] Supreme Court held that a provision in a license agreement which required the assignment of future development patents was not per se illegal and unenforceable.

In the present case there is absent any showing that the provisions in the agreement between Continental and Federal relating to future development patents had any anti-competitive effect or resulted in the stifling of any research. Thus, the contentions of the plaintiffs as to illegality and unenforceability of those provisions have to be based upon the provisions per se.

While the holding of the Supreme Court that a condition **[**66]** in a license agreement requiring the assignment of future development patents is not per se illegal and unenforceable was a 5 to 4 decision, it apparently is still the law.

It is the view of the Court that the contentions of the plaintiffs as to the illegality and unenforceability of the Weiss and Ganz patents because of the situation as to future development patents are not well founded.

31. The plaintiffs contend that the rights of the defendant under the Weiss patent are unenforceable for another reason. In that connection it is the contention of the plaintiffs that fraud was practiced on the Patent Office in connection with the securing of the Weiss patent. It appears that during the prosecution of the Weiss application the Patent Office cited certain references. It is the contention of the plaintiffs that arguments were made in behalf of the applicant differentiating those references and that such arguments were false and that they were known to be false at the time they were made. The Patent Office examiner had before him the prior art references and formed his own views as to what they disclosed. It is the finding of the Court that no deception was practiced by Weiss **[**67]** or by the defendant acting in his behalf in connection with the prosecution of the Weiss application.

32. The plaintiffs, as heretofore noted have asked for an allowance of attorneys' fees under the provisions of *Section 285, Title 35 U.S.C.A.* This case involved numerous important and difficult questions in the field of patent law, some of which were close and troublesome. The Court is of the view and holds that this is not such an exceptional case as to justify the allowance of attorneys' fees.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter of this action and the parties thereto.

2. Claim 4 of Ganz Patent No. 2,986,857 is invalid in that it does not particularly point out the invention claimed as required by the provisions of *Section 112, Title 35 U.S.C.A.*

3. Claim 4 of Ganz Patent No. 2,986,857 is invalid as lacking in invention under *Section 103, Title 35 U.S.C.A.*

4. Claims 1, 2 and 4 of Weiss Patent No. 2,990,997 are invalid as lacking in invention under *Section 103, Title 35 U.S.C.A.*

5. Any rights the defendant might have under Weiss Patent No. 2,990,997 are unenforceable under *Section 135(c), Title 35 U.S.C.A.*

6. The defendant has not **[**68]** been guilty of the violation of the anti-trust laws of the United States in connection with **[*573]** the Weiss and Ganz patents or any misuse of those patents.

7. No fraud was practiced on the Patent Office in the prosecution of the application of the Weiss patent.

8. The counterclaim of the defendant should be dismissed with prejudice.

9. No allowance of attorneys' fees should be made to the plaintiffs. **[***88]**

10. The plaintiffs are entitled to have taxed herein against the defendant their taxable costs and disbursements.

ORDER FOR JUDGMENT

It is hereby ordered that judgment shall be entered:

1. Adjudging and declaring that Claim 4 of United States Letters Patent No. 2,986,857 issued on June 6, 1961, to H. Ganz is invalid.

2. Adjudging and declaring that Claims 1, 2 and 4 of United States Letters Patent No. 2,990,997 issued on July 4, 1961, to A. J. Weiss are invalid.

3. Adjudging and declaring that whatever rights the defendant might have under United States Letters Patent No. 2,990,997 issued on July 4, 1961, to A. J. Weiss are not enforceable.

4. Adjudging and declaring that the defendant has not been guilty of the violation of the anti-trust laws of the United States **[**69]** in connection with the Weiss and Ganz patents or any misuse of those patents.

5. Adjudging and declaring that no fraud was committed on the Patent Office in the prosecution of the Weiss application.

6. Dismissing the defendant's counter claim with prejudice.

7. Denying the claim of the plaintiffs for an allowance of attorneys' fees.

8. Assessing the taxable costs and disbursements of the plaintiffs against the defendant.

It is further ordered that this Memorandum shall constitute the Findings of Fact and Conclusions of Law in this case.

Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.

United States District Court for the District of Hawaii

July 24, 1967

Civil No. 2418

Reporter
272 F. Supp. 915 *; 1967 U.S. Dist. LEXIS 11556 **; 1967 Trade Cas. (CCH) P72,186

Hawaiian Oke & Liquors, Ltd., Plaintiff v. Joseph E. Seagram And Sons, Inc., The House of Seagram, Inc., McKesson & Robbins, Inc., Barton Distilling Co., and Barton Western Distilling Co., Defendants

Core Terms

conspire, unincorporated, entity, Distillers, conspiracy, heads, sales, distributors, subsidiaries, marketing, products, anti trust law, decisions, Sherman Act, organizations, wholesale, pretty

Judges: [1]** Pence, C.J.

Opinion by: PENCE

Opinion

[*916] Memorandum Decision and Ruling on Plaintiff's Requested Instruction Number 36 Concerning Possible Intracorporate Conspiracy

PENCE, C.J.:

Plaintiff Hawaiian Oke & Liquors, Ltd. (Hawaiian Oke) brought this action to recover treble damages under Section 4 of the Clayton Act (Title *15 U.S.C. § 15*) for injury allegedly resulting from defendants' violations of the antitrust laws. Hawaiian Oke contended it was damaged by a "combination . . . or conspiracy, in restraint of trade" among the following entities, which eliminated plaintiff from the wholesale liquor distribution business contrary to the provisions of the Sherman Act (Title *15 U.S.C. § 1*):

Joseph E. Seagram & Sons, Inc. (Joseph Seagram);
Calvert Distillers Company (Calvert), a division of House of Seagram, Inc. (House of Seagram);
Four Roses Distillers Company (Four Roses), a division of House of Seagram;
Frankfort Distillers Company (Frankfort), a division of House of Seagram;
McKesson & Robbins, Inc. (McKesson);
Barton Distilling Company (Barton); and
Barton Western Distilling Co. (Barton Western), a wholly-owned subsidiary of Barton.

Calvert, **[**2]** Four Roses and Frankfort are unincorporated divisions of House of Seagram, which in turn is a wholly-owned subsidiary of Joseph Seagram.

Pre-Trial Order No. 1 required the parties to file proposed jury instructions **[*917]** for the court's consideration. [1] Plaintiff's requested Instruction No. 36 provided that each of the unincorporated divisions of House of Seagram here involved "should be treated as a separate corporation for purposes of determining" whether there had been a violation of the antitrust laws. [2] Defendants objected that the requested instruction did not accurately state the law. After briefing [3] and oral argument [4] the court ruled on April 20, 1967, that it would give an instruction which contained the substance of plaintiff's Number 36. Following is the text of the instruction given the jury on April 24, 1967:

> " Plaintiff's Revised Instruction No. 36
>
> "Calvert Distilling Co., Four Roses Distilling Co. and Frankfort Distilling Co. were each separate unincorporated divisions of the defendant House of Seagram, Inc. at the time that each terminated dealings with Hawaiian Oke.
>
> "Each of these divisions of defendant House of Seagram, Inc., shall be treated **[**3]** by you as separate entities for the purpose of determining whether or not there has been a combination or conspiracy, as I have heretofore defined those terms, to terminate Hawaiian Oke as their respective distributor. For the purpose of returning a verdict, however, you will consider these divisions as being the defendant House of Seagram, Inc."

This memorandum sets forth the basis of the court's April 20, 1967, ruling.

I. The Legal Authorities

A. Basic Principles **[**4]** of ***Antitrust Law***.

The legal question here presented for determination is one of first impression. Previous courts have considered whether corporate subsidiaries of a single parent can conspire among themselves and/or with the parent, or whether unincorporated divisions may conspire vertically with the "parent" body. But no recorded opinions have dealt with an alleged horizontal conspiracy among the unincorporated divisions of a single corporation. In analyzing this question the court believes some consideration of the aims and purposes of the antitrust laws is necessary to put the issue in context.

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 . . . is . . . illegal". This broad language was interpreted by the Supreme Court in its seminal opinion in *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*, where the Court dismembered the Standard Oil petroleum combine. In construing the Sherman Act Mr. Chief Justice White reviewed the legal history of the language employed by Congress and concluded that *Section 1* is "an *all-embracing* **[**5]** enumeration to make sure that *no form* of contract or combination by which an undue restraint" [5] of interstate commerce is achieved can be saved from condemnation. The court then enunciated the "rule of reason" to guide each court's discretion in determining whether "in a *given case a particular act* had or had not brought about the wrong against which the statute provided." [6] In applying these principles the court is concerned only with the acts complained of and their results. The judiciary is entrusted with protection of the broad public policy favoring competition, and "every" act, **[*918]** whether its form be new or old, which unduly interferes with the interstate flow of commerce is proscribed.

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[1] Pre-Trial Order No. 1 (filed January 20, 1967), p. 5, para. 9(c).

[2] The parties agreed that for the purposes of this litigation Barton and its wholly-owned subsidiary Barton Western should be treated as a single entity.

[3] Seagram's Objections to Plaintiff's Instructions and Memorandum (filed April 4, 1967) pp. 2-4, and Plaintiff's Memorandum in Support of Plaintiff's Proposed Jury Instruction No. 36 re Divisions of The House of Seagram, Inc., (dated April 19, 1967).

[4] Transcript of Proceedings (TR.), April 19, 1967.

[5] *221 U.S. at 59*.

[6] *Id. at 60*.

B. Defendant's Position.

Briefly stated defendant's position is that as a matter of law a corporation cannot conspire with itself through its unincorporated divisions. The House of Seagram has relied upon the following decisions to support its view, none of which **[**6]** are directly on point: *Poller v. Columbia Broadcasting System, Inc., 109 U.S. App. D.C. 170, 284 F.2d 599 (D.C. Cir. 1960)*, reversed on other grounds *368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348 (D. Del. 1962)*; Kemwel Automotive Corp. v. Ford Motor Co., 1966 TRADE CASES at para. 71, 882 (S.D.N.Y. 1966); *Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960)*; and *Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952)*, cert. denied *345 U.S. 925, 97 L. Ed. 1356, 73 S. Ct. 783 (1953)*. [7]

In *Nelson Radio, supra at 914* (a trebledamage action for restraint of trade in communication equipment), the alleged conspirators were the defendant corporation **[**7]** and its officers, employees, representatives and agents. However, there is no allegation that either a corporate subsidiary or division participated. The appellate court affirmed dismissal for failure to state a cause of action:

> "It is basic in the law of conspiracy that you must have two persons or *entities* to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."

Each of the four other decisions advanced by defendant as authority for its position involve claims that a corporation and an unincorporated division thereof conspired in violation of the Sherman Act. The allegation in *Poller, supra*, was that the Columbia Broadcasting System joined with CBS-TV, an unincorporated division, [8] and others, to acquire plaintiff's television station at a price below its actual value. The charge in *Deterjet, supra*, was that United Aircraft Corp. combined with Pratt & Whitney Co., its division, and others, to preclude plaintiff from marketing its product (used in regulating the operation of aircraft propellers), which was allegedly an improvement **[**8]** upon, and in competition with defendant's product. In *Kemwel*, supra, plaintiff asserted that Ford Motor Co. and Ford International, an unincorporated division, conspired to monopolize the export of Ford automotive parts and accessories. The claimed conspiracy in *Johnny Maddox Motor Co., supra*, was among Ford Motor Company, its divisions, and others, to discriminate against plaintiff (a franchised automobile distributor) in purchase price, and merchandise and services provided. In each of these actions the court granted motions for dismissal or summary judgment insofar as the complaints recited claims of conspiracy between a corporation and its unincorporated division. And in each of these decisions the courts relied upon the above quoted passage from *Nelson Radio, supra.* However, this court does not feel that the broad principle of law taken from *Nelson*, and applied unswervingly in *Poller, Deterjet, Kemwel*, and *Johnny Maddox*, is controlling of the instant factual situation. Even as enunciated in *Nelson*, the principle that a corporation cannot conspire with itself does not preclude divisions from being legally capable of conspiring. As quoted above, **[**9]** "you must have two **[*919]** . . . entities to have a conspiracy." The interpretation given this concept to date, when related to divisions, is that a corporation and an unincorporated division thereof are but one entity in a court of law. However, we are not here dealing with a similar vertical corporate organization. Rather, the conspiracy alleged among the Seagram divisions, and others, relates to the activity of business entities on the same level of the corporate structure. The question presented is whether each business division may be considered a separate legal entity capable of conspiring.

This was also recognized in *Reines Distributors, Inc. v. Admiral Corporation, 256 F. Supp. 581, 583 (S.D.N.Y. 1966)*, where the issue was whether a division can be a purchaser **[**10]** or customer under Sections 2(a), (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act (Title *15 U.S.C. § 13*). There the court stated that

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[7] Defendant might also have pointed to *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 606, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)* (dissenting opinion of Justice Jackson) and Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) p. 35.

[8] The Supreme Court specifically reserved the question whether a corporation and a division thereof are legally capable of conspiring, and reversed the appellate court on other grounds. *368 U.S. 464, 469 n. 4, 82 S. Ct. 486, 7 L. Ed. 2d 458*.

"substance rather than form should govern", [9] and considered the intracorporate relationship to determine whether the division was in fact a separate business entity. In concluding that the division was not a purchaser or customer the court found that its operation was interlocked with and controlled by the "corporate" entity.

The factual conclusion that a division has independence of action in the relevant business activity is critical to a determination that the division is legally capable of conspiring. [10] As stated in *Standard Oil, supra*, *Section 1* of the Sherman Act is "all-embracing", and covers "every" combination which restrains trade, regardless **[**11]** of the form employed. The trial court must consider the peculiar facts of any given litigation in deciding if the division involved is a separate entity in the context of the charge in which the conspiracy is alleged.

In *Nelson, supra*, the court's opinion, and its statement that a person cannot conspire with himself, were founded on the facts as they *there* occurred. We, as judges and lawyers, should not be restricted by the semantics chosen to describe a particular factual situation. Historically and legally a corporation has been deemed a person - and normally so personified as if a man, a creature with but one brain, one medium of thought and action - and this is the concept applied by the court in *Nelson*, and followed in *Poller, Deterjet, Kemwel*, and *Johnny Maddox Ford*.

But are **[**12]** all corporations, in fact, "persons", each with one brain, one nerve center, at which all decisions are reached? It is well settled that in corporate structures which consist of a parent corporation and incorporated subsidiaries, each entity is capable of conspiring. There, we have no difficulty in envisioning separate and independent conspirators, regardless of whether the intracorporate arrangement is vertical or horizontal. [11] The question, then, is what, if any, magic occurs when the paper partition is removed. Is a business group which chooses to organize as a single corporation with unincorporated divisions automatically cast in the form of a normal person? Or may we have a corporate "person" in the form of a multi-headed Siva, or as portrayed by Dali or Artzybasheff?

[13]** Thus, whether a division is capable of conspiring depends on the peculiar **[*920]** facts demonstrated. Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the antitrust laws. [12] There is nothing sacrosanct about the "unincorporated" aspect of corporate divisions. To hold otherwise would give businessmen the power to avoid the proscriptions of the antitrust laws by the fortuitous employment of alert legal counsel.

The Supreme Court "has emphasized **[**14]** in the past that . . . differences in form often do not represent 'differences in substance.' *Simpson v. Union Oil Co., 377 U.S. 13, 22, 12 L. Ed. 2d 98, 84 S. Ct. 1051*. Draftsmen may cast business arrangements in different legal modes for purposes of commercial law, but these arrangements may operate identically in terms of economic function and competitive effect. It is the latter factors which are the concern of the antitrust laws." [13]

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[9] See also *United States v. Yellow Cab Co., 332 U.S. 218, 227, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)* (an antitrust action in which the court found a conspiracy among a corporation and its subsidiaries).

[10] A division may be given authority to make final decisions in some, but not all, areas of its operation. The situation extant in that phase of the operation under attack is the pertinent factual inquiry.

[11] *United States v. Yellow Cab Co., supra, n. 9*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*; *Timken Roller Bearing Co. v. United States, supra, n. 7*; *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966)*.

[12] See dissenting opinion in *Poller, supra, 284 F.2d at 607*: "In my view, CBS could conspire with CBS-TV, a wholly-owned, but not incorporated, 'division' - as separate and distinct an organization as a wholly-owned subsidiary."

[13] *U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856*, concurring opinion of Mr. Justice Stewart (June 12, 1967).

II. The House of Seagram Corporate Structure

The House of Seagram is a wholly-owned subsidiary of Joseph Seagram and markets "various brands of alcoholic beverages imported by it, or purchased . . . from its manufacturing parent corporation" [14] through seven unincorporated sales divisions. Among those divisions are Calvert, Four Roses and Frankfort, each of which is managed by officers who bear the titular designations of the **[**15]** particular division represented. The House of Seagram has the position of president, which has apparently been filled on occasion, but has remained unoccupied for at least the last two years. The Calvert division is headed by a president, Mr. Arthur Murphy; Four Roses is headed by a president, Mr. Jack Wishny; and Frankfort is headed by an executive vice-president, Mr. Roy Flint. [15]

Prior to July 31, 1954 alcoholic beverages manufactured by Joseph Seagram were distributed in the United States by a group of wholly-owned subsidiaries. At that time the Seagram group of companies underwent a corporate reorganization, with each of the domestic sales subsidiaries becoming divisions of a newly formed corporation known as Distillers Distributing Corp. Pursuant to this reorganization the Calvert Distillers Corporation, for example, became the Calvert Distillers **[**16]** Company, a division of the Distillers Distributing Corp. The latter corporation was subsequently renamed The House of Seagram, Inc., defendant herein. [16]

This organizational juggling by the Seagram companies apparently resulted from the Supreme Court's decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra, n. 11, 340 U.S. at 215*. [17] In that action **[*921]** a wholesale liquor distributor charged that two of the Seagram sales subsidiaries had conspired to set wholesale prices. The Court rejected defendants' contention that subsidiaries of a common parent can not conspire with each other:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But **[**17]** this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. *United States v. Yellow Cab Co., 332 U.S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560*. The rule is especially applicable where, as here, respondents hold themselves out as competitors."

Although Seagram changed the form of its corporate structure following *Kiefer-Stewart*, there was no substantive change in the marketing technique employed.

[18]** There is nothing wrong with reorganizing to comply with court rulings. However, to avoid the judicial proscription the reorganization must be more than a shuffling of papers. Courts are concerned with applying rules

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[14] Memorandum of Defendants Joseph E. Seagram & Sons, Inc. and The House of Seagram, Inc., filed March 3, 1967, at 2.

[15] See Seagram Exhibit No. S-17.

[16] See United States v. The House of Seagram, Inc., 1965 TRADE CASES at 81,269, 81,270, para. 71,517 (a government action to enjoin resale price maintenance of Seagram brands in Southern Florida).

[17] Seagram's present counsel has stated that the Court's decision in *Kiefer-Stewart* precipitated Seagram's change to the divisions organization. This is reflected in the following colloquy with the court, which occurred at the close of plaintiff's case, during argument on defendants' motion for a directed verdict (TR. April 19, 1967):

> " The Court: Now, I notice in *Kiefer-Stewart v. Seagram and Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259*, we have here the same company, the defendant Seagram and Sons. It would appear to the Court as an inference only - just for the purpose of this discussion I will take this inference - that excellent counsel advised Seagram to tear out the veil of corporate ownership; nevertheless, keep your divisions just as 'independent' as they were before, keep them as competitive as they were before, but tear out the veil, and then we will have cured the defect found in our organizational setup, as pointed out by the U.S. Supreme Court in Stewart.
>
> " Mr. Anthony: That is correct."

of law in an actual, factual context. Private parties can not evade the applicable law merely by changing the label attached to a particular business entity.

The relationship between the various divisions of The House of Seagram, and the House of Seagram and Joseph E. Seagram & Sons, was stated by Mr. Edgar Bronfman, President of Joseph E. Seagram & Sons, Inc., the parent corporation.

"Q Do the respective heads of The House of Seagram companies report directly to you, Mr. Bronfman?

"A In a manner of speaking, yes.

"Q Would you explain that further?

"A Well, we run a pretty autonomous operation, and the heads of the companies pretty well run their own shows. They keep me informed or posted on what is taking place, but they don't report to me for direction. We sort of have what you call a General Motors type concept here.

* * *

"Q To what extent do your day-to-day activities involve you in marketing of Seagram-produced products?

"A **[**19]** Well, to the extent that I take a pretty close look at the advertising. Beyond that, very little.

"Q I take it from that answer you leave the marketing activities reside pretty autonomously with the heads of the various marketing companies?

"A That's right.

* * *

"Q At or about or even following the assignment by you of the distribution to the Calvert division did you discuss with Mr. Murphy, in terms of distributors, who should handle the distribution of the rum?

[*922] "A No, sir.

* * *

"Q What is the relationship in terms of pricing policies or choice of distributors between The House of Seagram and Joseph E. Seagram and Sons, Inc.?

" A. Well, there is no relationship.

" Q. In other words, Joseph E. Seagram and Sons, Inc. does not get into that province at all?

" A. No." [18]

These facts were echoed by Mr. Jack Yogman, the Executive Vice-President of Joseph E. Seagram & Sons:

" Q. What connection, either in staff or line responsibility, have you had with the marketing of products?

" A. Very little. I am aware of what is going on, but the heads of the sales companies report directly to the president. My functions **[**20]** with the sales heads of course have been extensive in, say, market research, in packaging, in product, things of that nature.

"But as far as the specific marketing function, they perform that themselves and report to the president.

" Q. What do you understand to be the nature, if any, sir, of the relation between the marketing divisions or the sale companies?

" A. Between them?

" Q. Yes, sir.

" A. Well, it is pretty well designed along the General Motors setup, where they are independent sales divisions, in the sense that they compete, the same as Pontiac competes against Buick and they both compete against Oldsmobile. They are self-contained units. They have their own products. I think they fight each other as hard as they fight anyone else.

* * *

" Q. Do the heads of the various House of Seagram companies customarily report to you about a change in distributors?

" A. Not at all." [19]

* * *

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[18] Deposition of Edgar M. Bronfman, dated March 3, 1966 at 4-6, 18, 26, introduced into evidence on March 29, 1967.

[19] Deposition of Jack Yogman, dated March 3, 1966 at 4-6, 18, introduced into evidence on March 29, 1967.

Mr. Arthur Murphy, President of Calvert, gave the following description of the relationship between the Seagram divisions:

" Q. Now, is it correct, sir, that each of the separate unincorporated divisions of the House of Seagram **[**21]** was charged with the responsibility of marketing certain designated brand-named products?
" A. Correct.
" Q. And most of the products they market are distilled by Joseph E. Seagram and Son or one of the affiliated Seagram companies?
" A. Correct, sir.
" Q. Now, is it also correct, sir, that each of these divisions has a group of officers such as president, like yourself, or in some instances an executive vice-president, and so forth down the line?
" A. Yes, sir.
" Q. And each have their own chain of command with offices in different places in the United States and different people to man them, is that correct?
" A. Yes, sir.
* * *
" Q. Now, is it a fact, sir, that the various unincorporated divisions, for example, Calvert and Seagram Distillers Company, and Four Roses and Frankfort, actually are in competition with each other in selling the various whiskies through distributors throughout the United States?

[*923] " A. Correct.
" Q. And that you wouldn't move over and let Four Roses, you wouldn't accommodate them in any meaningful competitive way and you wouldn't expect them to do that for you?

" A. No, sir, I would **[**22]** not.
" Q. Now, is it correct that each of these divisions, through its own management, makes the decision as to who will be the distributors in any area?
" A. That's correct, sir.
* * *
" Q. That is because each one looks at the circumstance and makes its decision independent of the others, is that correct?
" A. That's correct.
" Q. Now, is it also true, sir, that each division makes a determination for itself as to promotions that are going to be made, advertising campaigns, that sort of thing?
" A. This is my responsibility.
" Q. And as head of the division, and your counterpart heads, do they make the determination as to the price or prices throughout the country which you are going to charge to wholesalers for the products?
" A. Correct." [20]

[23]** There "self-contained", "independent sales divisions" are responsible for establishing distribution systems to market the various products entrusted to them. This responsibility includes the choice of one or more wholesale distributors to represent the products in a given geographic area. Each division individually selects the distributor for its products, and decides when a change in distributorship would be appropriate.

The decisions of Four Roses, [21] **[**24]** Frankfort [22] and Calvert [23] to terminate Hawaiian Oke were made by the authorized personnel in each division. Normally such decisions are made "entirely independently" [24] of any other

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[20] Tr. April 19, 1967.

[21] Deposition of Jack Wishny, (President of Four Roses), dated March 2, 1966, at 11-12, introduced into evidence on March 31, 1967. Deposition of Edwin D. Kaufman (Western Division Manager of Four Roses), dated January 17, 1966, at 14, introduced into evidence on April 3, 1967.

division. If these autonomous divisions deviated from their normal procedure, so that separate, decision-making "heads" acted in concert, they became subject to the proscriptions of the antitrust laws.

While reserving its position that divisions of a single corporation are legally incapable of conspiring among themselves, Seagram has pointed to a variety of factors which allegedly preclude a factual finding that these divisions were independent. The dialogue between court and counsel which followed the court's oral ruling on Plaintiff's Proposed Instruction No. 36 sets forth these factors:

> " Mr. Anthony: The court has said that the divisions of Seagram operate independently. That is confined solely to the matter of sales. All billings, all accounting, payrolls, checks, everything of that nature is done through the one corporation. There **[**25]** is no such independence of operations as your Honor has assumed in the oral decision given prior to the recess. In other words, these are simply sales divisions.
> * * *
>
> "Next, your Honor has neglected to recognize the clear evidence in this **[*924]** case, namely, that the plaintiff dealt with the House of Seagram, Inc. The very contract is in the name of the House of Seagram, Inc., through its respective divisions.
> * * *
> " The Court: I was aware that the evidence showed, and . . . the Court . . . accepted the fact that the evidence showed that the organizations, each division, were sales organizations; they were sales divisions.
> " Mr. Anthony: Only . . . . Sales only.
> * * *
> "They don't even have bank accounts, these divisions, your Honor. They didn't even employ advertising agencies. All of these functions are done by the House of Seagram, Inc., all of the accounting, all of the banking, all of the employment. . . . And so what I respectfully say to your Honor is that this decision that was announced prior to the recess should be founded upon the single proposition that they had separate sales organizations, the functions of which were confined to sales." [25]

[26]**

III. Conclusion

Counsel's observation that the court's decision is "founded upon the single proposition that they [the divisions] had separate sales organizations" is accurate. Plaintiff charged a conspiracy to terminate it as defendant's sales representative in Hawaii. The distribution of defendant's products is the only business function which is relevant herein. The fact that the Seagram divisions may have certain joint or common functions does not detract from the admittedly divided responsibility for marketing. Plaintiff's allegations related to defendant's sales organizations. This is the only activity which must be considered in determining each division's status as a separate legal entity capable of conspiring. Defendant has acknowledged that each division has individual responsibility for establishing its own distribution system. Seagram chose this form of business organization for reasons sufficient unto itself. Having made the divisions separate and independent for **[**27]** this particular economic function, defendant cannot now escape the legal impact of its action. The court finds that Four Roses, Frankfort and Calvert are each distinct and separate, operating, marketing entities, legally and factually capable of entering into the conspiracy alleged. [26]

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[22] Deposition of Roy Flint (Executive Vice-President of Frankfort), dated March 2, 1966 at 7, 10, introduced into evidence on April 4, 1967. Deposition of Joseph E. Flick (Western Division Manager of Frankfort) dated January 17, 1966 at 12, introduced into evidence on April 4, 1967.

[23] Deposition of Gerald J. Novak (Western Division Manager of Calvert), dated January 17, 1966 at 37, introduced into evidence on March 31, 1967.

[24] *Id. at 33*.

[25] Tr. April 20, 1967.

[26] The jury found a conspiracy among all named defendants.

End of Document

Lewis v. Seanor Coal Co.

United States Court of Appeals for the Third Circuit

August 16, 1967, Decided

No. 16161

Reporter

382 F.2d 437 *; 1967 U.S. App. LEXIS 5318 **; 66 L.R.R.M. 2007; 56 Lab. Cas. (CCH) P12,131; 1967 Trade Cas. (CCH) P72,189

John L. Lewis et al., Appellees v. Seanor Coal Company, Appellant

Disposition: [1]** Affirmed.

Core Terms

royalties, coal, employees, oral modification, district court, welfare fund, nonsignatory, invalid, royalty payment, per ton, bargaining, collective bargaining agreement, written agreement, summary judgment, reopen

LexisNexis® Headnotes

Admiralty & Maritime Law > Shipping > Regulations & Statutes > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN1[] **Shipping, Regulations & Statutes**

29 U.S.C.S. § 158(e) does not invalidate an entire collective bargaining agreement because it contains a "hot cargo" provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it contains the "hot cargo" provision.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

HN2[] **Sherman Act, Claims**

The remedy for violation of the ***antitrust law*** is not avoidance of payments due under a contract, but rather the redress which the antitrust statute establishes, a private treble damage action.

Judges: Freedman, Circuit Judge. Gerald McLaughlin, Circuit Judge, dissenting.

Opinion by: FREEDMAN

Opinion

[*439] FREEDMAN, Circuit Judge:

The trustees of The United Mine Workers of America Welfare and Retirement Fund of 1950 brought this action against Seanor Coal Company, the appellant, for royalty payments of forty cents per ton as fixed by the National Bituminous Coal Wage Agreement as amended in 1964, on coal produced by the company between February 1 and June 30, 1965. They claimed also the balance on a promissory note which they alleged was accelerated because of the default in the payment of royalties. The company counterclaimed for payment it had made earlier into the welfare and retirement fund under the forty cents royalty provision of the agreement. [1] The court below entered summary judgment in favor of the plaintiffs for the royalties, amounting to $38,110.93 with interest, and for the unpaid balance of the note in the amount of $52,441.82 with interest, and also entered summary judgment in favor of the plaintiffs on the company's counterclaim. *(256 F. Supp. 456 (W.D. Pa. 1966))*. The company presents a number of issues. It asserts that **[**2]** (1) the agreement requiring the payment of royalties violates the Sherman Antitrust Act; (2) it also violates § 8(e) of the National Labor Relations Act; and (3) the union did not fulfill an oral agreement made by the president of the local union on which the company relied in reopening its mine, which relieved it of its contractual obligation to pay royalties.

I.

In support of its contention that the provision for the payment of royalties under the agreement is illegal under the hot cargo prohibition of § 8(e) of the National Labor Relations Act, the company relies upon two decisions of the National Labor Relations Board. *Raymond O. Lewis, 144 NLRB 228 (1963)*, held invalid under § 8(e) the subcontracting provision of the 1958 National Bituminous Coal Wage Agreement which required that the terms and conditions of employment for subcontracting operations be at least as favorable as those **[**3]** fixed for employees of signatories of the agreement. Later, the board dealt with the subsequent 1964 agreement, which discontinued this requirement but added a new provision which in addition to increasing from thirty to forty cents the royalty payments to the fund for every ton of coal produced by the operator for use or for resale, also required for the first time an eighty cent royalty on coal which an operator acquired from a nonsignatory. [2] **[**4]** The Board held that this new provision also violated § 8(e). *Raymond O. Lewis, 148 NLRB 249 (1964)*. The first decision, dealing with the 1958 agreement, came before the Court of Appeals for the District of Columbia, which remanded the case to the Board for reconsideration in the light of recent decisions rejecting the Board's interpretation of § 8(e). *Lewis v. NLRB, 122 U.S. App. D.C. 18, 350 F.2d 801 (D.C. Cir. 1965)*. The court noted that its action undermined the Board's finding in the second case that the 1964 amendment violated § 8(e). [3] A trial examiner's subsequent decision that the 1964 agreement violated § 8(e) has not yet been acted on by the Board.

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[1] The counterclaim was in the amount of $88,322.20, representing payments made at forty cents per ton.

[2] The new addition, somewhat circumstantially phrased, reads: "On all bituminous coal procured or acquired by any signatory Operator for use or for sale there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty cents (40) per ton has not been paid into said fund prior to such procurement or acquisition."

[3] See *350 F.2d at 802, n. 12*.

[*440] The court below believed that the question whether the provision of the 1964 agreement was illegal as an unfair labor practice under § 8(e) was one for the exclusive jurisdiction of the Board. We believe it is unnecessary to decide this question. [4] For even if the Board should again reach the same conclusion regarding the provision before it, the company would not thereby be relieved of its obligation to pay the royalties here involved. The Board dealt in the first case with an entirely different provision from that which is here involved; and in the second case it dealt not with the forty cent royalty which is here involved, but with the effect of that provision in relation to the establishment for the first time in the 1964 agreement of a difference in the royalties exacted from an operator if he purchased from nonsignatory rather than from other signatory operators, and required him to pay double royalties where the purchase was from nonsignatory operators.

[5]** It is clear, therefore, that the Board has not decided or even cast any doubt on the validity of the basic royalty provision of forty cents per ton but instead has limited its inquiry to the effect under § 8(e) of the exaction from the coal operators of the doubled royalty where they purchased coal from outside, nonsignatory operators. The basic provision of forty cents royalty per ton for coal produced by the employer is radically different from the special provision requiring an eighty cents royalty on coal acquired from outside nonsignatory operators and standing alone is beyond the range of § 8(e). The essence of a proscribed "hot cargo" agreement is that it applies pressure on an employer, directly or indirectly, to require him to cease doing business with a third party in order to persuade the third party to accede to the union's objectives. [5] Its focus, therefore, is on the effect of the agreement upon the relationship of the employer who is a party to the collective bargaining agreement with an outside employer. The Board recognized this in its second decision in *Raymond O. Lewis*, supra, where it held that the requirement of an eighty cent royalty on coal acquired **[**6]** from nonsignatory operators was to restrain signatory operators from acquiring coal from nonsignatories and thus to limit the coal operators' relationships to other operators who had signed a union contract. This element of discrimination is of course absent from that portion of the agreement which fixes the forty cent royalty, for that has no relation to purchases from nonsignatory operators, and indeed existed independently of it before 1964.

In these circumstances, any finding by the Board that the 1964 agreement is invalid under § 8(e) would not affect the severable basic royalty provision. [6] ***HN1***[] Section 8(e) does not invalidate an entire collective bargaining agreement because it contains a "hot cargo" provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it **[**7]** contains the "hot cargo" provision. [7] Indeed, it is particularly requisite in a case such as this not to allow the possible invalidity of a provision which is not operative as to these parties to afford a basis for noncompliance with a valid obligation, for the Supreme Court has pointed out that royalty payments into a welfare fund which are bargained for **[*441]** have the characteristics of compensation to the workers for their services. [8]

II.

The company's claim that the agreement violates the Sherman Antitrust Act is not a defense to the trustees' action. It is now well established that ***HN2***[] the remedy for violation of the ***antitrust law*** is not avoidance of payments due under a contract, but rather the redress which the antitrust **[**8]** statute establishes, -- a private treble damage

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[4] Compare San Diego Bldg. *Trades Council, v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)* with *Vaca v. Sipes, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967)*; *Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966)*; Comment, 113 U. Pa. L. Rev. 1104 (1965).

[5] *National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)*; *A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772* (3 Cir. 1967).

[6] See *NLRB v. Rockaway News Supply Co., Inc., 345 U.S. 71, 97 L. Ed. 832, 73 S. Ct. 519 (1953)*.

[7] § 8(e), *29 U.S.C. § 158(e)*.

[8] *Lewis v. Benedict Coal Corp., 361 U.S. 459, 469, 4 L. Ed. 2d 442, 80 S. Ct. 489 (1960)*.

action. *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)*; *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)*. See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F.2d 776, 791* (3 Cir. 1967). To permit avoidance of payments required under the contract would go beyond the remedy prescribed by the antitrust statute and, as the Supreme Court has pointed out in *Bruce's Juices, Inc. v. American Can Co., supra, 330 U.S. at 756-57*, would have the incongruous effect of affording an injured party simple compensatory damages where he is a defendant while allowing him to treble the identical damages where he is a plaintiff. Moreover, the general rule is especially applicable here, where as we have already pointed out the payments required by the contract have the characteristics of compensation to the employees for services they have already rendered. [9] The company claims, however, that the case falls within the exception prescribed where judicial recognition of the contract would work to enforce "the precise conduct **[**9]** made unlawful by the Act." [10] This exception is of no avail to the company, for it is directed to cases where the contract price itself has been inflated because of unlawful price fixing, whereas here there is involved a contract valid on its face and the fact that it provided the occasion for a restrictive agreement does not require that it should itself be invalidated.

III.

The company's final defense is the alleged oral modification of the 1964 agreement. It asserts that shortly after it had terminated operation of its mine in February 1965 because of heavy losses, it reopened the mine in reliance upon the statement of the president of the local union that if it did so "the productivity per employee would increase sufficiently to enable the Defendant to meet its obligations under the labor contract." The company alleges that this statement was intended to induce it to reopen the mine **[**10]** and to incur new and additional obligations including the royalties, and that in reliance on the representation it reopened the mine but that "the increase in productivity per employee promised and represented . . . has in fact not occurred."

In its pleading the company presented these claims as establishing an estoppel against the plaintiffs from claiming that any royalties were due. It has apparently abandoned this contention and instead relies upon the circumstances as creating an oral modification of the agreement to pay royalties.

We come then to the question whether there was a valid oral modification of the agreement which absolves the company of the requirement to pay the forty cents per ton royalty.

At the outset it may be observed that the alleged agreement might well be declared ineffective because it lacks definiteness and is vague and uncertain. [11] There is, however, a more fundamental objection to the alleged oral modification; **[*442]** this objection is based on § 302(c)(5), *29 U.S.C. § 186 (c)(5)*, of the Labor-Management Relations Act, the provision under which the fund was established. This provision was written into the statute **[**11]** because of the special concern of Congress over the welfare fund of the United Mine Workers of America, which already was in existence and which Senator Taft described as administered without restriction by the union so that "practically the fund became a war chest . . . for the union." [12] **[**13]** It was part of the larger congressional concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships. [13] In § 302 of the Labor-Management Relations Act, *29 U.S.C. § 186*, Congress therefore

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[9] *Lewis v. Benedict Coal Co., supra, n. 8*.

[10] *Kelly v. Kosuga, supra 358 U.S. at 520*.

[11] *Zukoski v. Baltimore & Ohio Railroad Co., 315 F.2d 622, 625* (3 Cir. 1963), cert. denied, ***375 U.S. 856, 11 L. Ed. 2d 83, 84 S. Ct. 118 (1963)***.

[12] 93 Cong. Rec. 4746, reprinted in 2 Legis. Hist. of the Labor-Management Relations Act, 1947, pp. 1310-11. See also S. Rep. No. 105, 80th Cong., 1st Sess. 52 (Supplemental Views), reprinted in 1 Legis. Hist. 458; 93 Cong. Rec. 3565-66, 3569, 1 Legis. Hist. 754-57; 93 Cong. Rec. A1910, 1 Legis. Hist. 869 (remarks of Rep. Meade); 93 Cong. Rec. 4678, 2 Legis. Hist. 1305 (remarks of Sen. Byrd); 93 Cong. Rec. 5015, 2 Legis. Hist. 1498 (remarks of Sen. Ball).

imposed a maximum penalty of imprisonment for one year and a fine of $10,000 for violation of its provisions, which prohibited in broad terms, with certain narrow exceptions, both the payment of anything of value by an employer and its receipt by a representative of any of his employees. One of the exceptions (§ 302(c)(5), *29 U.S.C. § 186(c)(5)*) permitted employer contributions to welfare trust funds under rigid safeguards. It required that the fund be for the sole and exclusive benefit of the employees and their families and dependents, that all payments be held in trust to pay out only certain specified **[**12]** benefits, [14] that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer", that the employees be equally represented with the employers in the administration of the fund, together with neutral persons, that there should be an annual audit of the fund and a statement of the audit be made available for inspection by interested persons [15] and that payments intended for pensions and annuities be made to a separate trust to be used solely for that purpose. [16]

The requirement that "the detailed basis on which *such payments* are to be made is specified in a written agreement with the employer . . ." (§ 302(c)(5)(B), *29 U.S.C. § 186(c)(5)(B)*) is not free from ambiguity. The same phrase, "such payments", appears in the proviso in § 302(c)(5)(A), *29 U.S.C. § 186(c)(5)(A)*, where it clearly refers to payments made by the employer. In § 302 (c)(5)(B), *29 U.S.C. § 186(c)(5)(B)*, however, the language seems to look to payments to be made out of the fund by the trustees to the employees. We may not, however, determine the meaning of the provision by a microscopic study of **[**14]** its language in order to decide whether "such payments" refers only to those made by the employer to the trust fund or only to those made by the trustees to the employees. We have recently been reminded of the particular emphasis which must be given to the legislative history of labor legislation, [17] and the duty which rests on the federal courts to fashion a body of federal common law for the enforcement of collective bargaining agreements. [18] It **[*443]** would be, at the least, incomplete to require for the benefit of the employees and to prevent collusive or fraudulent side arrangements between employers and union representatives that the benefits which the employees are to receive from union welfare funds shall be specified in a written agreement with the employer and yet to permit the written foundation on which the welfare fund rests, in this case calling for the amount of the royalties payable on coal mined, to be the subject of oral modifications. It would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the fund without requiring **[**15]** such payments to become a matter of record and thus would frustrate the purpose of § 302(c)(5). Moreover, the employees have a right to know if the obligation to make the payments into the fund is modified; otherwise they might be led to remain at their jobs in reliance on the benefits which the formal agreement has promised, after they have been eroded by oral modification of the obligation to make the payments supporting such benefits. Thus, the policy of § 302(c)(5) requires that any modification of the basis of both the payments into the fund and out of the fund be made in writing. Thereby, we also preserve the prophylactic effect of informing not only the employees, but all other employers similarly situated, who should know what the arrangement is without fear of surreptitious side agreements. Congress knew that agreements such as the National Bituminous Coal Wage Agreement were the result of industry-wide bargaining and were to bind numerous employers. It knew, of course, that the elaborate collective bargaining agreements which resulted were reduced to writing, [19] it could

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[13] See *Arroyo v. United States, 359 U.S. 419, 3 L. Ed. 2d 915, 79 S. Ct. 864 (1959)*; *United States v. Ryan, 350 U.S. 299, 100 L. Ed. 335, 76 S. Ct. 400 (1956)*.

[14] § 302(c)(5)(A), *29 U.S.C. § 186(c)(5)(A)*.

[15] § 302(c)(5)(B), *29 U.S.C. § 186(c)(5)(B)*.

[16] § 302(c)(5)(C), *29 U.S.C. § 186(c)(5)(C)*.

[17] *National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)*; *NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967)*.

[18] *Lewis v. Benedict Coal Co., 361 U.S. 459, 470, 4 L. Ed. 2d 442, 80 S. Ct. 489 (1960)*.

[19] See § 8(d), *29 U.S.C. § 158(d)*; *H.J. Heinz Co. v. NLRB, 311 U.S. 514, 85 L. Ed. 309, 61 S. Ct. 320 (1941)*.

hardly have intended that individual operators should be permitted to enter into oral side agreements **[**16]** with local union officials cancelling out those provisions dealing with the significant subject of payments into the union welfare fund. Whatever ambiguity lurks in the phrase "such payments" does not justify a conclusion that the provision for payment contained in the written collective bargaining agreement may be removed by oral arrangement. On the contrary, it would take clear and unambiguous language to prescribe that in order to fall within the exceptions to the criminal sanctions of § 302 only the detailed basis for the payments by the welfare fund to the employees but not the payments by the employer into the fund must be specified in the written agreement with the employer.

[17]** We hold therefore that an oral modification which would have suspended the payment of the forty cents per ton royalty into the fund by the employer was ineffective because it violated § 302(c)(5)(B). [20] Nothing in our decision in *Lewis v. Mears, 297 F.2d 101* (3 Cir. 1961), cert. denied, *369 U.S. 873, 8 L. Ed. 2d 276, 82 S. Ct. 1142 (1962)*, forecloses this conclusion. That case held only that parole evidence was admissible to show that the written agreement to make payments into a welfare trust never became effective because it was not fully executed and delivered. Here, on the other hand, it is agreed that a valid written contract existed which obligated the company to make royalty payments into the fund, under which the company in fact made substantial payments, but a claim is made of an oral arrangement which later suspended or modified it. Such an oral agreement to suspend or modify an existing written contract falling within § **[*444]** 302(c)(5) (B) is invalid and there can be no estoppel against the assertion of the public policy which condemns it.

[18]** The judgment of the district court will be affirmed.

Dissent by: McLAUGHLIN

Dissent

McLAUGHLIN, Circuit Judge, dissenting:

The appeal here is from the granting of a motion for summary judgment by the District Court. The significant facts are simple and admitted. The union involved, through its president whose authority is conceded, agreed with appellant mine owner that if the latter would reopen its mines (which it had permanently closed) the employee productivity would increase sufficiently to enable the mines owner to meet all its obligations under an existing collective bargaining contract. Relying on that agreement, which clearly modified the underlying agreement requiring appellant to pay royalties to the union's welfare fund, appellant opened its mines. The employees did not increase their productivity and so enable appellant to pay royalties to the welfare fund. As a result appellant had to shut down its mines. Notwithstanding that situation, the trustees of the welfare fund brought this suit for said royalties and in the face of the above facts, the District Court granted the trustees' motion for summary judgment.

Both equitable estoppel and oral modification of the **[**19]** 1964 labor contract were urged by appellant in the District Court as defeating the present action. The trial judge held that such oral modification was against public policy on the strength of *Lewis v. Harcliff Coal Co., 237 F. Supp. 6, 8 (W.D. Pa. 1965)*. The oral agreement there was prior to the written contract. The decision is no authority to uphold the brazen repudiation of the subsequent oral agreement in this appeal. This Court in *Burlesque Artists Assn. v. Hirst Enterprises, Inc., 267 F.2d 414* (3 Cir. 1959) affirmed a judgment where the jury had found that there had been a valid subsequent oral addition to the original written labor agreement. This recognition of subsequent oral modification of collective bargaining contracts is viewed as sound in labor arbitration practice. Gertman Co., Inc., 45 LA 30 (Thomas Kennedy Arbitration 1965). *Metropolitan Transit Authority, 39 LA 849* (W. Fallon Arbitration, 1965).

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[20] See *Lewis v. Lowry, 295 F.2d 197, 200* (4 Cir. 1961), Sobeloff, Ch. J., dissenting, cert. denied, ***368 U.S. 977, 7 L. Ed. 2d 438, 82 S. Ct. 478 (1962)***. See also ***Lewis v. Mears, 297 F.2d 101, 105*** (3 Cir. 1961), Biggs, Ch. J. dissenting from denial of rehearing en banc, cert. denied, ***369 U.S. 873, 8 L. Ed. 2d 276, 82 S. Ct. 1142 (1962)***.

The District Court considered that the modification to the original agreement under *29 U.S.C.A. § 186(c)(5)(B)* had to be in writing. The majority opinion does not agree with that. It **[**20]** cautiously considers that the statute "is not free from ambiguity". However, it never does construe it and simply goes on to fashion new law to support this judgment. I think it very clear that Section 302(c)(5)(B) of the L.M.R. Act does not touch the validity of the oral modification before us. In our *Bey v. Muldoon, 354 F.2d 1005* (3 Cir. 1966) we affirmed the District Court, *223 F. Supp. 489*, in holding regarding § 302(c)(5)(B) that "Reference to the legislative history shows that the Act was intended to prohibit any receipt of money by unions from employers unless the precise use to which the money shall be put is delineated." Absent a statutory provision that the oral modification involved is required by statute to be in writing that subsequent agreement is itself a valid contract. *United Shoe Workers, etc. v. Le Danne Footwear, Inc., 83 F. Supp. 714 (D. Mass. 1949)*.

The District Court not only disposed of the above most substantial controverted issue by summary judgment but also so disposed of appellant's affirmative defenses of illegality. It is impossible to conjure away the vital fact questions raised. Appellant contended that **[**21]** the Welfare and Retirement Fund clause of the National Bituminous Coal Wage Agreement was illegal under either or both the National Labor Relations Act and The Sherman Anti - trust Act. The District Court opinion concedes that the 1964 Amendment to the Welfare and Retirement Clause of the said Agreement with respect to its 80 cents per ton payment into the Fund by the signatory operator was held to be violative of Section **[*445]** 8(e) of the National Labor Relations Act. The motion of the union to have the Amendment declared valid was denied by the Board. The finality of the decision of that issue was stated by the District Court as still pending. Confronted by that inescapable situation, the Court disposed of the problem by holding that the plaintiffs' claim in this suit was not under the 80 cents provision of the Amendment but the older 40 cents provision, stating that "this being so, then the partial or even the entire invalidity of the Agreement would not alter the obligation to pay for the work already performed." From any reasonable viewpoint such an arbitrary disposal of the 1964 Amendment cannot be accomplished on this summary motion. At the very least appellant is **[**22]** entitled to its day in court to show the intent of the parties with reference to the Amendment. Genuine, substantial questions of fact were presented to the District Court. They called for a trial on the merits of those issues, including the counterclaim of the defendant.

Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.

United States District Court for the District of Minnesota, Third Division

September 7, 1967

No. 3-66-269 Civil

Reporter

284 F. Supp. 148 *; 1967 U.S. Dist. LEXIS 11120 **; 1968 Trade Cas. (CCH) P72,403

Clausen & Sons, Inc., Plaintiff, v. Theo. Hamm Brewing Co., Defendant

Core Terms

alleges, beer, interstate commerce, products, Clayton Act, interstate, commerce, Robinson-Patman Act, violations, distributors, wholesalers, Counts, sales, cause of action, Sherman Act, contends, purports, interstate transaction, intrastate, antitrust, appears, prices, moves, wholesale distributor, price discrimination, substantial effect, alleged violation, resale price, purchases, reselling

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**

The Sherman Act, 15 U.S.C.S. § 1, 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.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN2[] **Antitrust & Trade Law, Sherman Act**

The Sherman 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, or with foreign nations, shall be deemed guilty of a misdemeanor.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] Antitrust & Trade Law, Clayton Act

The Clayton Act, 15 U.S.C. § 14, provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce, to make a sale for resale within the United States on condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods of a competitor of the seller, where the effect of 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 > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN4[] Price Fixing & Restraints of Trade, Vertical Restraints

See §§ 2 (a), (d) and (e) of the Clayton Act, 15 U.S.C.S. § 13(a), (d) and (e).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] Defenses, Demurrers & Objections, Motions to Dismiss

The general rule is that a claim should not be dismissed for insufficiency of statement unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proven in support of the claim.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN6[] Pleadings, Heightened Pleading Requirements

There are no special rules of pleading for antitrust cases.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Evidence > Inferences & Presumptions > General Overview

HN7[] Pleadings, Rule Application & Interpretation

In evaluating pleadings a court should not require technical exactness and should construe the pleadings in the pleader's favor in order to do substantial justice and may draw reasonable inferences from the words of the pleading to this end.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN8[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. When the manufacturer's actions go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which affect adherence to his resale prices, he has put together a combination in violation of the Sherman Act.

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

Antitrust & Trade Law > Clayton Act > Scope

HN9[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The prohibition of *§ 2 (e)* of the Clayton Act is not against every discrimination, nor even against every discrimination in the course of interstate commerce. The prohibition is against discrimination in the furnishing of "services or facilities connected with the processing, handling, sale, or offering for sale of such commodity." The language is not complex nor are the words technical. Neither the legislative history nor the judicial interpretation of the quoted words requires the court to depart from their literal meaning. In other words, the services or facilities that must be made available on proportionally equal terms to all purchasers in competition are merchandising services or facilities.

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

§ 3 of the Clayton Act makes it unlawful for any person engaged in interstate commerce to engage in certain restraints in the course of such commerce.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] **Robinson-Patman Act, Claims**

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act makes it unlawful for any person engaged in interstate commerce to engage in price discrimination in the course of such commerce where either or any of the purchases involved in such discrimination are in interstate commerce.

Antitrust & Trade Law > Clayton Act > General Overview

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

The fact that *§ 2(a)* of the Clayton Act, *15 U.S.C.S. § 13(a)*, expressly requires that some interstate transactions must be involved in the violation in addition to requiring that the violation must occur in the course of interstate commerce indicates that a violation can be "in the course of such commerce" without involving interstate transactions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN13[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

See *§ 2(c)* of the Clayton Act, *15 U.S.C.S. § 13(c)*.

Antitrust & Trade Law > Sherman Act > General Overview

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

Coerced adherence to a restraint in violation of *§ 1* of the Sherman Act does not place plaintiff in pari delicto.

Judges: [1]** Lord, D.J.

Opinion by: LORD

Opinion

[*149] Memorandum Order

LORD, D.J.

Pursuant to an order requiring a more definite statement, [1] **[**2]** plaintiff, Clausen & **[*150]** Sons, Inc., [2] filed a second amended complaint. [3] Defendant, Theo. Hamm Brewing Co., [4] moved pursuant to *Rules 12* and *56 of the Federal Rules of Civil Procedure* for an order dismissing said complaint and parts thereof. Affidavits and memoranda of law in support of and in opposition to said motion have been received.

The complaint alleges generally that defendant is a corporation engaged in interstate commerce in the business of brewing beer and selling it to independent wholesale distributors; that upon each of these independent wholesale distributors defendant confers the exclusive right to sell Hamm's products within defined areas; and that plaintiff is one such independent wholesale distributor engaged exclusively in the distribution of Hamm's products in southern Minneapolis and the neighboring suburbs. The complaint, which purports to allege violations of the federal antitrust laws and seeks treble damages and injunctive relief, is comprised of four counts.

Briefly, Count I alleges as follows:

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[1] The order requiring a more definite statement directed the filing of a second amended complaint in which:

"(a) a separate count is used for each offense of violation of federal ***antitrust law*** charged;

"(b) the essential facts, and not mere conclusions, are pleaded as to each such count to the greatest extent possible;

"(c) the statutory grounds allegedly prohibiting each claimed offense or violation are stated in each count;

"(d) the manner and amount in which plaintiff claims to have been damaged as a result of each such offense or violation are stated; and

"(e) the relationship between such violation and the alleged resulting injury to plaintiff is stated * * *."

[2] Hereinafter referred to as Clausen.

[3] Hereinafter referred to as the complaint.

[4] Hereinafter referred to as Hamm's.

"10. On information and belief each Minneapolis-St. Paul wholesaler and distributor of Hamm's products has been induced by Hamm's to observe Hamm's specific resale prices, which resale prices have been set at artificially low price levels.

* * *

"14. Hamm's has regularly **[**3]** called monthly meetings of its Twin City area wholesalers or distributors for the purpose of reminding each of its area wholesalers or distributors, including Clausen, to adhere to and not to deviate from Hamm's resale price maintenance scheme.

* * *

"21. As a direct and proximate result of the foregoing actions of Hamm's, Clausen has been prohibited from reselling Hamm's products at prices that are consistent with sound economic and business principles and as a result thereof Clausen has been prevented from realizing a fair gross profit on the resale price of Hamm's beer products."

Count I further alleges that plaintiff was coerced to agree to abide by defendant's price maintenance scheme, alleges specific acts of defendant whereby plaintiff was thus coerced, alleges that defendant's conduct maintained the resale price of beer at so artificially low a level as to unreasonably restrain the flow of national and foreign beers into Minnesota, and alleges in conclusion that defendant's conduct violates *Section 1* of the Sherman Act. [5]

[4]** Count II in brief alleges that plaintiff has desired to and has had the opportunity to distribute products which pass through the channels of interstate commerce, specifically soft drinks and Schmidt, Budweiser, Gluek, Heineken and Lowenbrau beers, but has been precluded from doing so by threats by defendant of coercion and the immediate termination of its distributorship arrangement. Count II alleges that similar restraints have been imposed on every Hamm's distributor in the Minneapolis-St. Paul area. Count II alleges that Hamm's sales constitute 35% to 50% of the industry sales in the relevant market. Count II further alleges that as a condition to allowing plaintiff to purchase Hamm's products defendant has required plaintiff to purchase from defendant unpopular and unknown products, **[*151]** such as a premium beer known as Waldech and an inexpensive beer known as Buckhorn, in quantities which plaintiff did not desire and could not dispose of. Count II alleges that by the foregoing actions defendant has attempted to or has, in fact, acquired monopoly power in the sale and distribution of beer and related malt products in the Minneapolis-St. Paul area and has substantially **[**5]** restrained commerce by making it more difficult for interstate brewers to gain access to the Minneapolis-St. Paul market area. Count II alleges that plaintiff has lost profits as a result of the foregoing acts of defendant and that these acts constitute violations of *Section 2* of the Sherman Act [6] and Section 3 of the Clayton Act. [7]

[6]** Count III in summary alleges as follows:

"2. Hamm's has sold Hamm's beer products to Minneapolis-St. Paul wholesalers and distributors, other than Clausen, at dock or platform prices lower than those prices charged to Clausen.

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[5] ***HN1***[] *Section 1* of the Sherman Act, *15 U.S.C. § 1*, provides as follows:

"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 * * *."

[6] ***HN2***[] *Section 2* of the Sherman Act, *15 U.S.C. § 2*, provides as follows:

"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 misdemeanor * * *."

[7] ***HN3***[] Section 3 of the Clayton Act, *15 U.S.C. § 14*, provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a sale * * * for * * * resale within the United States * * * on condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor * * * of the * * * seller, where the effect of such * * * condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

> "3. Hamm's has sold and continues to sell Hamm's beer products to many Minneapolis-St. Paul wholesalers or distributors, other than Clausen upon credit terms and conditions which are not extended to Clausen and has continuously and arbitrarily refused to grant similar credit terms to Clausen notwithstanding Clausen's fine credit standing and reputation in the community.
>
> * * *
>
> "8. As a direct and proximate result of the foregoing acts of price discrimination and credit preferences by Hamm's, Clausen has been unable to compete with other Hamm's distributors upon equal terms and conditions. The above acts of price discrimination and credit preferences by Hamm's have injured competition and affect interstate commerce.
>
> "9. The foregoing acts of price discrimination and credit preferences by Hamm's have unreasonably lessened competition and tend to permit Hamm's to create a monopoly in the sale of beer products in the Minneapolis-St. Paul market area."

[7]** Count III further alleges that plaintiff has suffered injury as a result of the foregoing acts of defendant and that these acts constitute violations of Subsections (a), (d), and (e) of *Section 2* of the Clayton Act as amended by the Robinson-Patman Act. [8]

[8]** **[*152]** Count IV alleges briefly as follows:

> "2. Hamm's has extracted an agreement for each of its distributors and wholesalers whereby each wholesaler or distributor, including Clausen, shall resell Hamm's products solely within those areas designated and determined from time to time, by Hamm's.
>
> "3. From and after 1945 through April 1963, Clausen resold Hamm's beer products within and around the City of Bloomington, Minnesota. On or about April 1, 1963, Hamm's began to prohibit and has continued to prohibit Clausen from reselling Hamm's products within and around the City of Bloomington, Minnesota (except for Metropolitan Stadium) said action having been arbitrarily taken by Hamm's without the consent of Clausen.
>
> "4. Hamm's has and continues to prohibit Clausen from reselling Hamm's products in any area of Minneapolis other than the area commonly known as the 'South Side' of Minneapolis, even though Clausen has continuously sought to resell Hamm's beer in other areas of Minneapolis and Hennepin County.
>
> * * *
>
> "6. The foregoing wrongful acts of Hamm's have been tantamount to an agreement to eliminate intra-brand competition within the St. Paul-Minneapolis trade area. **[**9]**
>
> * * *

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[8] ***HN4***[] Subsections (a), (d) and (e) of *Section 2* of the Clayton Act as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a)*, *(d)* and *(e)*, provide as follows:

"(a) 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 either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for * * * resale within the United States * * * and 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; * * *.

* * *

"(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

"8. The foregoing wrongful acts of Hamm's have a pernicious effect on competition and lack any redeeming value."

Count IV further alleges that the foregoing acts of defendant have caused injury to the plaintiff and that these acts constitute violations of *Section 1* of the Sherman Act. [9]

From the affidavits submitted by both parties, the following uncontradicted facts appear:

Defendant is engaged in a substantial interstate beer selling business;

Plaintiff's business is strictly intrastate;

None of Hamm's independent wholesale distributors in Minnesota sells beer across state lines;

All the beer products sold by defendant to its independent wholesale distributors in Minnesota in the past five years have been produced within the State of Minnesota; [10]

During the past five years defendant's share of the total wholesale beer sales to retailers in the Minneapolis and Hennepin County market area has been less **[**10]** than 30%;

Neither the defendant nor any other brewer selling beer products to wholesalers **[*153]** in Ramsey and Hennepin Counties sells soft drink beverages to such wholesalers; and

The alleged price-fixing activities of defendant reduced the gross profit margin of Hamm's products sold by plaintiff and as a result reduced plaintiff's net profits.

The affidavits of the parties are in conflict as to whether or not Hamm's, Waldech, and Buckhorn beers are functionally interchangeable substitutes serving the same consumer markets.

HN5[] The general rule is that a claim should not be dismissed for insufficiency of statement unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which **[**11]** could be proven in support of the claim. See, e.g., *Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *P. H. Machinery, Inc. v. Harnischfeger Corp., 207 F. Supp. 392 (D.C. Minn. 1962)*.

HN6[] There are no special rules of pleading for antitrust cases. *Nagler v. Admiral Corp., 248 F.2d 319 (2nd Cir. 1957)*; *New Home Appliance Center v. Thompson, 250 F.2d 881 (10th Cir. 1957)*; *Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963)*; *Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964)*; *Louisiana Farmers' Protective Union v. Great A. & P. Tea Co., 131 F.2d 419 (8th Cir. 1942)*.

The Eighth Circuit philosophy of liberal pleading in antitrust litigation is amply demonstrated by the following quotation from *Bales v. Kansas City Star Co., 336 F.2d at 443*:

"Our action of reversal can sufficiently be cast in the summary expression of Mr. Justice Holmes in *Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 274, 43 S. Ct. 540, 541, 67 L. Ed. 977 (1923)*, in making reversal of the dismissal of a private antitrust action, as follows: 'It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act **[**12]** of Congress, or at least that the claim is wholly frivolous.'

"The attitude of this somewhat early case in the field seems to have been that a charge of antitrust violation, with claim of business injury therefrom, should generally be afforded the opportunity for proof to be made thereon, because of the aspect of public interest involved. Only where it is legally certain that the acts charged, in their rational implications, are incapable of constituting a violation of the antitrust laws, or where it is factually patent that the asserted claim is wholly frivolous, would a summary dismissal of the complaint be entitled to be made."

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[9] *Section 1* of the Sherman Act is quoted at footnote 5 supra.

[10] While plaintiff alleged by complaint and affidavit that it had purchased beer from defendant's California brewery, one of defendant's affidavits states that this has not occurred within the past ten years, and this affidavit by defendant has not been contradicted.

HN7[] In evaluating pleadings a court should not require technical exactness and should construe the pleadings in the pleader's favor in order to do substantial justice and may draw reasonable inferences from the words of the pleading to this end. See *Fed. Rules Civ. Pro. 8(f)*; 1A Barron & Holtzoff, Fed. Prac. & Pro., § 283 and the cases cited therein. As the Court said in *Nagler v. Admiral Corp., 248 F.2d at 325*, "we are not conducting exercises in pleading; we must look beyond the mere mountain of words to the meaning sought to be conveyed."

Defendant **[**13]** moves for dismissal of Count I on the ground that the required jurisdictional facts regarding the direct and substantial effect of the alleged restraint upon interstate commerce are not alleged. Defendant's contention in this regard is that the only "contract, combination * * * or conspiracy" alleged in Count I is that between plaintiff and defendant and that this single agreement is insufficient to have a direct and substantial effect on interstate commerce. This, it seems to the Court, is an extremely restricted and unreasonable interpretation of the allegations of Count I. Given the liberal rules of pleading and construction of pleadings, the construction of Count I proposed by plaintiff is more reasonable. This construction is that Count I alleges a vertical, **[*154]** and a vertically imposed horizontal, price fixing combination involving not only the plaintiff and the defendant, but also all the other independent wholesale distributors of Hamm's products in the Minneapolis-St. Paul metropolitan area. Such a combination, maintaining artificially low prices, might well substantially impede the flow of interstate beers into Minnesota and thereby have a direct and substantial **[**14]** effect on interstate commerce. Thus, it appears that defendant is not entitled to dismissal of Count I on this ground.

Defendant also contends that Count I should be dismissed on the ground that the price maintenance alleged therein was accomplished entirely unilaterally and, therefore, falls within the rule of *U.S. v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. However, the Court's construction of Count I, indicated in the previous paragraph, requires a rejection of this contention of defendant. The Supreme Court's reasoning in refusing to apply the *Colgate* doctrine to the facts involved in *U.S. v. Parke, Davis & Co., 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*, applies as well to the facts alleged in the instant complaint:

> "* * * HN8[] judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements * * *. When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which affect adherence to his resale prices, * * * he has put together a combination in violation of the Sherman Act."

Defendant further contends that **[**15]** Count I fails to allege a causal connection between the alleged price maintenance scheme and the alleged injury to plaintiff. However, the complaint alleges that plaintiff has lost gross profits as a result of being precluded, by defendant's scheme maintaining artificially low prices, from reselling Hamm's products at prices consistent with sound business principles, and it cannot be said that under no state of facts which might be proved in support of this allegation would plaintiff be entitled to relief. Defendant contends that gross profits is an improper measure of damages; however, since plaintiff has indicated by affidavit an intention to prove loss of net profits, no useful purpose would be served by granting dismissal on this ground.

Defendant also contends that any price fixing scheme which might have existed would have accrued to plaintiff's benefit. This contention may prove relevant at trial, but is of no relevance at this stage of the proceedings. The only statement by affidavit addressing this point contradicts defendant's contention.

Defendant moves for dismissal of Count II in so far as it purports to assert a cause of action under *Section 2* of the Sherman Act **[**16]** on the ground that the essential elements for either an actual monopolization or an attempted monopolization claim for relief are not pleaded and on the ground that the required jurisdictional facts regarding the direct and substantial effect of each alleged restraint upon interstate commerce are not alleged. Count II alleges that defendant attempted monopolization and effected actual monopolization of the Minneapolis-St. Paul metropolitan area market for beer products and sets out competing brand and product prohibitions and tying agreements as acts evidencing such violations. Also supporting the attempted and actual monopolization charges are the allegations of the other counts of the complaint. Liberally construed, the allegations of Count II encompass allegation of power to fix prices and control competition and the dangerous probability of and intent to acquire such power. A sufficient allegation of damages and causal connection with alleged wrongful acts has been made. Moreover, facts might be proved in support of Count II which would establish a direct and substantial effect on commerce. It appears, therefore, that these grounds are insufficient to justify dismissal of **[**17]** Count II in so far as it alleges **[*155]** violation of *Section 2* of the Sherman Act.

Defendant moves for dismissal of Count II in so far as it purports to assert a cause of action under Section 3 of the Clayton Act on the ground that it fails to state a claim upon which relief may be granted. Defendant contends that none of the practices complained of in Count II is alleged to have been contained in any sale on condition, agreement, or understanding thereof; however, this contention is based upon an unreasonably restricted interpretation of the allegations of Count II and is, therefore, invalid. Defendant contends that soft drink beverages are not commodities of a competitor of defendant and that Waldech, Buckhorn, and Hamm's beers are functionally interchangeable substitutes serving the same consumer markets; however, these contentions cannot avail defendant upon a motion for summary dismissal because their validity depends entirely upon the evidence which presumably will be adduced in their support at trial. Defendant further contends that insufficient facts have been alleged in Count II regarding the effect of the alleged restraints upon competition, regarding the causal **[**18]** relationship between the alleged wrongful acts and the alleged injury, and regarding plaintiff's opportunities to distribute beers of competitors of Hamm's; however, it cannot be said that plaintiff would not be entitled to relief under any state of facts which might be proved in support of the allegations already made with respect to these matters. Accordingly, it appears that defendant is not entitled on these grounds to dismissal of Count II in so far as it alleges a cause of action under Section 3 of the Clayton Act.

Defendant moves for dismissal of Count III in so far as it purports to state a cause of action for violation of Subsections (d) and (e) of *Section 2* of the Clayton Act as amended by the Robinson-Patman Act on the ground that it fails to state a claim upon which relief may be granted. Count III alleges price discrimination and credit preferences. Subsections (d) and (e) proscribe discrimination between purchasers of a commodity in the furnishing of, or in payment in return for the furnishing by the purchaser of, services and facilities connected with "the processing, handling, sale, or offering for sale" of the commodity. Neither the price discriminations nor the **[**19]** credit preferences alleged in Count III can be considered to be services or facilities furnished in connection with "the processing, handling, sale or offering for sale" of Hamm's beer. See *Skinner v. United States Steel Corporation, 233 F.2d 762, 765-766 (5th Cir. 1956)*, wherein the court said:

> "* * * ***HN9***[] The prohibition of *Section 2 (e)* is not against every discrimination, nor even against every discrimination in the course of interstate commerce. The prohibition is against discrimination in the furnishing of 'services or facilities connected with the processing, handling, sale, or offering for sale of such commodity '. The language is not complex nor are the words technical. Neither the legislative history nor the judicial interpretation of the quoted words requires us to depart from their literal meaning. The service, furnished to Union Supply Company and denied the appellant, does not have any connection with the processing, handling, sale or offering for sale of any of the commodities which may have been sold by the appellee to Union Supply Company * * *. This is a particularly apt situation for the application of the maxim *'expressio unius est exclusio alterius.'* * **[**20]** * *.
> "* * * In other words, the services or facilities that must be made available on proportionally equal terms to all purchasers in competition are merchandising services or facilities. * * *."

Also see *Secatore's Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D.C. Mass. 1959)*. Thus, it appears that Count III must be dismissed to the extent that it purports to state a cause of action for **[*156]** violation of Subsections (d) and (e) of *Section 2* of the Clayton Act as amended by the Robinson-Patman Act.

Defendant moves for dismissal of both Counts II and III on the ground that these counts fail to comply with the order of this Court requiring a more definite statement. [11] However, the Court is satisfied that these counts adequately comply with its order. While they may not comply exactly with all the specifics of that order, they clearly comply with its spirit and give adequate notice of the conduct of which complaint is made.

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[11] See footnote 1, supra.

Defendant moves for dismissal of both **[**21]** Counts II and III in so far as they purport to assert causes of action for violation, respectively, of Section 3 of the Clayton Act and *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act on the ground that these counts fail to allege transactions in the course of interstate commerce. The sales alleged in Count II as having been made upon the condition that plaintiff comply with certain restraints were solely intrastate sales. Likewise, the discriminatory sales alleged in Count III were solely intrastate sales. Thus, no interstate transactions are relied upon in either Count II or Count III. ***HN10***[] Section 3 of the Clayton Act makes it unlawful for any person engaged in interstate commerce to engage in certain restraints "*in the course of such commerce*." ***HN11***[] *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act makes it unlawful for any person engaged in interstate commerce to engage in price discrimination "*in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in* [*interstate*] *commerce*." Thus, both sections proscribe only violations "in the course of such commerce," and *Section **[**22]** 2(a)* of the Clayton Act as amended by the Robinson-Patman Act contains the additional requirement that "either or any of the purchases involved in such discrimination" be in interstate commerce. Defendant contends that the violations alleged in Counts II and III did not occur "in the course of such commerce" because said violations involved no interstate transactions. However, ***HN12***[] the fact that *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act expressly requires that some interstate transactions must be involved in the violation in addition to requiring that the violation must occur in the course of interstate commerce indicates that a violation can be "in the course of such commerce" without involving interstate transactions. The case of *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 99 L. Ed. 145, 75 S. Ct. 148 (1954)*, demonstrates the expansive construction given by the Supreme Court to the phrase "in the course of such commerce". Plaintiff in that case conducted an intrastate bakery business in New Mexico. Defendant conducted an interstate bakery business. Defendant cut prices in New Mexico but not in other states and was sued for violation of *Section 2(a)* **[**23]** of the Clayton Act as amended by the Robinson-Patman Act. The Supreme Court held that the violation occurred in the course of interstate commerce, applying the following rationale:

> "We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources * * *. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, **[*157]** not by reason of their skills or efficiency but because of their strength and ability to wage price wars. * * * No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the **[**24]** combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. * * *." *Id. at 119*.

While the facts of *Moore* differ from those of the instant case, the above quoted rationale compels a conclusion that Counts II and III allege violations "in the course of such commerce ". The beneficiary of such violations is an interstate business, the alleged violations were calculated to exclude interstate competition, and defendant's power to impose the restraint was enhanced by its interstate treasury. In *Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (1965)*, the Ninth Circuit held on the basis of the *Moore* decision that certain commercial bribery had occurred "in the course of such commerce" within the meaning of *section 2(c)* of the Clayton Act as amended by the Robinson-Patman Act, [12] **[**27]** notwithstanding the fact that no interstate sales were involved and the bribery

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[12] ***HN13***[] *Section 2(c)* of the Clayton Act as amended by the Robinson-Patman Act, *15 U.S.C. § 13(c)*, provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

payments did not pass through interstate commerce because the bribery "created influences intrastate which injured the free competitive interstate commerce in fish food." *351 F.2d at 861*. In that case both the plaintiff and the defendant were manufacturers of fish food **[**25]** engaged in interstate businesses. Plaintiff, a Utah based producer, sued defendant, an Idaho based producer, for bribing a state official of Idaho to prefer defendant's fish food. The fish food sales by the defendant to the State of Idaho occurred entirely within intrastate commerce. The cases cited by defendant in support of its contention that the "in the course of such commerce" requirement is not satisfied unless interstate transactions are involved in the violation, are not persuasive because all such decisions rendered subsequent to the *Moore* decision either ignored that decision entirely [13] or involved *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act which section expressly requires that violations involve some transactions in interstate commerce. [14] Thus it appears that the violations alleged in Counts II and III occurred "in the course of such commerce ", notwithstanding the fact that said violations involved no interstate transactions. Consequently, defendant's motion for dismissal of Count II in so far as it alleges violation of Section 3 of the Clayton Act must be denied. [15] However, defendant is entitled **[*158]** to summary judgment with **[**26]** respect to Count III in so far as it alleges violation of *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act because that section expressly applies only "where either or any of the purchases involved in such discrimination are in [interstate] commerce," and no interstate discriminatory sales are alleged in Count III. See *Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961)*. [16]

[28]** Defendant moves for dismissal of Count IV to the extent that it purports to assert a separate cause of action for violation of *Section 1* of the Sherman Act on the grounds that (1) it fails to state a claim upon which relief may be granted; (2) it fails to allege sufficient facts regarding direct and substantial effect on interstate commerce; and (3) plaintiff would be *in pari delicto* with respect to any violation alleged in Count IV. Count IV alleges a vertically coerced territorial confinement agreement among Hamm's distributors severely restricting intra-brand competition and substantially restraining interstate commerce. It cannot be said that nothing can be proved in support of this claim which would entitle plaintiff to relief and establish the requisite effect on commerce. See *United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249* (June 12, 1967). Nor can the Court accept the contention that the doctrine of *in pari delicto* precludes plaintiff from basing a claim for relief upon the allegations of Count IV. ***HN14***[] Coerced adherence to a restraint in violation of *Section 1* of the Sherman Act does not place plaintiff *in pari delicto*. *Bales* ***[**29]*** *v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964)*. It thus appears that defendant is not entitled to dismissal of Count IV.

Upon the foregoing analysis,

It Is Hereby Ordered:

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[13] *Massachusetts Brewers Assoc. v. P. Ballantine & Sons Co., 129 F. Supp. 736 (D.C. Mass. 1955)*.

[14] *Willard Dairy Corp. v. National Dairy Pro. Corp., 309 F.2d 943 (6th Cir. 1962)*; *La Pointe v. Schweigert Meat Co., 282 F. Supp. 974 (D.C. Minn. 1966)*; *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products, 243 F. Supp. 331 (W.D. Mich. 1965)*; *Borden Co. v. F.T.C., 339 F.2d 953 (7th Cir. 1964)*; *Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961)*.

[15] Defendant also moved on the ground of failure to allege transactions in the course of interstate commerce for dismissal of Count III in so far as it purports to state a cause of action for violation of *Section 2(d)* and *(e)* of the Clayton Act as amended by the Robinson-Patman Act. The above analysis regarding Section 3 of the Clayton Act indicates that the Court does not consider this a valid ground for dismissal of Count III in so far as it purports to state a cause of action for violation of these subsections.

[16] The *Moore* decision cannot save Count III because some of the purchases involved in the discrimination therein were in interstate commerce. Nor does the fact that some of the ingredients used in the process of manufacturing beer in defendant's St. Paul, Minnesota brewery passed through interstate commerce save Count III, because these ingredients were transformed into an entirely new product. See, e.g., *Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 860 (9th Cir. 1965)*.

That defendant's motion for summary judgment dismissing Count III herein in so far as it purports to assert causes of action for violation of *Section 2(a)*, *(d)*, and *(e)* of the Clayton Act as amended by the Robinson-Patman Act is hereby granted. The Court sees no just cause for delay in entering this judgment after ten days have passed from the date this order is signed, during which time the Court will entertain any motion which plaintiff may make to amend Count III. Let Judgment Be Entered Accordingly.

It Is Further Ordered:

That all the other motions by defendant pursuant to *Rules 12* and *56 of the Federal Rules of Civil Procedure* for dismissal herein are hereby denied.

United States v. Concentrated Phosphate Export Asso.

United States District Court for the Southern District of New York

September 11, 1967

No. 64 Civ. 3914

Reporter

273 F. Supp. 263 *; 1967 U.S. Dist. LEXIS 8973 **; 1967 Trade Cas. (CCH) P72,203

UNITED STATES of America, Plaintiff, v. The CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, Inc., American Cyanamid Company, W. R. Grace & Co., International Minerals & Chemical Corporation, Tennessee Corporation and Socony Mobil Oil Company, Inc., Defendants

Core Terms

procurements, export, foreign aid, bid, supplier, funds, sales, transactions, shipment, Webb-Pomerene Act, commodities, Regulation, phosphates, financed, Authorization, fertilizer, domestic, immunity, concentrated, delivery, certificate, invitation, exemption, prices, anti trust law, cooperating, conditions, provisions, handled, shipped

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**

§ 1 of the Sherman 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, or with foreign nations, is hereby declared to be illegal.

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

International Trade Law > General Overview

HN2[] **Exemptions & Immunities, Export Trade**

§ 1 of the Webb-Pomerene Act, 15 U.S.C.S. § 61, provides that the words "export trade" mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

HN3[] **Exemptions & Immunities, Export Trade**

See § 2 of the Webb-Pomerene Act, *15 U.S.C.S. § 62*.

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN4[] **Exemptions & Immunities, Export Trade**

"To export" had at the time the Webb-Pomerene Act was enacted the same meaning that it now has, to carry or send abroad, especially to foreign countries.

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

International Trade Law > General Overview

HN5[] **Exemptions & Immunities, Export Trade**

The Webb-Pomerene Act specifically defines what is excluded from the words "export trade" by stating that they shall not be deemed to include the production, manufacture or selling for consumption or resale within the United States, which it defines as trade among the several states.

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN6[] **Exemptions & Immunities, Export Trade**

The word "export" as used in the Constitution and the laws of the United States means the transportation of goods from this to a foreign country.

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

Judicial construction should be used not to create doubt, but only to resolve one. Where there is no doubt, there is nothing to construe. The court should not under the guise of "construction" rewrite the statute; obviously, this is not a judicial function.

Counsel: **[**1]** Donald Turner, Asst. Atty. Gen., Dept. of Justice, Washington, District of Columbia, for plaintiff (Burton R. Thorman, E. Leo Backus, Larry D. Knippa, Robert K. Johnson, Washington, District of Columbia, of counsel).

Hollabaugh & Jacobs, Washington, District of Columbia, for defendant The Concentrated Phosphate Export Ass'n Inc. (Marcus A. Hollabaugh and Alan S. Ward, Washington, District of Columbia, of counsel).

Donovan Leisure, Newton & Irvine, New York, New York, for defendant American Cyanamid Co. (Samuel W. Murphy, Jr., Andrew J. Kilcarr and Vernon E. Vig, New York, New York, of counsel).

Cahill, Gordon, Sonnett, Reindel & Ohl, New York, New York, for defendant W. R. Grace & Co. (Douglas E. Cutler and Peter H. Schuck, New York, New York, of counsel).

White & Case, New York, New York, for defendant International Minerals & Chemical Corp. (Edgar E. Barton and Abdul W. Wohabe, New York, New York of Counsel).

Guggenheimer & Untermyer, New York, New York, for defendant Tennessee Corp. (Randolph Guggenheimer, Leon H. Tykulsker and Randolph Guggenheimer, Jr., New York, New York, of counsel).

Howrey, Simon, Baker & Murchison, Washington, District of Columbia, for defendant Mobil **[**2]** Oil Corp. (Edward F. Howrey and John Bodner, Jr., Washington, District of Columbia, of counsel).

Judges: Ryan, District Judge.

Opinion by: RYAN

Opinion

[*264] RYAN, District Judge:

This is an action brought to enjoin the price-fixing and business allocation activities of five fertilizer producers in connection with sales of fertilizer, made under the United States Foreign Aid Program, which was destined for the Republic of Korea. The challenged activities were conducted through the defendant Concentrated Phosphate Export Association, Inc. (CPEA), organized by the other defendants, or their respective corporate predecessors, in 1961. All facts have been stipulated. The question of law presented is whether the exemption from the Sherman Act provided for in the Webb-Pomerene Act applies to these transactions. [1]

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[1] ***HN1***[] *Section 1* of the Sherman Act, as amended, 26 Stat. 209, *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 hereby declared to be illegal * * *".

HN2[] *Section 1* of the Webb-Pomerene Act, 40 Stat. 516, *15 U.S.C. § 61*, provides in pertinent part:

> "The words 'export trade' * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale."***HN3***[]

Section 2 of the Webb-Pomerene Act, 40 Stat. 517 (1918), *15 U.S.C. § 62*, provides:

[3]** The parties have stipulated as follows:

> The issue presented by the pleadings in this case is whether the Concentrated Phosphate Export Association, Inc., a nonprofit membership corporation organized and operated under the Act of April 10, 1918, Ch. 50, 40 Stat. 516, 15 U.S.C. 61-65 (commonly known as the Webb-Pomerene Act), and its members violated *Section 1* of the Sherman Act (*15 U.S.C. 1*) in connection with that portion of the Association's sales of phosphatic fertilizer which such Association made for shipment to the Republic of Korea, where the Board of five Directors of the Association composed of one Director for each Member agreed on selling prices and on allocation of sales among such Members, when United States Government foreign aid funds were made available to pay for said phosphatic fertilizer shipments in accordance with statutes, treaties and regulations applicable to the U.S. foreign aid program.

Plaintiff, conceding that the transactions involved were exports from Florida to the Republic of Korea, contends that because they were part of a United **[*265]** States program of foreign aid, controlled, managed and funded by the Government, they are not "export **[**4]** trade" within the meaning of the "Webb-Pomerene Act" and consequently were in violation of the antitrust laws. The defendants rest squarely on the Act and answer that since these transactions were literally exports, the fact that they were shipped under the foreign aid program cannot convert them into domestic sales excluded from the statutory immunity. Plaintiff does not otherwise dispute the lawfulness of CPEA's operations under the Webb-Pomerene Act and the only question, therefore, is the application of the Act to these sales.

Plaintiff's reasoning is that the sales in question do not come within the Webb-Pomerene Act because they do not constitute export trade in that they were such an integral part of a United States program which paid for and closely controlled them, that they were tantamount to purchases made by the United States for the benefit of the Republic of Korea and are therefore domestic sales. Plaintiff also urges that, even if these transactions be held to be export trade, they were never within the contemplation of Congress when it legislated the immunity because (a) there was at that time no Foreign Aid Program in which the Government assumed the financial **[**5]** burden and cost for these commodities sold; (b) the price-fixing activities of the defendants injured the United States. The Government also urges that there is no necessity for these defendants to have the benefit of the immunity of the Act for they were not required to meet unlimited competition from suppliers abroad in foreign aid sales. Finally, the Government contends that a contrary interpretation of the immunity of the Webb-Pomerene Act would destroy the purpose of the exemption and frustrate the foreign aid program as well as the Sherman Act.

Summed up, the Government's argument is one a posteriori: from the conclusion that price fixing is per se illegal under antitrust principles in that injury to competition and to the public is presumed, it takes but one step back to conclude that ergo the United States and its citizens, who bore the cost initially of these fixed prices, must have been hurt. The Government reasoning that this was not intended by Congress when it immunized certain sales reaches a conclusion that these sales do not come within the exemptions of the Webb-Pomerene Act, that they are in violation of ***antitrust law***, and, being "illegal per se", are to be struck **[**6]** down.

We have concluded that the answer lies in the wording of the statute. Let us, first, summarize the facts necessary to an appreciation of the question presented.

There is no dispute as to the accuracy of facts advanced by either party in support of its position. They do differ as to relevance and materiality of some of these facts and, of course, as to the conclusions to be drawn from them.

> "That nothing contained in (the Sherman Act) shall be construed as declaring to be illegal and association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

The cooperation of counsel at pretrial hearings produced a statement of stipulated facts with exhibits attached; we turn to these:

The defendants are:

CPEA - a non-profit Delaware corporation with its principal place of business in New York, New York, organized on September 12, 1961 to engage solely in export trade as the term "export trade" is defined in the Webb-Pomerene Act, and specifically to engage in trade and commerce in the product known as triple superphosphate and certain other concentrated phosphatic materials. (At all material times, CPEA has been duly registered with the Federal Trade Commission as an association organized and acting under the Webb-Pomerene Act.)

CPEA's five Members: W. R. Grace & Co.; Tennessee Corporation; Socony Mobil Company, Inc.; American Cyanamid **[**7]** Company and International Minerals and Chemical Corporation. [2]

[*266] Each of these defendant members is a domestic corporation producing chemical fertilizers known as "concentrated phosphates".

CPEA acts as an export selling agency for the concentrated phosphate products of its members. These products are shipped from Florida to Korea and other foreign ports. CPEA handles all phases of developing and negotiation of these sales and this includes all details, such as the submission of bids, shipment, transportation and billing. The management of CPEA is provided for in its by-laws. It is vested in a Board of Directors equal in number to the number of members with each member entitled to nominate one director. CPEA at all times since its formation has been governed by the Board of Directors, each director representing one of its members. The Board of Directors established the minimum price at which materials would **[**8]** be sold by CPEA and the price at which the member would sell to the Association. The Board of Directors also allocated the available business among the members in accordance with the procedures set forth in the Membership Agreements. [3] None of the members bid as individuals on the Korean foreign aid procurements here in suit, all such sales were handled by CPEA.

The Government does not challenge the lawfulness of defendants' operations under the Act except as specifically stated in the issue stipulated. Thus, it does not charge that defendants have in any way restrained the domestic export trade of a competitor **[**9]** or enhanced or depressed prices within the United States - activities which under the wording of the Act would deprive them of its immunity.

There were 13 shipments made from September 1961 (when CPEA was formed) through 1966, in which concentrated phosphates were procured "for shipment directly to and use by the Republic of Korea." This action is concerned with but 11 of these shipments. The materials procured and the costs of these shipments "were paid for with funds from the United States Government made available under its foreign assistance program to the Government of Korea", administered by AID, [4] or its predecessor ICA. [5]

One of the other two shipments was financed with Korean Foreign Exchange Funds, and the other shipment was financed out of a special Stabilization Fund granted in 1961 by the United States to the Republic of Korea to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system. Neither of the two shipments was made subject to ICA or AID regulations; both were handled in accordance with OSROK's [6] applicable

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[2] International Minerals and Chemical Corp. withdrew its membership on June 30, 1966.

[3] As required by the Act, copies of CPEA's corporate charter, by-laws and membership agreement were filed with the FTC. Annual reports for the years 1961-1965 were also so filed, as well as special reports of annual sales volume. In 1964, at the Commission's request, CPEA submitted a report separately stating the dollar volume of CPEA's 1961-1962 sales believed to have been subject to AID financing.

[4] "AID" - Agency for International Development, an agency of the United States Department of State, established in 1961.

[5] "ICA" - International Cooperation Administration, the predecessor agency of AID.

procurement **[**10]** procedures. Although payment for this last mentioned shipment was made with United States funds, the Government does not challenge the lawfulness of this transaction.

The authority for the foreign assistance program since 1961 is contained in the Act for International Development of 1961 (AID) (*22 U.S.C. § 2151*, 75 Stat. 424, 427), which provides authority **[*267]** to the President "to furnish assistance on such terms and conditions as he may determine in order to promote the economic development of less developed friendly countries and areas, with emphasis upon assisting the development of human resources through such means as programs of technical **[**11]** cooperation and development." (Sec. 211)

Among the terms and conditions, which must be met before eligibility for foreign aid is determined, is that the President find that the assistance proposed would not have a substantially adverse effect on the United States economy.

Following World War II, the United States Government made funds available to many countries to pay for commodities, including fertilizer, sold by commercial companies and shipped from the United States and other free-world sources to the recipient countries. Foreign aid funds have been made available from time to time both prior to and after 1961 to pay for various commodities such as fertilizer, including concentrated phosphates for the Republic of Korea through Acts of Congress beginning with the Mutual Security Act of 1954, 68 Stat. 832. [7]

[12]** This assistance is made available to Korea through various treaties and agreements. The relevant agreement here is "The Economic Technical and Related Assistance Agreement between the United States and the Republic of Korea of February 8, 1961". Concern for the economic and general welfare of the United States in the furnishing of this foreign aid is reflected in this Agreement for it is provided that the assistance to be given shall be subject to applicable United States laws and regulations. It is also provided that the Korean Government is to cooperate with the United States Government to assure that procurement will be at reasonable prices and on reasonable terms. It is further provided that

> "All or any part of the program of assistance provided hereunder may be terminated by the Government of the United States if it determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable."

The Foreign Aid program was supported by funds appropriated annually by Congress on budget requests and recommendations of the State Department and AID, stating the basis of detailed proposals which were made following negotiations with **[**13]** foreign countries seeking assistance. The funds appropriated by Congress were made available by AID in the form of loans or grants in accordance with the applicable statutes, agreements, and regulations. Foreign aid funds have not been used to procure commodities for use or resale in the United States.

The expenditure of funds AID allocated for Korean commodity imports was subject to AID's approval of "Procurement Authorization Applications", submitted by agencies of the Korean Government to AID from time to time. AID's approval of Korean fertilizer procurements was made either in the form of a "Procurement Authorization" issued to OSROK or a "Procurement Authorization, U.S. Government Agency Purchase Requisition" issued to GSA.

AID, which was officially characterized as essentially a financing institution, did not itself procure any concentrated phosphates for Korea.

The Government of Korea had no obligation to repay the amounts granted by the United States, but the concentrated phosphates procured with AID financing were sold to Korean consumers by a Korean Government agency and the Korean currency (hwan) received from such sales was deposited by the selling **[*268]**

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[6] "OSROK" - Office of Supply, Republic of Korea, the Korean governmental agency responsible for procurement of commodities for the Government of Korea.

[7] Although plaintiff disputes their similarity, defendants say that foreign aid programs go back at least to 1948 and the Marshall Plan and even farther to the time the Webb-Pomerene Act was enacted, when Congress also enacted the Organization of American Relief in Europe in 1918. The significance of this will appear later.

agency **[**14]** in an account at the Bank of Korea in accordance with agreements between the United States and Korean governments. The Korean currency generated by such sales was not necessarily equal to the United States dollar value of the fertilizer sold. Such deposits were called "counterpart funds" and were used to support, in part, Korean and United States military establishments in Korea and for other purposes mutually agreed upon by the governments of the United States and Korea, including financing public works projects of the Korean Government. These funds were also available to the United States "as requested" but the Korean Government could also draw against them. Agreement between the two countries as to the disposition of unencumbered balances was subject to approval of Congress.

It appears that of the 13 transactions in which Korea purchased concentrated phosphates for import and consumption, 11 were handled directly by OSROK issuing the invitation for bids and that the other 2 transactions were handled by General Services Administration (GSA). Where OSROK was the procuring agency, CPEA registered in Korea as a bidder as required by Korean regulations, and its bids were submitted **[**15]** there to OSROK and shipped on OSROK's call or requisition. OSROK, as buyer, handled the insurance; all disputes arising from the performance under the contract were adjusted and settled in Korea.

The following administrative procedure was taken where the procurement authorization issued to OSROK:

1. OSROK's submission to AID of a Procurement Authorization Application.
2. AID's issuance of a Procurement Authorization, a portion of which constituted a letter of commitment by AID to a specified United States Banking Institution to reimburse the bank for payment made to suppliers of the material being procured.
3. Invitation for Bids issued by OSROK requesting bids in compliance, inter alia, with AID Regulation No. 1.
4. AID's issuance of a Small Business Circular entitled "Trade Opportunities for American Suppliers", publishing the invitation for bid.
5. OSROK's Abstract of Bids received.
6. Lists of Successful Bidders prepared by OSROK and transmitted to AID.
7. Notice of Award issued by OSROK and in this instance addressed to CPEA.
8. Notice to supplier of Opening of Letter of Credit.
9. Letter of Credit with conditions issued **[**16]** to CPEA by J. Henry Schroder Banking Corporation, New York, hereinafter called "Schroder Bank".
10. A performance bond of the supplier.
11. Voucher of Schroder Bank to the United States Government claiming payment and stamped by the United States Treasury Department as "paid", and attached documents in support thereof, including the invoice of CPEA and its Supplier's Certificate.

OSROK described on its application the type and amount of fertilizer it required; the proposed area of source; the proposed basis and time of delivery; the United States Banking Institution; the estimate of cost; how it would ship the commodities f.o.b. on United States flagships; how it would evaluate the bids; the condition of the fertilizer (that it meet United States Federal Specification Inspection terms); and a detailed "End-use Justification" for such authorization.

Where GSA was the procuring agency it issued "Invitations for Bids" on its standard form and its acceptance of any bid was endorsed at the foot of the face **[*269]** page of the form in the name of the "United States of America by the Contracting Officer". Bids were invited to be submitted to GSA which indicated the recipient **[**17]** country, and code and delivery was specified as FAS or FOB vessel.

The bid tabulation of GSA shows that bids were received for delivery FOB vessel at Tampa, Florida, and for delivery FOB vessel in Tunisia and Portugal. Awards to successful bidders were made after review by GSA personnel. Invoices with supporting documents, including bills of lading, were submitted to GSA for payment. The shipper was designated as GSA with consignment to OSROK. Delivery by the supplier was established by a "Material Inspection and Receiving Report".

In short, GSA handled all incidents of the procurement from the invitation to bid to acceptance at the point of shipment, made shipment of the goods and made payment of the freight as well as payment of the purchase price.

The details of the control which the United States Government exerted over the Foreign Aid Program are spelled out in the Regulations adopted by AID for carrying out the program.

Upon the filing of a Procurement Authorization Application by the cooperating country to procure specified commodities against its allotment of AID funds, AID issued the Procurement Authorization after determination that the proposed purchase was in accordance **[**18]** with the objectives of the Act. The Procurement Authorization issued by AID either to OSROK or to GSA specified the commodity and the maximum amount of money which would be provided, the delivery periods, the source from which the commodity might be obtained, and other provisions deemed necessary by it.

Among the requirements imposed by Regulation 1 upon the cooperating country is that at least fifty percent of the gross tonnage of all commodities financed by AID transported by ocean vessels to the cooperating country must be carried in privately owned United States flag commercial vessels. Another is that where formal competitive bidding is used, as was done with all the relevant procurements, copies of the invitation for bids must be sent to the Office of Small Business, AID, to give United States suppliers an opportunity to bid. [8] It also was further provided that if it appeared that "the objective of lowest competitive market price is not being met", AID would take appropriate action to impose additional limitations and might require a refund of the entire amount or as against the supplier of the amount by which the price exceeded the maximum price permitted by the regulation. **[**19]** Specific calculations were set forth for determining the permitted maximum price where there was no available competitive market. Even in instances of delivery FOB, AID reserved the right to divert the shipment at any time before delivery and to vest title in transit "if necessary to assure compliance with any Act of Congress."

As to the Supplier, Regulation 1 also required that, to obtain payment, the Supplier (here the defendants) had to complete an AID form called the Supplier's Certificate in which he acknowledged that the procurement was to be paid for from funds made available by the United States pursuant to AID Regulation 1. The Supplier agreed to make appropriate refund to AID upon demand, in the event of non-performance under his contract, for any breach of the certificate or for any false certification. The Supplier in addition **[**20]** certified that (1) the price did not exceed the market price; (2) that he had not given or received and would not give or receive any side payments or "kickbacks"; and (3) that he had not paid any contingent fees or commissions except as stated. This certificate, under "Notes", provides "(b) False statements herein are punishable **[*270]** by United States law." An important modification of the form certificate made in 1964, further provides that the agreement between the supplier and AID incorporated in the certificate shall be deemed to be a contract made under the laws of the District of Columbia. The 1964 revision requires too that the supplier maintain his records for a period of at least five years available for examination by AID.

As to the banks involved, Regulation 1 spelled out the responsibilities of the banking institutions. Generally, the bank is responsible for collection of the documents required, including the Supplier's Certificate, and for determining whether "in accordance with good commercial practice" the shipment complies with the requirements set forth in the letter of commitment as to delivery, source, destination, description and discounts or commissions. **[**21]** While the American bank operates under a letter of credit from the Bank of Korea, it looks not to the Bank of Korea but to the United States Government for payment, under the letter of commitment issued by AID to the bank set forth in AID's agreement to reimburse the bank for payments made against the account of the approved applicant which may be applicable to the procurement.

Adherence to these requirements was a condition imposed on suppliers by the Korean Government under OSROK's General Provisions for Bidding. These provisions limited the Korean Government's contractual liability to the suppliers by conditioning its obligation on the receipt by the latter of the pertinent letter of commitment from AID.

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[8] It is stipulated that in all 13 purchases CPEA directly competed for AID financed sales to Korea with domestic and eligible foreign producers of concentrated phosphates.

The control of the United States over the OSROK'S procurements is clearly defined. This control is even more evident in those instances where GSA was the procuring authority, for there, although Korea appeared as the "recipient country", the award was signed on behalf of the United States of America who, through GSA, made payment to the bank upon submission of invoices to it by the supplier. By agreement between GSA and AID's predecessor, ICA, AID provided GSA with funds to **[**22]** pay for the cost of commodities. Following ordinary usual Governmental bidding procedure, the bids were sent to Washington and one of the standard bidding provisions was that the contract would be awarded to the bidder whose bid was most "advantageous to the Government, price and other factors considered."

One cannot logically dispute plaintiff's conclusion that the GSA procurements represent the ultimate in control by the United States over the expenditure of foreign aid funds in the Korean fertilizer procurements and that they emphasize the close regulation and control provided for to insure the proper and judicious expenditure of United States funds under the foreign aid program.

We do question the Government's further statement that by reason of this control the real contracting party for the commodities was the United States and that the transactions were therefore not "export trade", but domestic trade. We find to the contrary - the transactions were "export trade", especially in view of the concession by the Government that the goods sold by defendants were "for shipment to the Republic of Korea" procured by or on behalf of Korea by either OSROK or GSA acting as "the procurement **[**23]** agency" and that the commodities were used in Korea.

We also do not accept or agree with defendant's argument that AID was but an incidental party to the transaction - no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transactions, it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to it for payment and obligated itself to conform to its requirements and conditions if he was to **[*271]** receive payment. We find, however, that defendants were selling to the Korean Government. This we find, that the transaction was an "export" even where GSA was described in its procurement authorization and related documents as the "purchaser". The AID regulations referred to these transactions as "exports". It has been stipulated that AID did not purchase concentrated phosphates for consumption or resale. It is plain from the stipulated facts and from the **[**24]** very raison d'etre of the foreign aid program that the "cooperating country" and not the United States is the purchaser.

Plaintiff also stresses as an important factor that the Korean Government was under no obligation to repay these "grants" or "loans". [9] But we find this not to be the fact for, while Korea may not have signed a promissory note payable on demand in equivalent funds with interest, it did obligate itself to the extent that the Korean funds it received on resale of the commodities were to be deposited and used by it in accordance with its agreement with the United States and to be available to the Government of the United States in the manner required by it. This condition was hardly consistent with an outright gift of money to Korea. Indeed, the Government itself has pointed out that, despite the general statement of the purpose behind the Foreign Assistance Act, the Act makes it clear that Congress had no intention of writing a "blank check" for the underdeveloped countries to spend at will. AID Administrator David E. Bell, before the Senate Banking and Currency Committee (111 Cong.Rec. 5373 (1965)), testified:

> "The foreign aid program provides goods and **[**25]** services to other countries which they cannot obtain through normal means - through their export earnings and through obtaining capital on commercial terms and by private investment. A successful aid program is one which enables the recipient country to strengthen its economy to the point where it can obtain goods and services it needs for steady expansion and growth by normal trade and normal capital movements - and without further need for aid grants and soft loans * * *. It is

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[9] Neither the tender nor award documents nor AID regulations make any distinction between the two forms of financing.

> plainly important to seek to carry out this important national program like any other, at minimum cost to the United States."

The commodity involved in these transactions was produced in the United States. It was loaded on ocean going vessels sailing from a United States port, with shipping documents naming the Korean Government as consumer and Korea as the destination. The risk of loss was not with the **[**26]** supplier for title passed from the supplier to OSROK (or the designee of ICA) and the Korean Government was named as shipper and consignee in the f.o.b. vessel bills of lading. The sales in question are clearly "export trade" and exempt from the antitrust laws unless it is provided to the contrary in the Webb-Pomerene Act.

This brings us to plaintiff's second argument, which is that, although the transactions may be literally export trade, in the context and against the background of the Act, they are not or cannot be the export trade intended by the Act, and that an examination of the legislative history of the Act demonstrates that it was not Congressional intent to include this type of transaction within the statutory exemption, for the reason that it never contemplated this type of transaction where the United States Government was the financing party. The argument of the Government, attempting to divine a Congressional intent, continues that had Congress contemplated such foreign aid transactions would occur, it would not have exempted them.

In support of this ingenious argument, the Government puts emphasis upon the fact that Congress in the Act made it clear that the activities **[**27]** exempted were not "to operate to the prejudice of the **[*272]** American public" or "punish the people of the United States" and that, if that should be the result of the activities, they would not be immune. The Government further argues that the defendants frustrated the AID "objective of lowest competitive market prices" because, in aggregating the manufacturing and selling resources of five very substantial size companies, whose competitors, in most of the larger procurements herein, could furnish only a limited portion of the requirements, defendants eliminated much of the competition which would otherwise have existed. Having thus frustrated the objectives of the foreign aid program, the Government reasons defendant cannot now claim the immunity of the provisions of the Webb-Pomerene Act simply because of the format of their Association.

It may be that competition within the United States was curtailed among those five, although it has been stipulated that all CPEA-AID financed sales were obtained as a result of competitive bidding and that CPEA has faced world-wide competition for all sales from eligible sources. The argument concludes that, since Congress could not have **[**28]** intended to protect activities which injured the United States, the activities of the defendants are not protected and ergo come within the antitrust laws and are illegal under them.

Much as plaintiff strains at the meaning of the words "export trade", we are unable to find any ambiguity in them.

HN4[] "To export" had at the time the Act was enacted the same meaning that it now has - "to carry or send abroad, especially to foreign countries" There is nothing to indicate that the Congress did not intend them to have this meaning; the Act itself refers to export as "goods exported from the United States to any foreign nation. [10] On the face of the statute, the transactions were exempt from the antitrust laws.

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[10] ***HN5***[] The Act specifically defines what is excluded from the words "export trade" by stating that they shall not be deemed to include the production, manufacture or selling for consumption or resale "within the United States" which it defines as trade "among the several states".

The United States Department of Commerce gives the official definition of exports as "the physical movement of merchandise out of the United States customs to foreign countries without regard to the method of financing." Census Bureau, Monthly Report of U.S. Export Report F.T. 410.

In 1903, the Supreme Court defined ***HN6***[] the word "export" as used in the Constitution and the laws of the United States to mean the "transportation [of goods] from this to a foreign country." *Swan & Finch Co. v. United States, 190 U.S. 143, 146, 23 S. Ct. 702, 703, 47 L. Ed. 984*.

HN7[]

[29]** Judicial construction should be used not to create doubt, but only to resolve one. Where there is no doubt, there is nothing to construe (*United States v. Rice, 327 U.S. 742, 753, 66 S. Ct. 835, 90 L. Ed. 982*; *Hamilton v. Rathbone, 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219*). We should not under the guise of "construction" rewrite the statute; obviously, this is not a judicial function. (*Palmer v. Commonwealth of Massachusetts, 308 U.S. 79, 83, 60 S. Ct. 34, 84 L. Ed. 93 (1939)*.)

The distinguishing feature, observes the Government, is that "In the context of the era and Congressional attitude, as reflected in the legislative history, 'export trade' has the common meaning of United States goods shipped to foreign nations and paid for by foreign buyers in a net transfer of wealth to this nation."

Accepting this definition, foreign aid financed trade is foreign trade, since there is a "net transfer of wealth to this nation", if not in dollars, certainly in its equivalence by the assurance of the economic and military stability of friendly nations. The return of wealth to this country may well be incalculable and far exceed measurement in dollar and cent standards.

But, in support **[**30]** of its position that Congress never envisaged immunizing transactions of this sort when the United States was the one paying the fixed price, **[*273]** the Government points to the purpose of the Webb-Pomerene Act, which appears to have been to enable the domestic companies to compete with large foreign combines by permitting them to combine their capital and establish selling agencies to reduce their expenses of advertising and cultivating world trade as well as to affect the power of cartels. (H.R.Rep. #50, 65th Cong., 1st Sess. p. 2, 1917; 55th Cong.Rec. 3576 and 2785.)

Defendants say that it had another purpose - foreign aid, because at the time that Congress was making extremely large appropriations for foreign assistance and was authorizing the issuance of bonds to provide the funds for those appropriations under the form of "export credits" to be expended by the foreign countries for the purchase of American goods, there was no real prospect that these loans or credits would be repaid. Therefore, defendants urge that Congress did envisage the transactions in suit.

In further support of its argument, the Government contends that it is clear from the discussions leading **[**31]** up to the exclusions contained in the Act that the reason Congress immunized these trade export associations was that Congress was not overly concerned with what price was being exacted of a foreign purchaser, because there the American public was not bearing the financial brunt.

Herein is the core of the Government's argument; we cannot say that it does not have appeal. It seems obviously unfair to the United States, which paid these defendants, to permit the defendants to charge an artificially set price and deprive the Government of price benefits which might come from competitive trade conditions within the United States.

It is plain from the remarks of the proponents of the Act made in Congress when the Act was being considered that they were concerned that no injury befall to the domestic purchaser from this Act.

The remarks of Senator Pomerene were, in part, that:

> "* * * although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its trust **[**32]** laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice." (56 Cong.Rec. 170) Congressman Webb stated:
> "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." (55 Cong.Rec. 3580)

Another proponent of the bill said that its purpose was "to make that which is illegitimate relating to the people of the United States perfectly legitimate when relating to foreign peoples;" (55 Cong.Rec. 2788); and that it was not the duty of Congress to look after the interests of foreign nations.

The Report of the Senate Committee states:

> "But while the purpose of these associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers." Sen.Rep.No.109, 65th Congr., 1st Sess. p. 2 (1917).

It was because Congress **[**33]** was concerned that the Act be not used to the detriment of domestic trade that it limited immunity to an association, agreement or act which was not in restraint of trade within the United States and not in restraint of the export trade of any domestic competitor of such association or which artificially, or intentionally, enhanced or depressed prices of lessened competition or restrained trade within the United States, none of which is charged here.

[*274] The Government's final argument is that the defendants' activities burdened and frustrated the Foreign Aid Program because the burden of any price-fixing activities as to foreign aid procurements is borne directly by the American taxpayer, not by a foreign nation or consumer as in the ordinary export trade transaction. The added charge upon AID financed procurements, it urges, limited the attainment of the United States' foreign aid objectives.

It is undisputed, however, that officials of AID, OSROK and GSA were aware of CPEA's status as a "Webb" association; its membership was no secret to them; and they knew CPEA's material was being offered for sale in response to invitations to bid to supply phosphatic materials for **[**34]** shipment directly to Korea. Defendants, along with other "Webb" associations, were encouraged by the Government agencies to participate in these programs. [11] It is true that this was an entirely business-motivated participation of the "Webb" associations but that is not to say that all these associations fixed prices and allocated territories for there is no evidence one way or the other. We assume, however, if several competitors do join in such an association, they do so for their mutual benefit.

Factually, it does **[**35]** appear that the activities of CPEA were known for as required by the provisions of the Webb-Pomerene Act, a report of CPEA's formation was made to the Federal Trade Commission (FTC) on October 6, 1961; and copies of the corporate charter, bylaws and membership agreements were filed with that report. All amendments to the charter and the membership agreements were reported to the FTC. CPEA also filed with the FTC annual reports for the years 1961 through 1965 in accord with provisions of the Webb-Pomerene Act, and responded to FTC's requests for special reports of, among other things, annual sales volume. In 1964, CPEA submitted to the FTC, at the Commission's request, a report which separately stated the dollar volume of CPEA's 1961-1962 sales believed to have been subject to AID financing.

If these activities were found to have been harmful to the foreign aid program, AID was not without remedy or means to discourage and stop such activities. Regulation I provided that the price was not to exceed the market price prevailing in the United States, or a price to be determined if there was no available market, with the privilege on the part of AID to seek a refund of the entire amount **[**36]** or of the excess charge and to cancel the transaction. These were terms to which the suppliers agreed. AID, however, has taken no action in this respect; perhaps, it is because it has found that the price, although artificially fixed, is not unreasonable.

All that we have before us is a claim of violation of antitrust laws.

We conclude that there is no violation of antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act. [12]

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[11] Webb associations other than CPEA have sold and are selling under the AID program and have sold under foreign aid programs administered by ICA. In addition, under different statutory and regulatory requirements, the U.S. Government has furnished funds to finance export sales of agricultural products by Webb associations under the Public Law 480 program administered by the United States Department of Agriculture. Webb associations sold, too, under the Lend Lease program at least from 1941.

[12] Apparently the question of whether defendants who are selling in connection with foreign aid programs should enjoy such immunity is not novel. It appears that Congress has reviewed the Webb-Pomerene Act on a number of occasions over the years

Complaint is dismissed upon the merits and the Clerk of the Court is directed to enter judgment of dismissal in favor of the **[**37]** defendants. So ordered.

End of Document

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and, on such occasions, spokesmen for the Justice Department often have advocated its outright repeal. Congress, however, has thus far declined to either amend or repeal the statute.

Wash. v. Am. Pipe & Constr. Co.

United States District Court for the Western District of Washington, Southern Division; United States District Court for the Western District of Washington, Northern Division; United States District Court for the District of Oregon; United States District Court for the District of Hawaii; United States District Court for the Northern District of California; United States District Court for the Eastern District of California; United States District Court for the Central District of California; United States District Court for the Southern District of California

September 14, 1967

C.A. Nos. 3157, 6568, 65-266, and related pipe cases in the D. of Or. bearing C.A. No. 65-299, 65-301, 2360, 9160, 42929, and related pipe cases in the N.D. of Calif. bearing C.A. Nos. 42930-42933, 43403-43407, 43729, 43752-43754, 44930-44935, 44953, 44954, 44983-44985, 44989, 44990, 44994, and 45001, 64-832 and related pipe cases in the C.D. of Calif. bearing C.A. Nos. 64-833 - 64-836, 65-378, 65-911 - 65-915, 65-926, 65-935 - 65-950, 65-952, 65-1057, 65-1126, 66-557, 66-626 - 66-634, 66-640, 66-645 - 66-647, 66-649 - 66-653, 66-655 - 66-659, 66-800 and 66-801, 3396 and related pipe cases in the S.D. of Calif. bearing C.A. Nos. 3525-3528, 3531 and 3532

Reporter
274 F. Supp. 961 *; 1967 U.S. Dist. LEXIS 11211 **; 1967 Trade Cas. (CCH) P72,233

State of Washington et al. v. American Pipe & Construction Co. et al. Washington Public Power Supply System v. American Pipe & Construction Co. et al. State of Oregon et al. v. American Pipe & Construction Co. et al. State of Hawaii et al. v. American Pipe & Construction Co. et al. Sacramento Municipal Utility District v. Kaiser Steel Co. et al. East Bay Municipal District et al. v. Kaiser Steel Co. et al. United States et al. v. American Pipe & Construction Co. et al. City of San Diego et al. v. American Pipe & Construction Co. et al.

Core Terms

pipe, distributors, manufacturer, contractors, products, cause of action, defense motion, estimating, antitrust, wax

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

HN1[] **Private Actions, Standing**

The antitrust laws provide that any person injured in his business or property, *15 U.S.C.S. § 15*, may seek redress for an alleged antitrust violation. Within the limitation that the litigant must show he was proximately and not incidentally damaged, anyone who falls within that area of the economy which is endangered by a breakdown of competitive conditions may recover.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

HN2[] **Private Actions, Standing**

One is not in the "target area" for purposes of a private antitrust action unless he was "aimed at" by the conspirators. But in using the words "aimed at," the Ninth Circuit did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, a plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN3[] **Appellate Jurisdiction, Certified Questions**

When a district judge, in making in a civil action an order not otherwise appealable under *28 U.S.C.S. § 1292* shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in an order certifying the question for interlocutory appeal pursuant to *§ 1292(b)*.

Judges: [1]** Pence, Chief Judge.

Opinion by: PENCE

Opinion

[*962] Memorandum Decision on Defendant's Motion for Summary Judgment on Purchases Made Through an Intermediary

PENCE, Chief Judge:

Plaintiffs in the above-captioned actions are seeking recovery under the antitrust laws (Title *15 U.S.C. § 15*) for injuries allegedly sustained as a result of price fixing by the manufacturers of concrete and steel conduit pipe. Defendant American Pipe & Construction Co. (American), contending "that plaintiffs have no standing to sue for damages allegedly resulting from sales of pipe to **[*963]** anyone other than themselves . . . who [may] in turn [have] sold to the plaintiffs projects which included that pipe," [1] moved for summary judgment pursuant to *Rule 56, F.R. Civ. P.*, on all claims based on purchases in which plaintiffs and defendant were not in privity of contract. On September 7, 1967, after hearing, the court orally denied defendant's motion. This memorandum decision augments and sets forth in greater detail the basis for that ruling.

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[1] Memorandum of Points and Authorities in Support of Motion of Defendant American Pipe and Construction Co. for Partial Summary Judgment Under *Rule 56 of the Federal Rules of Civil Procedure*, page 1 (dated July 11, 1967).

[2]** In implementing a project for the installation of pipe lines or other construction work that might include pipe, the normal procedure of the plaintiffs was to award a single contract for the project. Frequently plaintiffs had direct consultations with defendant concerning a particular project prior to awarding the contract. Mr. C. David Herlihy, defendant's Vice-President for Marketing, has described this process:

> "In most every instance that I can recall in my experience the agency for whom the pipeline was being designed, or the agency doing the design work, would call upon us for estimating prices. We might have furnished estimating, or we did furnish - I'll put that quite definitely - we did furnish estimating prices to projects which were in the feasibility stage of study, and then later on, preliminary design phases, and later, final design; and in many, many cases the estimating prices that we figured in response to their specific request for them, and in terms of the designs which they presented to us even in a preliminary way to evaluate, were worked out as carefully as any final prices that we would - any final estimate that we would make in terms of our own quotation." **[**3]** [2]

General contractors in bidding for the right to perform a project, of course included a pipe quotation in the bid, and, if the successful bidder, independently purchased pipe and "resold" it to plaintiffs as part of the completed job. Generally the pipe used was specifically designed and manufactured by defendant for and to conform with plaintiffs' project specifications. Normally the contractors would but incorporate defendant's quotations in their bids, and purchase the pipe only when awarded a contract. Defendant was fully aware of and participated in this procedure.

As previously ruled at the oral hearing, defendant's motion for a summary judgment must fail. ***HN1***[] The antitrust laws provide that "*any person* . . . injured in his business or property . . ." [3] may seek redress for the alleged antitrust violation. Within the limitation that the "litigant must of course show he was proximately and not incidentally damaged . **[**4]** . .", [4] anyone who falls "within that area of the economy which is endangered by a breakdown of competitive conditions . . ." [5] may recover. In *Karseal, supra n. 4*, the plaintiff manufacturer of automobile polish asserted injury resulting from Richfield's practices which precluded independent service stations from handling Karseal's products. The Ninth Circuit denied Richfield's motion to dismiss even though plaintiff sold through distributors, and not directly to the gasoline stations which were allegedly forced to boycott Karseal's wax:

> "Primarily the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. The impact was on the market. The gist of the **[*964]** violation was the prevention or impeding of the sale of these competitive products. Logically, and as found in the findings and conclusions of the trial judge in the Richfield case, the illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax. Such persons and such products were the 'target' of the illegal practices.
>
> " . . . Apparently, Richfield's **[**5]** argument is in part, that the independent distributors of Karseal's Wax might have a cause of action, but that Karseal is once removed from the distributors and therefore may not sue. We need not pass on whether such distributors have a cause of action. But it would appear that both the manufacturer and the independent distributor have such a cause of action. . . . Classes or categories effected by a statute must rest on a realistic basis. To say to a manufacturer of wax that he may have the protection of the antitrust laws in private litigation if he hires salesmen for his product, and not have such protection if he decides to contract with a distributor, would appear to be an unequal application of the law and unjustified dictation as to how he operated his business." *221 F.2d 358 at 364-365*.

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[2] Deposition of C. David Herlihy at page 79 (dated December 6, 1966).

[3] Title *15 U.S.C. § 15*.

[4] *Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358, 365* (9 Cir. 1955).

[5] *Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 55* (9 Cir. 1951), cert. denied ***342 U.S. 919, 96 L. Ed. 687, 72 S. Ct. 367 (1952)***.

[6]** In a more recent opinion the Ninth Circuit elaborated upon this "target" area concept, *Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190, 220* (9 Cir. 1964):

> "Discussing what it meant by 'target area,' this court, in Karseal, referred to it as a factor in determining whether there was proximate causation. At two places in that opinion, there is language indicating that ***HN2***[] one was not in the 'target area' unless he was 'aimed at' by the conspirators.
>
> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy."

As heretofore indicated, it was standard procedure for defendant to consult with, and thereafter tailor its pipe to the specifications of, the ultimate purchaser, i.e., plaintiffs here. American knew the specific jobs for which contractors placed orders for pipe, and willingly participated **[**7]** in the sales chain with knowledge that plaintiffs would eventually obtain title to and use that pipe. Plaintiffs here are clearly within the "area which it could reasonably be foreseen would be affected by the [defendant's alleged] conspiracy." They constitute "a recognizably small enough class to enforce the ***antitrust law***", [6] and each is entitled to recover insofar as it can establish causation and injury.

Defendant American has referred the court to numerous cases which allegedly preclude recovery by these plaintiffs, [7] **[**9]** and, relying thereon, contends **[*965]** that the alleged conspiracy spent itself on the contractors, so that any injury to the "end-users", i.e., plaintiffs here, is too inconsequential and remote to support a cause of action. Defendant asserts the law only takes the "first step" [8] in awarding damages, and that the first step here leads to and stops with the contractors. Not alone does this argument conflict with the language in **[**8]** *Karseal, supra*, to the effect that both the manufacturer and independent distributor would fall within the area of the economy endangered by a breakdown of competitive conditions, but also, none of the cases relied on by American are factually analogous to the instant situation. There are, however, three reported opinions with a similar factual basis: Armco Steel Corp. v. State of North Dakota, (8 Cir. 1967); *State of Missouri v. Stupp Bros. Bridge & Iron Co., 248 F. Supp. 169 (W.D. Mo. 1965)*; and *State of Washington v. General Electric Co., 246 F. Supp. 960 (W.D. Wash. 1965)*. This court now does but apply Judge Boldt's decision in *State of Washington* where the product purchased through a contractor was electrical equipment:

> "[This] Court is unwilling to deny plaintiff its right to sue merely because it purchased the equipment through a third party rather than directly from the manufacturer." *246 F. Supp. at 962*.

Defendant has also raised the specter of double liability if sued by the general contractors. [9] Defendant's argument does nothing more than present this court with a hypothetical question concerning the allocation of provable injury,

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[6] Statement of counsel for American at oral hearing.

[7] E.g., *Southern Pacific Co. v. Darnell-Taenzer Co., 245 U.S. 531, 62 L. Ed. 451, 38 S. Ct. 186 (1918)*; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564* (7 Cir. 1963); *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826 (M.D. Pa. 1960)* aff'd per curiam, *281 F.2d 481* (3 Cir. 1960), cert. denied ***364 U.S. 901, 81 S. Ct. 234, 5 L. Ed. 2d 194 (1960)***; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203* (7 Cir. 1964); *Loeb v. Eastman Kodak Co., 183 Fed. 704* (3 Cir. 1910); *Gerli v. Silk Association of America, 36 F.2d 959 (S.D.N.Y. 1929)*; *Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678* (2 Cir. 1955), cert. denied, ***350 U.S. 936, 100 L. Ed. 818, 76 S. Ct. 301 (1956)***; *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383* (6 Cir. 1962), cert. denied, ***372 U.S. 907, 9 L. Ed. 2d 717, 83 S. Ct. 721 (1963)***; *Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956)*; *United Copper Sec. Co. v. Amalgamated Copper Co., 232 Fed. 574* (2 Cir. 1916); *Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957)* aff'd per curiam, *242 F.2d 758* (1 Cir. 1957), cert. denied ***355 U.S. 828, 78 S. Ct. 38, 2 L. Ed. 2d 41 (1957)***; *Ames v. American Telephone & Telegraph Co., 166 Fed. 820 (D. Mass. 1909)*.

[8] *Southern Pacific Co. v. Darnell-Taenzer Co., supra n. 7*.

[9] Reply Brief of Defendant American Pipe & Construction Co. in Support of Its Motion for Partial Summary Judgment (Indirect Purchaser) at pp. 10-11 (dated August 11, 1967).

not with that of the standing necessary to maintain a cause of action. However, the question of the contractor's standing to sue is not presented here for decision, and this court does not reach that issue. [10]

Certification

At the conclusion of the court's oral ruling on September 7, 1967, American orally moved for an order certifying this question for interlocutory appeal pursuant to Title *28 U.S.C. § 1292(b)*. **[**10]** [11]

The court denied defendant's motion, holding that under *Karseal, Twentieth Century Fox Film Corp.*, and *State of Washington v. General Electric, supra*, the law on the subject is well settled in the Ninth Circuit [12] and this question therefore does not present substantial ground for difference of opinion.

Defendant's motions (1) for **[**11]** summary judgment and (2) for certification are denied.

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[10] Cf., however, *Karseal, supra.*

[11] ***HN3***[] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." etc.

[12] (as well as in the Eighth Circuit, viz.: Armco Steel Corp. v. North Dakota, supra).

Hensley Equip. Co. v. Esco Corp.

United States Court of Appeals for the Fifth Circuit

September 15, 1967

No. 23723

Reporter

383 F.2d 252 *; 1967 U.S. App. LEXIS 5107 **; 155 U.S.P.Q. (BNA) 183 ***; 1967 Trade Cas. (CCH) P72,209; 1967 Trade Cas. (CCH) P72,210; 11 Fed. R. Serv. 2d (Callaghan) 137

HENSLEY EQUIPMENT COMPANY, Inc., Appellant, v. ESCO CORPORATION, Appellee

Core Terms

patent, wear, adapter, surfaces, manufactured, infringement, misuse, conical, license, royalties, products, district court, tooth, dealers, teeth, invention, patentee, socket, replacement, revolution, monopoly, expired, pin, licensees, marketed, plug, anti trust law, Sherman Act, termination, machine

LexisNexis® Headnotes

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Patent Law > Claims & Specifications > Invention Theory

HN1[] **Jurisdiction & Review, Standards of Review**

It is fundamental that patent claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining an invention.

Patent Law > Nonobviousness > Evidence > Fact & Law Issues

Patent Law > Anticipation & Novelty > General Overview

Patent Law > ... > Claims > Claim Language > General Overview

Patent Law > ... > Specifications > Definiteness > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN2[] Evidence, Fact & Law Issues

It is desirable that district courts make specific findings on the following factual matters that the Supreme Court holds determines obviousness: the state of the prior art; the level of ordinary skill in the art; and the difference between the prior art and the claims of a patent at issue.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Claim Interpretation > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Repair & Replacement

HN3[] Infringing Acts, Indirect Infringement

To supply patented parts of a patented combination without authority from a patentee to purchasers of a combination is a direct infringement of the claims of a patent on a part and a contributory infringement of the claims of a patent on a combination, assuming that the requirements of *35 U.S.C.S. § 271(c)* are otherwise met.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Governments > Federal Government > US Congress

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

Governments > Courts > Authority to Adjudicate

HN4[] Congressional Duties & Powers, Copyright & Patent Clause

The constitutional provision authorizing congressional grants of patents is both a grant of power and a limitation. Neither Congress nor courts may exercise or apply the patent authority in such manner as to give a patentee more than the rewards of his discovery.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN5[] Ownership & Transfer of Rights, Assignments

Under the patent law, a patentee is given by statute a monopoly of making, using, and selling a patented article. Pursuant to this monopoly a patentee may exploit his exclusive rights as he sees fit, but should his exploitation exceed means normally and reasonably adapted to secure pecuniary reward for a patent monopoly, his actions become subject to the same restraints as are imposed upon those not protected by a patent's monopoly, such as the antitrust laws.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

HN6[ ] **Congressional Duties & Powers, Copyright & Patent Clause**

See *U.S. Const. art. I, § 8*.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN7[ ] **Misuse of Rights, Patent Misuse Defense**

One who attempts to exploit a patented invention beyond the scope of a patent monopoly may be the subject of a judicially imposed disability to enforce a patent. It is now familiar law that courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or "purged." The rule is an extension of the equitable doctrine of "unclean hands" to the patent field.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Governments > Courts > Authority to Adjudicate

HN8[ ] **Defenses, Misuse**

It is a principle of general application that courts may appropriately withhold their aid where a plaintiff is using a right asserted contrary to the public interest. It is the adverse effect upon the public interest of a successful infringement suit in conjunction with a patentee's course of conduct that disqualifies him to maintain a suit, regardless of whether a particular defendant has suffered from misuse of a patent. A patentee, like other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by courts where it is being used to subvert that policy.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN9[] Defenses, Misuse

Misuse of a patent in no way affects the validity of a patent itself, and once a patentee has "purged" himself, he may again enforce his patent by infringement suits.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN10[] Misuse of Rights, Patent Misuse Defense

Since the activities giving rise to patent misuse frequently have actual or anticipated adverse effects on competition, there is a close relationship between the patent misuse doctrine and ***antitrust law***. So long as a patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN11[] Ownership & Transfer of Rights, Licenses

Patent monopoly is "exhausted" by the first authorized sale of a patented item, and patent law does not protect attempts by a patentee or his licensees to control use of a product after such sale.

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

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

It a per se violation of the Sherman Act for a manufacturer to restrict persons to whom an article may be traded after a manufacturer has parted with dominion over it.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Patent Law > Jurisdiction & Review > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN13[] **Judgments, Declaratory Judgments**

The right of a party to seek a declaratory judgment is subject to the "same transaction or occurrence" requirement of *Fed. R. Civ. P. 13(a)* and the "same subject matter" test of *Fed. R. Civ. P. 13(b)*, relating to counterclaims.

Judges: [1]** Bell, Godbold and Dyer, Circuit Judges.

Opinion by: GODBOLD

Opinion

[*185] [*255]** GODBOLD, Circuit Judge:

Hensley Equipment Company, Inc., appeals from an adverse decision in a patent infringement action brought by Esco Corporation, assignee of United States Patent No. 2,919,506 (the " '506 patent"). [1]

The suit concerns excavating teeth to be attached to the digging edge of power shovel buckets and similar excavating equipment. Because of the stress and abrasion to which such a digging edge is subject the teeth must be replaceable. For a number of years two-part teeth have been available, each consisting of an "adapter" affixed to the bucket or digging apparatus and a "wear point" which is the forward or "spike" portion of the tooth. A projection of the adapter fits into a socket in the rear of the wear point. The wear point is held on the **[*256]** adapter by a removable pin. While adapters periodically must be replaced, the wear points bear the brunt **[**2]** of the abrasion and are replaced more frequently. [2]

Prior to the marketing of teeth produced under the '506 patent most two-piece excavating teeth had a wedge-shaped projection on the adapter with a correspondingly-shaped socket in the rear of the wear point. The horizontal surfaces of wedge-shaped adapter and point were the bearing surfaces at which the two parts came in contact. The bearing surfaces were flat. Under some operating conditions lateral pressure or thrust on the tooth caused sideways movement, producing a pivoting action between adapter and wear point, reducing the full (or substantial) contact or bearing between the **[**3]** two parts, causing instead "point contact" concentrated in a small area of the two bearing surfaces. Under these conditions the teeth were subject to rapid distortion and wear and often broke under the concentrated pressure.

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[1] *251 F. Supp. 631* (N.D.Texas, 1966).

[2] On some pieces of equipment, (drag lines used in strip mining coal) the bucket weighs 100 tons and moves 85 cubic yards of material at a bite, each tooth is 13 inches wide and weighs 425 pounds, and in use the teeth become so hot that they smoke and cannot be touched with the hand. Esco conical teeth vary from that size to as small as two inches wide, weighing three pounds.

Insofar as can be stated in non-technical terms, the invention which the '506 patent (described as "Excavating Tooth and Base Support Therefor") purports to embody is as follows. A conical bearing surface is employed on the adapter and on a correspondingly shaped socket in the wear point. Both the conical surface of the adapter and the conical surface of the wear point have, as a matter of geometry, a common vertical axis. Each conical surface comprises only a segment of a cone. See Figures 5 and 7 of drawings contained in the patent and made an appendix to this opinion showing a structure with a complete conical surface (labelled 40) and demonstrating how a segment thereof (labelled 43 in Figure 7) is used to form the bearing surface of the adapter. [3]

[4]** Employing more technical language, the bearing surfaces of adapter and point are described in a number of claims as "surfaces of revolution" around a vertical axis. [4] The concept of use of a "surface of revolution," as opposed to surfaces which cannot be created by a single line rotated about a constant axis, is significant, and the creation of the two conical bearing surfaces of wear point and adapter around a common vertical axis likewise is significant.

[5]** The invention contemplates that because of the design of the bearing surfaces lateral movement produces little **[***186]** or no change in bearing contact between wear point and adapter. Irrespective of the relative positions of the two members **[*257]** their bearing surfaces remain in substantial contact, and no concentration of pressure develops at one or more points.

The conical tooth enjoyed significant commercial success, and in 1962 Esco received for it an award by a trade magazine, based on selection made by a panel of international mining and metallurgical experts, for "achievement in equipment development by aiding the technological advancement of the mining industry."

In 1965 Hensley began to sell wear points designed, intended, and advertised and held out to the public, as replacement points for Esco adapters. It did so after having supplied a steel company with models of Esco points and an Esco adapter and ordering the points be copied with certain modifications. Hensley publicly referred to its said wear points as "Esco-type points." The points will not fit adapters of any company other than Esco. Later Hensley began to market adapters for one of Esco's smaller conical **[**6]** points. In its catalogs it describes these wear points and adapters as "conical." Since the beginning of this litigation Hensley has acquired a steel foundry and now manufactures as well as sells the products described above. [5] Hensley also markets parts corresponding to products manufactured by Esco but not under the patent at issue [6] and by other manufacturers.

Esco's complaint alleged that Hensley had infringed the '506 patent by making and selling tooth points. Hensley answered, denying the validity of the '506 patent and infringement and alleging that sale of wear points **[**7]**

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[3] Figure 6 demonstrates a nose and socket structure comprised of a conical surface on the adapter engaging a corresponding conical surface on the point (see 44, 47 and 48) but with a flat surface (45) of the adapter engaging the flat surface (46) of the upper socket wall of the point -- this is a "single cone" construction. Figure 4 shows a nose and socket structure with conical surfaces on upper and lower socket surfaces of the adapter and corresponding surfaces on the point -- this is "double cone" construction, and its advantage is that the point, when worn on one side, can be reversed on the adapter.

[4] Hensley's expert defined "surface of revolution" as follows:

> "A surface * * * is a two dimensional figure and * * * can be described by or * * * produced by a single dimensional figure or line. * * * We can take any line whatsoever and rotate it about a constant vertical axis and the figure which the line sweeps out is a surface of revolution. * * * [The shape of the surface] depends entirely on the shape of the line which generates it."

An umbrella demonstrates the concept more graphically. If the handle is considered the vertical axis and a single rib the rotating line, spinning the handle (thus rotating the line around the axis) causes the rib to define a surface of revolution in the shape of the cloth of the umbrella.

[5] Texas Steel Company, which manufactured the accused articles prior to Hensley's acquiring its own manufacturing facilities, was named as a defendant but was dismissed by stipulation.

[6] Recently the Ninth Circuit affirmed a judgment against Hensley for infringement of another Esco patent. *Hensley Equipment Co. v. Esco Corp., 375 F.2d 432* (9th Cir., 1967), affirming *265 F. Supp. 863* (N.D.Cal., 1965).

constitutes legitimate repair. It also alleged that Esco was barred by misuse from enforcing the '506 patent. Several counterclaims were asserted, alleging in substance that Hensley manufactured and sold replacement wear points for those manufactured by Esco under United States Patents No. 3,026,947 and No. 3,079,710 as well as the '506 patent; that these patents were invalid; that Esco had violated the antitrust laws by bringing the present suit and by using the patents on products outside their scope. Hensley asked a declaratory judgment that all three patents are invalid, that Hensley was not infringing any of them, and that Hensley, its supplier and customers, could continue to manufacture, use, and sell the teeth and wear points without interference. Injunctive relief, and triple damages also were demanded.

The district court held that the '506 patent is valid; that Hensley has infringed it; that Esco has not misused the patent, and that Esco is entitled to damages. Hensley was enjoined from further infringement of the '506 patent. The counterclaims were dismissed with prejudice except as related to validity and infringement of the '947 and '710 patents.

I.

[8]** Hensley challenges the position of the district court that the patent claims included a conical surface of revolution.

The claims, construed in the light of the specifications and drawings, [7] make clear to one familiar with the field involved that the surfaces of revolution -- the bearing surfaces -- are to be conical, or nearly so, and are not to be flat. We hold that the patent was properly considered as claiming conical surfaces of revolution.

II. Validity.

The district court did not err in finding against Hensley on its defenses of anticipation under *35 U.S.C.A. § 102* and **[*258]** obviousness within the meaning of *35 U.S.C.A. § 103*.

[9]** We need discuss at length only the closest prior art, the Hensley '601 wear point, marketed by Hensley since 1955 for use on its single-shank "rippers." [8] Testimony was produced that as rippers were used with tractors of higher power more breakage was experienced with the wear points, which had rectangular, or flat-surfaced, sockets to receive the wear collars. Therefore, Hensley began experimenting in 1951 or 1952 with a **[***187]** socket containing curved top and bottom, and in 1954 began marketing a wear point with such a feature. Subsequently larger models differing somewhat in the contour of the socket were marketed by Hensley. The 601-H, the model introduced at trial and relied upon by Hensley, was marketed in 1955 or 1956. Conflicting evidence was produced of the nature of the contour of the socket of the 601-H, and the district court found as a fact that it did not constitute a conical surface of revolution. Hensley argues that this is clearly erroneous and that the 601-H tooth literally anticipated the '506 patent or made its subject matter obvious to one skilled in the art.

[10]** It is clear that the 601-H point was an attempt to use a rounded socket connection between a wear point and its support to reduce breakage. But Esco's expert, Professor William Tiller of Stanford University's Department of Material Science, testified that the '506 conical point differed significantly in both theory and engineering design from the Hensley 601-H point. The socket shape of the 601-H point, he testified, was approximately an elliptical paraboloid. While it avoided some problems encountered with the rectangular socket models, rotational forces would cause the outer part of the 601-H to "ride up" over the inner part so as to cause "line contact", i.e., contact along a line of limited dimension as opposed to substantial surface-to-surface contact of bearing surfaces. This resulted in wearing of the adapter so as to distort its original shape. The '506 conical design possesses all the

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[7] ***HN1***[] "It is fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention." *United States v. Adams, 383 U.S. 39, 49, 86 S. Ct. 708, 713, 15 L. Ed. 2d 572, 579 (1966)*.

[8] A "ripper" is a device installed on the front or rear of a bulldozer or on the sides of a tractor. It consists of a shank extending beneath the surface of the ground which, when pulled or pushed through the ground, "rips" it up. Hensley's rippers had replaceable wear points attached to "wear collars," corresponding in function to adapters.

advantages of the 601-H shape plus the advantage of accommodating the rotational forces and movement; any wear, he testified, simply makes the cone fit better. He concluded there was little relationship between the '506 conical tooth and the Hensley 601-H. [9]

[11]** The district court did not err in finding that the 601-H tooth (and other prior patents) did not anticipate the '506 patent insofar as that patent claimed a conical surface of revolution about a vertical axis. Nor does the evidence establish that the conical design would have been obvious to one skilled in the art at the time of the invention. [10] In this connection the district court gave appropriate recognition to the secondary indicia of commercial success and industry recognition of satisfaction of unsolved needs, referred to in *John Deere. 383 U.S. at 17-18, 86 S. Ct. at 693-694*.

[12]** Hensley contends that prior patents disclosing flat bearing surfaces (especially **[*259]** Baer, No. 2,483,032) anticipated. But the testimony was in conflict whether a flat surface correctly can be described as a "surface of revolution." Also we have held that the '506 claims, read in light of the specifications, disclose that the invention included nose and socket contours either conical or similar or equivalent thereto. Nor does the fact that the Hensley 601-H device, and prior patents (especially Morrison, No. 2,050,014), employed the concept of concave-convex bearing surfaces for wear point and adapter necessarily make obvious the particular type of surfaces embraced by the '506 patent, though they are within the generic term "concave-convex." Much more is embraced in the '506 than concavity and convexity.

Downie, No. 1,399,337, had a flat surface plus some tin inserts which from use conceivably might be worn or extruded so as to create arched or curved surfaces. [11]

[13]** The appellant contends the trial court erred in stating the presumption of validity prescribed by *35 U.S.C.A. § 282* must be overcome by clear and convincing evidence, arguing that the Patent Office failed to consider pertinent prior art and thereby removed or weakened the presumption. See *Zero Mfg. Co. v. Mississippi Milk Producers Ass'n, 358 F.2d 853* (5th Cir., 1966); *Up-Right, Inc. v. Safway Prods., Inc., 364 F.2d 580* (5th Cir., 1966). But we have no hesitancy in holding that the patent in issue meets standards of validity without the necessity of resting it upon any presumption. **[***188]**

The findings and conclusions of the district court on the issue of validity are affirmed.

III. Infringement

The evidence was in conflict whether the configuration of the Hensley point was such that it embraced surfaces of revolution. Likewise there was evidence both ways on whether the Hensley point, when placed on an Esco adapter, sufficiently meets and remains in contact with it that it is within the requirement of the claims that bearing surfaces of wear point and adapter "remain in fitting contact" during movement of the wear point. [12] We **[**14]** are not able to say the district court was plainly erroneous on these factual questions.

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[9] Another witness, Grove, described the inside surface of the 601-H point, viewed as though cut through in vertical sections, to be a series of ellipses, starting from an ellipse at the front end, to an ellipse at the rear end, and midway approximately a circle.

[10] ***HN2***[] It is desirable that the district courts make specific findings on the factual matters which the Supreme Court, in *Graham v. John Deere Co., 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966)*, held determined obviousness: the state of the prior art, the level of ordinary skill in the art, and the difference between the prior art and the claims of the patent at issue. *383 U.S. at 17, 86 S. Ct. 684*. That case was decided after the trial and decision in the present case, so it is understandable that the findings of the district court are not as explicit as they might be; however, we see no necessity of remanding for more explicit findings.

[11] While we specifically discuss Baer, Morrison and Downie we note that Hensley's expert testified none of them were as close to the patent in suit as the Hensley 601-H, which he considered the closest prior art.

[12] For example, there was evidence that the lesser surface contact of the Hensley point is caused by inevitable variations in mass production; that the relevant contact is that encountered under the severe pressures of actual operation, and that

Hensley also contends that sale of wear points alone cannot be infringement because, insofar as the '506 patent attempts to claim the wear point alone as an invention, it lacks the statutory requirement of utility. 35 U.S.C.A. § 101. Hensley reasons that the wear point alone serves no useful function unless combined with the adapter. It is urged that we treat the situation as one of replacement of an unpatented part of a patented machine in the exercise of the right of legitimate repair. [13]

[15]** But the invention of the '506 patent is not simply a combination of elements, all previously known, into a purportedly new machine. It is a machine composed of two basic parts, a wear point and an adapter, each of which contains an integral portion of the novel factor, a bearing surface made in the form of a conical surface of revolution. The claims embrace the complete machine, i.e., the excavating tooth, and also the two basic parts, wear point and adapter. Utility of the wear point is not lost because it **[*260]** must be used with something else to produce an advantageous result.

Since in manufacturing and selling patented wear points Hensley infringed specific claims of the patent, it cannot be protected by the doctrine of legitimate repair. Walker, Patents §§ 379, 509 (1937 Ed.). ***HN3***[] "To supply patented parts of a patented combination without authority from the patentee to purchasers of the combination is a direct infringement of the claims of the patent on the part and a contributory infringement of the claims of the patent on the combination, assuming that the requirements of **[**16]** 35 U.S.C. § 271(c) are otherwise met. (citing cases)." *Warner & Swasey Co. v. Held, 256 F. Supp. 303, 311* (E.D.Wis., 1966).

IV. Misuse

Assuming validity and infringement of the '506 patent, is Esco barred from enforcing its rights because it has misused the patent?

HN4[] The constitutional provision authorizing congressional grants of patents [14] is "both a grant of power and a limitation," *Graham v. John Deere Co., supra.* Neither Congress nor the courts may exercise or apply the patent authority in such manner as to give a patentee more than the rewards of his discovery. ***HN5***[] "Under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article." *United States v. General Electric Co., 272 U.S. 476, 485, 47 S. Ct. 192, 195, 71 L. Ed. 362, 363 (1926)*. Pursuant to this monopoly the patentee may exploit his exclusive rights as he sees fit, but should his exploitation exceed means "normally and **[**17]** reasonably adapted to secure pecuniary reward for the [patent] monopoly," his actions become subject to the same restraints as are imposed upon those not protected by a patent's monopoly, such as the antitrust laws. *United States v. General Electric, supra.*

HN7[] One who attempts to exploit a patented invention beyond the scope of the patent monopoly may be the subject of a judicially-imposed disability to enforce the patent. "It is now * * * familiar law that the courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until **[**18]** the effects of such misuse have been dissipated, or 'purged' as the conventional saying goes. The rule is an extension of the equitable doctrine of 'unclean hands' to the patent field." *United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465, 77 S. Ct. 490,* ***[***189]*** *494, 1 L. Ed. 2d 465, 471 (1957)*. But the simplicity with which the rule may be stated is misleading. In 1955 the Attorney General's National Committee to Study the Antitrust Laws commented that "the outer reach of the misuse doctrine has not yet been fully defined." [15] Eleven years later in 1966 the President's Commission on the Patent System reported that

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Hensley's points functioned adequately on Esco's adapters; that Hensley checks all its conical points for fit against an Esco adapter before shipping them.

[13] See *Wilbur-Ellis Co. v. Kuther, 377 U.S. 422, 84 S. Ct. 1561, 12 L. Ed. 2d 419 (1964)*; *Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 81 S. Ct. 599, 5 L. Ed. 2d 592 (1961)*; *Fromberg, Inc. v. Thornhill, 315 F.2d 407* (5th Cir., 1963).

[14] Art. I, § 8 of the Constitution authorizes Congress ***HN6***[] "to promote the Progress of * * * useful Arts, by securing for limited Times to * * * Inventors the exclusive Right to their * * * Discoveries."

uncertainty as to the precise nature of the patent right coupled with lack of doctrinal clarity in the misuse rule has "produced confusion in the public mind and a reluctance by patent owners and others to enter into contracts and other arrangements pertaining to patents or related licenses." [16]

[19]** The doctrine of misuse was developed by the Supreme Court in a series of early cases as a defense against contributory infringement. [17] In 1942 the **[*261]** Court applied it in a case of direct infringement. *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363 (1942)*. See also *B. B. Chemical Co. v. Ellis, 314 U.S. 495, 62 S. Ct. 406, 86 L. Ed. 367 (1942)*. The rationale of the doctrine is a rejection of the concept of the patent as an absolute property right in favor of its definition as a right which must not be exercised in a manner not consistent with the constitutionally-defined purpose for which it was conferred, i.e., to "promote the Progress of * * * useful Arts." In *Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661, 665, 64 S. Ct. 268, 271, 88 L. Ed. 376, 380 (1944)* Mr. Justice Douglas emphasized that to allow an infringement suit by a patentee who has misused his patent "would be to extend the aid of a court of equity in expanding the patent beyond the legitimate scope of its monopoly." It is not necessary that the defendant asserting the misuse defense has been -- or would be -- injured by the **[**20]** misuse. In *Morton Salt Co. v. G. S. Suppiger, supra*, Mr. Justice Stone wrote:

> ***HN8***[] "It is a principle of general application that courts * * * may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.
> * * *
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> "It is the adverse effect upon the public interest of a successful infringement suit in conjunction with the patentee's course of conduct which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent. * * * The patentee, like those other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy." *314 U.S. at 492-495, 62 S. Ct. at 405-406*.

[21]** ***HN9***[] Misuse of a patent in no way affects the validity of the patent itself, and once the patentee had "purged himself" he may again enforce his patent by infringement suits. E.g., *United States Gypsum Co. v. National Gypsum Co., supra.* [18]

Where a contract clause forms the basis for a misuse defense a mere showing that the clause is not enforced has been held insufficient to dissipate the misuse or to prevent a successful assertion of the defense. *Berlenbach v. Anderson & Thompson Ski Co., 329 F.2d 782* (9th Cir.,), cert. denied, *379 U.S. 830, 85 S. Ct. 60, 13 L. Ed. 2d 39 (1964)*. **[**22]**

HN10[] Since the activities giving rise to patent misuse frequently have actual or anticipated adverse effects on competition, there is a close relationship between the patent misuse doctrine and ***antitrust law***. "So long as the

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[15] Report of the Attorney General's National Committee to Study the Antitrust Laws 251 (U.S. Government Printing Office, 1955).

[16] To Promote the Progress of * * * Useful Arts 37 (U.S. Government Printing Office 1966).

[17] E.g., *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 37 S. Ct. 416, 61 L. Ed. 871 (1917)*; *Carbice Corp. of America v. American Patents Development Corp., 283 U.S. 27, 51 S. Ct. 334, 75 L. Ed. 819 (1931)*; *Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 58 S. Ct. 288, 82 L. Ed. 371 (1938)*.

[18] See *McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381, 407-408* (10th Cir., 1965), cert. denied, ***383 U.S. 933, 86 S. Ct. 1061, 15 L. Ed. 2d 851 (1966)***; *Turbo Machine Co. v. Proctor & Schwartz, Inc., 241 F. Supp. 723, 729* (E.D.Pa., 1965), aff'd, *362 F.2d 5* (3rd Cir., 1966).

patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others." *Hartford-Empire Co. v. United States, 323 U.S. 386, 415, 65 S. Ct. 373, 388, 89 L. Ed. 322, 362 (1945)*. [19]

[*190] [**23] [*262]** With these preliminary observations, we return to the case before us.

A. Exclusive dealerships

Esco products, including teeth manufactured under the '506 patent, are sold through a network of independent dealers. A policy statement distributed by Esco to its dealers contains, among other clauses, the following:

"Dealers will not stock or sell competitive products unless prior arrangements have been made with ESCO."

Appellant urges that Esco, by requiring its dealers to sell only Esco products, is misusing the patents under which these products are manufactured.

There is no proof in this case of an absolute contractual duty that Esco dealers not handle competing products. [20] There was evidence that because of the limited market for points and adapters it is neither practical nor economical for a dealer to carry more than one manufacturer's line of products. There was testimony that some Esco dealers did carry teeth made by other manufacturers (though Esco did characterize these as very minor situations which it has "chosen to overlook"). There was no evidence that Esco has refused to make "prior arrangements" with any dealer indicating a **[**24]** desire to stock or sell competitive products, and the district court found that Esco has not terminated any dealership for failure to comply with the policy statement.

Because no contractual condition was proved to exist there was no proof of misuse in the form of exclusive dealerships. [21]

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[19] Because of the decision we reach we need not decide between conflicting views of whether it is necessary to a successful assertion of the defense of misuse that all elements of civil or criminal liability under the antitrust laws be shown. The cases indicate no such standard of proof is required. *Morton Salt Co. v. G. S. Suppiger Co., supra, 314 U.S. at 490, 62 S. Ct. 402*; *Berlenbach v. Anderson & Thompson Ski Co., supra*, *Laitram Corp. v. King Crab, Inc., 245 F. Supp. 1019* (D.Alaska, 1965). Note the conclusion of the Attorney General's Committee that "from some abuses of patent policy [sufficient to justify non-enforcement of the patent] may flow consequences not drastic enough to meet antitrust prerequisites of effect on competition. In addition, many patent abuses are more effectively curbed by simply denying relief as a matter of patent policy," (Report, at 254.)

But compare the view of Kennedy, Patent and Antitrust Policy; the Search for a Unitary Theory, 35 Geo.Wash.L.Rev. 512 (1966), at 560: "Faulty reasoning * * * underlies the widely held view that extra patent restraints of no competitive significance justify the denial of injunctive relief. * * * Attempts at metaphysical distinctions between patent policy and antitrust policy violations serve no constructive purpose * * * [Defendants asserting misuse] defenses should be held to substantive standards of violation evolved under the Sherman, Clayton or Federal Trade Commission Acts."

Certainly a case of misuse not sufficient to constitute a violation of the antitrust laws requires careful synthesis of the policies represented by the patent and the antitrust laws. Kennedy, supra. Baxter, Legal Restrictions in Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L.J. 267 (1966).

[20] A contractual duty (even if not enforced) may be sufficient to constitute misuse. See *Berlenbach v. Anderson & Thompson Ski Co., supra.* A specific agreement not to handle competitive products without prior written approval may be enough. *F. C. Russell Co. v. Consumers Insulation Co., 226 F.2d 373* (3rd Cir., 1955).

[21] In addition, the trial court found that the existence of the company policy had not substantially lessened competition or created a monopoly in any line of commerce. As to whether, in a case where a contractual condition does exist, misuse is established merely by proof of the condition, or there must be proof of effect on the relevant market, see *McCullough v. Kammerer Corp., 166 F.2d 759* (9th Cir., 1948); *National Lockwasher Co. v. George K. Garrett Co., Inc., 137 F.2d 255* (3rd Cir., 1943); *Waco-Porter Corp. v. Tubular Structures Corp., 220 F. Supp. 724*, as modified by *222 F. Supp. 332* (S.D.Cal., 1963) [in the second opinion, the district court expressly adopted the view, rejected in the first opinion, that it was not necessary to show lessened competition to establish misuse]; *Steffen v. W. J. Schoenberger Co., 90 F. Supp. 710* (N.D.Ohio, 1950); *Park-In Theatres Inc. v. Paramount-Richards Theatres, Inc., 81 F. Supp. 466* (D.Del., 1948). Compare *Preformed Line Products Co. v. Fanner Manufacturing Co., 225 F. Supp. 762* (N.D.Ohio, 1962), aff'd, *328 F.2d 265* (6th Cir., 1964).

[25]** B. The Esco-Caterpillar License

The Esco-Caterpillar agreement, insofar as pertinent to our purposes, may be summarized as follows: Caterpillar is granted a license "to manufacture, to have manufactured, to use and to sell" articles embodying the inventions covered by all patents contained in an incorporated schedule; this includes, in addition to the '506 patent, two other United States **[*263]** patents and the foreign equivalents to these. The license extends only to tooth points, adapters, pins and plugs of dimensions and designs corresponding to incorporated exhibits. The items involved are parts for Caterpillar equipment. The license is stated to be "exclusive," but Esco, and others it may choose to license, are not excluded from manufacturing the parts and selling them to Caterpillar, if **[***191]** Caterpillar wishes to buy them. Royalties are fixed by a formula (discussed below), but no royalties are payable on items manufactured by Esco or its subsidiaries, successors, assignees or licensees and purchased by Caterpillar.

The "exclusive" nature of the agreement may be terminated by Esco if Caterpillar's use of the patents falls below a prescribed level (see discussion below).

[26]** Provision is made for Caterpillar to extend its license to subsidiaries and licensees if Caterpillar agrees to assume liability and responsibility to Esco for the acts and omission of the extendees pertaining to the agreement.

Under the agreement Caterpillar may manufacture the parts, or have them manufactured for it by one other than an Esco licensee or subsidiary. If it does so it pays royalties on parts so made. In practice it has not exercised this right, although it has investigated the feasibility of doing so in several instances, particularly in foreign countries. In practice Caterpillar has continued to purchase all the parts from Esco and its subsidiaries and licensees. (Esco is bound to use its best efforts to have any licensee who may obtain from it a license agreement covering its tooth points and adapters enter into an agreement to manufacture and sell to Caterpillar the items involved. In practice Esco has sought such agreement with at least some of its licensees.) Parts thus made for Caterpillar have the Caterpillar name thereon.

The agreement contains a specific condition which we set out in the margin. [22] The agreement does not restrict the condition to **[**27]** items manufactured by Caterpillar. ***HN11***[] Patent monopoly is "exhausted" by the first authorized sale of the patented item, and the patent law does not protect attempts by the patentee or his licensees to control use of the product after such sale. *United States v. Univis Lens Co., 316 U.S. 241, 62 S. Ct. 1088, 86 L. Ed. 1408 (1942)*. See also *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 37 S. Ct. 416, 61 L. Ed. 871 (1917)*, overruling *Henry v. A. B. Dick Co., 224 U.S. 1, 32 S. Ct. 364, 56 L. Ed. 645 (1912)*. *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249* (June 12, 1967) holds ***HN12***[] it a per se violation of the Sherman Act for a manufacturer to restrict persons to whom an article may be traded after the manufacturer has parted with dominion over it.

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with which an **[**28]** article may be traded after the manufacturer has parted with dominion over it. *White Motor, supra* [*White Motor Co. v. United States, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738]*; *Dr. Miles, supra* [*Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502]*. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. To permit **[*264]** this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale. (*388 U.S. 365, 87 S. Ct. 1865, 18 L. Ed. 2d 1249*)

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[22] "Provided, however, that such license is further restricted to the use of licensed products and/or sale of licensed products for original installation on products or equipment manufactured by or for CATERPILLAR and sold by CATERPILLAR and by CATERPILLAR dealers throughout the world and to use as replacement parts sold by CATERPILLAR and by CATERPILLAR dealers throughout the world for such products and equipment."

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> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred -- whether by explicit **[**29]** agreement or by silent combination or understanding with his vendee -- is a per se violation of § 1 of the Sherman Act." (388 U.S. at 382, 87 S. Ct. 1867, 18 L. Ed. 2d at 1262)

Under *Hartford-Empire, supra*, this per se violation of the antitrust laws bars Esco from enforcing its patent in this case.

There are equitable considerations present running both ways. It is not clear that the restriction limiting resale of parts to Caterpillar dealers was required by Esco for its purposes or even desired by it. Schwinn was pursuing its own interests. There **[**30]** was some evidence that Esco actually does not know, though it assumes it, whether Caterpillar is making resales to its dealers only, and there is no evidence of Esco taking any action to enforce the condition or even caring whether it is enforced. The Supreme Court found Schwinn "firm and resolute" in insisting upon observance of customer (and territorial) restrictions. Schwinn combined customer restrictions with territorial restrictions; there are no territorial restrictions **[***192]** in the case before us. Schwinn confined access to its product to dealers it selected; the agreement here confines access to dealers Caterpillar selects. Only a small fraction of Schwinn's sales were involved, while Caterpillar is the giant of the equipment industry and is Esco's best customer. As we understand the interplay of *Schwinn* and *Hartford-Empire*, and the underlying patent policy, there is no inquiry into purity of heart vs. bad motive, or market impact, or matters of what may seem to be essential fairness -- a per se violation of the Sherman Act is deemed such a monopolistic action that the patentee is barred from enforcing the limited and special monopoly given him by the patent laws.

[31]** C. Attempt to extend royalty payments beyond life of patent

The agreement with Caterpillar does not attempt to extend royalty payments on the '506 and other patents beyond the life of those patents.

In *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*, the Supreme Court considered a suit for royalties on a use license covering twelve patents, all but one of which expired before the expiration of the agreement (17 years after the sale). Only seven were incorporated in the purchased article (a portable hop picking machine) which the license permitted the purchaser to use; all of these expired before the termination of the agreement. The royalty payable under the agreement was a $500 minimum per season or $3.33 1/3 per 200 pounds of hops harvested, whichever was greater. The Court held that no royalties could be collected which accrued after expiration of the last patent incorporated into the machine, as "a projection of the patent monopoly after the patent expires is not enforceable." Significantly, the Court voiced no objection to the fact that the royalty rate did not vary when some, but less than all, of the patents incorporated into **[**32]** the device expired. *American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769* (3rd Cir.), cert. denied, *361 U.S. 902, 80 S. Ct. 210, 4 L. Ed. 2d 157 (1959)*; *Ar-Tik Systems Inc. v. Dairy Queen, Inc., 302 F.2d 496* (3rd Cir., 1962), and *Rocform Corp. v. Acitelli-Standard Concrete Wall, Inc., 367 F.2d 678* (6th Cir., 1966); *Technograph Printed Circuits, Ltd. v. Bendix **[*265]** Aviation Corp., 218 F. Supp. 1, 48-49* (D. Md., 1963), aff'd, *327 F.2d 497* (4th Cir., 1964). [23]

We need not further discuss the case law because Hensley's contention is based on a misconstruction of the agreement. In addition to the '506 patent the agreement covers two other United States Letter Patents and the foreign equivalents of all three. Patent No. 3,126,654 covers **[**33]** the pin and plug used in connection with the wear point and adapter ordered by the '506 patent. The agreement, as related to Patent No. 3,079,710, also covers wear points for use on "rippers", devices used on Caterpillar's front end loaders when the loading apparatus has been removed. The royalty provisions provide for royalties "for each tooth point, adapter, pin or plug manufactured

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[23] See generally, Comment, Post Expiration Royalty Payments and Mandatory Package Licensing as Patent Misuses, 11 Vill, L.Rev. 382 (1966). Note, 1965 Duke L.J. 836.

by or for and sold by Caterpillar during the life of this Agreement and embodying an invention disclosed and claimed in a Licensed Patent." For each tooth point, pin or plug, the royalty is set at five per cent of the net price of the item; for each adapter, the royalty is seven and one-half per cent of the aggregate net prices for the tooth point, pin and plug used on the adapter. The agreement specifically provides that "no royalties shall be * * * paid by Caterpillar on points, adapter, pins or plugs manufactured and sold in any country or countries in which ESCO has neither an unexpired patent nor a pending application for a patent disclosing and claiming an invention incorporated in the point, adapter, pin or plug."

No single item which Caterpillar is licensed to manufacture will embody more **[**34]** than one of the United States Patents covered by the agreement. The district court made a specific finding that the agreement imposed no liability on Caterpillar to pay royalties on articles covered under an expired Esco patent. This agreement is one step further from illegal extension of royalty payments than the situation in *Brulotte v. Thys Co., supra*, where the court refused to disapprove a requirement that royalties on an item embodying the inventions of more than one patent be maintained when some but less than all the patents had expired. [24]

[*193]** **[**35]** D. Termination of exclusivity

Hensley theorizes that par. 11 of the agreement, [25] dealing with termination **[*266]** of the so-called "exclusivity" feature of the license, violates Sections 1 and 2 of the Sherman Act as a contract in restraint of trade and an attempt by Esco to monopolize commerce in the replacement market for wear points and adapters for the types of Caterpillar-made equipment on which they are usable. Its argument runs as follows. Caterpillar must continue purchasing or using the license products exclusively or face competition from the Esco dealers in the replacement market for wear points and adapters for Caterpillar equipment. Caterpillar is deterred from changing to non-patented products or products outside the license agreement, and Esco is insured against competition from such products being used in lieu of the Esco conical teeth. The agreement is, in effect, one between two manufacturers not to compete with each other.

[36]** The agreement does not require as a consideration for securing the "exclusive" license that Caterpillar use the licensed products to the exclusion of all others. At all times Caterpillar may offer competing products as replacement parts even to the total exclusion of the licensed products, so long as there has been no previous

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[24] Cf. *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 70 S. Ct. 894, 94 L. Ed. 1312 (1950)*. Nor can there be any question of coercive package licensing. See *United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-159, 68 S. Ct. 915, 92 L. Ed. 1260, 1292 (1948)*; *American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769* (3rd Cir.), cert. denied, ***361 U.S. 902, 80 S. Ct. 210, 4 L. Ed. 2d 157 (1959)***; Note, 73 Harv.L.Rev. 1628 (1960). There is no indication here that Caterpillar was in any way coerced into unwillingly accepting any of the patents as a condition of being licensed to practice the others; in fact, the evidence suggests inclusion of all was necessary for the accomplishment of Caterpillar's objectives. See *McCullough Tool Co. v. Well Surveys, Inc., supra.*

[25] "The exclusive license herein granted shall cease to be exclusive and shall become nonexclusive as to a tooth point, adapter, pin and plug of the design and dimensions illustrated in any of Exhibits A, B, C, D, E and F and any Exhibits added hereto by amendment, if CATERPILLAR shall totally discontinue both the use and sale of such tooth point, adapter, pin and plug and if following such discontinuance ESCO shall give CATERPILLAR ninety (90) days' prior written notice of its election to make the license herein granted a nonexclusive one for such tooth point, adapter, pin and plug. In addition, the exclusive license herein granted shall cease to be exclusive and shall become nonexclusive as to a tooth point, adapter, pin and plug of the design and dimensions illustrated in any of Exhibits A, B, C, D, E and F and any Exhibits added hereto by amendment, if at any time after December 31, 1966, CATERPILLAR (including its extendees who for this purpose shall be considered in the aggregate with CATERPILLAR) shall substantially discontinue the use of such tooth point, adapter, pin and plug on original equipment manufactured by or for CATERPILLAR, and if in any calendar year after such discontinuance the aggregate sales (based on net price as defined in paragraph 3 hereof) of such tooth point, adapter, pin and plug amounts to less than forty per cent (40%) of one third of the aggregate sales (based on net price as defined in paragraph 3 hereof) of such tooth point, adapter, pin and plug in the three (3) calendar years immediately preceding such discontinuance and ESCO subsequently gives CATERPILLAR written notice of its election to make the license herein granted a nonexclusive one for such tooth point, adapter, pin and plug."

"substantial discontinuance" of use on new equipment. There are no agreements not to use the products of competitors of Esco. Caterpillar has the full right to have the items manufactured for it by others, who are or would be Esco's manufacturing competitors. It was shown that Caterpillar is a giant of the industry that manufactures equipment employing the conical teeth, but its status as a manufacturer of teeth (and other parts) -- new or replacement -- is another matter. Also the agreement insures that Caterpillar may not, through non-use, deprive the patentee and the public of benefits of the patent as applied to Caterpillar parts. If Caterpillar limits the practice of the invention as to Caterpillar parts to below the limits prescribed then Esco is free to practice it. There are no price fixing agreements, no division of geographical markets, no **[**37]** effort to extend the grant of the patent to unpatented devices.

Hensley does not suggest that the termination of exclusivity clause is within the narrow range of monopolistic practices denoted as per se violations of the Sherman Act.

Insofar as par. 11 is concerned the district court was not plainly erroneous in finding there was no misuse.

V. Counterclaims

The district court held it had no jurisdiction of validity and infringement of Esco's patents 3,026,947 and 3,079,710, which Hensley had sought to raise by counterclaims, since Esco had not charged Hensley with infringement thereof. Hensley asserts this as error but cites no authority or explanation for its contention. ***HN13***[] The right of a party to seek a declaratory judgment is subject to the "same transaction or occurrence" requirement of *Fed.Rule Civ.Proc. 13(a)* **[***194]** and the "same subject matter" test of *Rule 13(b)*, relating to counterclaims. The district court correctly found it had no jurisdiction to litigate validity and infringement of these two patents.

[*267] * * *

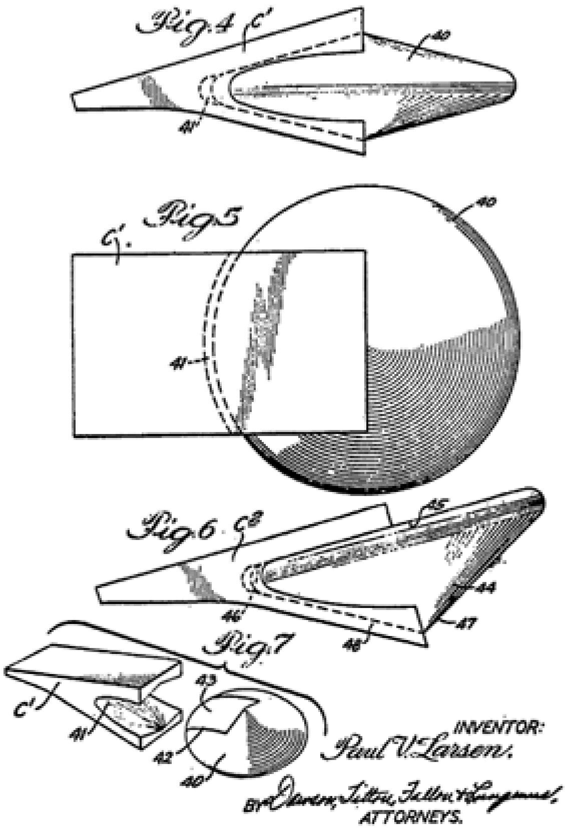
The findings of the district court that the patent **[**38]** is valid and that Hensley has infringed the patent are affirmed. The finding that Esco has not misused the patent is reversed. Remanded to the district court with direction to dismiss the case.

APPENDIX

Jan. 5, 1960 P. V. LARSEN 2,919,506

EXCAVATING TOOTH AND BASE SUPPORT THEREFOR

Filed April 21, 1958 4 Sheets-Sheet 2



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Trucking Unlimited v. California Motor Transport Co.

United States District Court for the Northern District of California.

October 6, 1967.

No. 45073.

Reporter

1967 U.S. Dist. LEXIS 11536 *; 1967 Trade Cas. (CCH) P72,298

Trucking Unlimited, et al. v. California Motor Transport Co., et al.

Core Terms

competitors, patent, Sherman Act, monopoly, infringement, antitrust, courts, defendants', combined, regulatory agency, anti trust law, railroads, oppositions, conspired, monopolize, concerted, restrain, cases, probable cause, manufacturer, plaintiffs', conspiracy, campaign, damages, destroy, public convenience, trial court, proceedings, agencies, truckers

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in the claim.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Sherman Act does not prohibit two or more persons from associating together 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 > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The fact that a business' sole purpose in seeking to influence the passage and enforcement of laws is to destroy a competitors' business would not transform conduct otherwise lawful into a violation of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The use by a business in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Sherman Act is directed at trade restraints, not against political activity designed to influence governmental action.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] **Sherman Act, Claims**

Violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be to destroy their competitors.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN6[] **Pleadings, Amendment of Pleadings**

The right of access to judicial agencies is within the protection of the *First Amendment* right of petition and a statute impairing such right is, therefore, unconstitutional.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > ... > Specifications > Enablement Requirement > Scope of Enablement

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN7[] **Ownership & Transfer of Rights, Assignments**

A patentee has been given a privilege of limited monopoly conditioned, however, by a public purpose; that, although he may enforce his patent rights either directly obtained or acquired from others under assignment or license, he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Opinion by: [*1] SWEIGERT

Opinion

Memorandum of Decision

SWEIGERT, J.: This is a civil antitrust class action for treble damages brought under Section 4 of the Clayton, Act, *15 U.S.C. § 15*, by fourteen plaintiffs, each engaged in transportation of goods by motor vehicle under regulation of the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC), charging nineteen individually named defendants, similarly engaged and regulated, with violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*.

The case is before the Court on defendants' motion under *Rule 12(b)(6) Fed. R. Civ. P.*, to dismiss the First Amended Complaint for "failure to state a claim upon which relief can be granted."

The record consists of the Complaint, the First Amended Complaint and the pending motion. No facts beyond the pleading are presented by either party through affidavit or otherwise except as may be hereafter specifically noted.

The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13 [not reproduced]) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out **[*2]** of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition."

It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such a program **[*3]** of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and information, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made.

Defendants contend that this First Amended Complaint should be dismissed upon the ground that under the doctrine **[*4]** of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961)* and *United Mine Workers v. Pennington , 381 U.S. 657 (1965)* the kind of activities alleged are immune from challenge under the antitrust laws.

We recognize, of course, that ***HN1***[] a complaint should not be dismissed under *Rule 12(b)(6) Fed. R. Civ. P.*, for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in the claim. Moore's Federal Prac. Vol. 2A § 12.08.

Before considering the applicability of Noerr and Pennington , we point out that the First Amended Complaint does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications.

There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust **[*5]** laws.

Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC - without any other alleged anti-competitive conduct - is rendered violative of the anti-trust laws by reason of defendants' alleged anti-competitive purpose and intent.

As plaintiffs state in their brief, "The misuse of judicial process constitutes plaintiffs' entire factual and legal case, not an insignificant matter incidental to different facts and legal theories." (Plt. Brief filed 5/16/67; p. 42). Further, the First Amended Complaint states that "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class, do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the ICC or PUC except as such activities pertain to the precise proceedings before such bodies." (First Amended Complaint, Par. 7, p. 5).

Noerr, supra , was an action by a group of trucking companies under Section 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, **[*6]** alleging that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.

The trial court, disclaiming any purpose to hold illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law, rested its judgment against the railroads upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors and, further, was fraudulent in that it involved deceiving the lawmaking and law enforcement authorities by use of the so-called third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will among the general public and the truckers' customers, thus injuring the truckers in ways unrelated to the passage or enforcement of laws.

On appeal, the Supreme Court reversed the judgment. After stating the principle that ***HN2***[] "the Sherman **[*7]** Act does not prohibit two or more persons from associating together to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," the Supreme Court held that none of the factors reflected in the trial court's findings were sufficient to remove the case from this controlling principle.

Specifically, the Supreme Court held that ***HN3***[] the fact, established by the trial court's finding, that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business", would not "transform conduct otherwise lawful into a violation of the Sherman Act." (*365 U.S. 127, at pp. 138, 139)*.

The Supreme Court further concluded that ***HN4***[] the use by the railroads in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Act is directed at trade restraints, not against political activity designed to influence governmental action. (*365 U.S. 127, at pp. 140, 141)*.

The Supreme **[*8]** Court further at p. 144, concluded that, assuming application of the Sherman Act might be justified in situations in which a publicity campaign, ostensibly directed toward influencing governmental action, would be a "mere sham to cover what is actually nothing more than at attempt to interfere directly with the business relationship of a competitor" such was not the case before it since no one denied that the railroads were making a genuine and apparently successful effort to influence legislation and law enforcement practices.

Pennington, supra , was an action by the United Mine Workers (U.M.W.) for royalty payments. The defendants, certain coal companies, filed a cross-claim for damages alleging that the U.M.W. and certain other large coal companies had violated *Sections 1* and *2* of the Sherman Act by: (1) entering into a Wage Agreement, which was later established under the Walsh-Healy Act by the Secretary of Labor, that provided a minimum wage for employees of contractors selling coal to the T.V.A., (2) imposing this Wage Agreement on all coal companies without regard to their ability to pay, and (3) waging a destructive and collusive price-cutting campaign in the T.V.A. "spot **[*9]** market" (which was exempt from the Walsh-Healy order) with the purpose of eliminating the smaller companies from the market.

After a jury trial, a verdict was returned in favor of the defendants on their antitrust cross-claim against the union.The trial court set aside the antitrust verdict against the plaintiffs, but denied a union motion for judgment notwithstanding the verdict or in the alternative for a new trial - a motion based on the ground that the union was exempt from liability under the facts of the case and also upon claimed trial court errors. The Court of Appeals affirmed denial of the union's motion, holding that the union was not exempt from liability under the Sherman Act and, further, that the instructions were adequate and that the evidence was sufficient to support the verdict.

The Supreme Court agreed that the agreement between the U.M.W. and the larger coal operators was not exempt from the antitrust laws under § 20 of the Clayton Act, and § 4 of the Norris-LaGuardia Act. However, the Supreme Court went on to hold that the trial court had erroneously denied the motion of the U.M.W. for a new trial on the ground that there had been errors in the admission **[*10]** of evidence and in instructions, stating on pages 669 and 670:

"We agree with the U.M.W. that both the Court of Appeals and the trial court failed to take proper account of the Noerr case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered Noerr as applying only to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' * * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, giving the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error."

The Noerr and Pennington cases establish the rule that ***HN5***[] violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging **[*11]** in such activity is, and the result may be to destroy their competitors.

The reasons given by the Supreme Court for this rule are threefold: (1) That this type of combination is essentially dissimilar from the type of agreements traditionally condemned by the Sherman Act; (2) That holding this kind of activity subject to the sanctions of the Sherman Act would impair the power of government to act upon the basis of information provided to it by interested parties, and (3) That a construction of the Sherman Act, bringing this kind of activity within its purvue, would raise important constitutional questions, e.g., the right to petition.

Thus, the Supreme Court has in effect weighed these factors in balance with the factor of the antitrust intent or result of certain kinds of concerted activity and has concluded that the latter factor must be risked in order to subserve other governmental needs and political rights.

The Noerr doctrine has been recognized and applied in *United States v. Johns-Mansville , 259 F.Supp. 440 (E.D. Pa. 1966)* (involving alleged combination for informal approaches to municipal authorities to obtain restrictive specifications for certain pipe with intent **[*12]** to injure competitors); *A.B.T. Sightseeing v. Gray Line , 242 F.Supp. 365 (S.D.N.Y. 1965)* (involving alleged combination to lobby lawmaking and administrative agencies of the City of New York with intent to ultimately eliminate competition); *Harmon v. Valley Natl. Bank , 339 F.2d 564 (9th Cir. 1964)* (involving alleged combination by defendants with the Attorney General of Arizona to commence a court action for the purpose of injuring a competitor); *Assn. of Western Ry. v. Riss , 299 F.2d 133 (D.C. Cir. 1962)* (involving an alleged combination of four Ry. Associations to influence legislative and administrative action with intent to destroy competition); and in *Baltimore & Ohio Ry. v. New York, NH & HR Co. , 196 F.Supp. 724 (S.D.N.Y. 1961)* (involving alleged combination to propagandize the ICC to impose certain rates on competitors together with the filing of a suit to obtain enforcement of the ICC rates).

In *Woods v. Aluminum Co. , 36 F.R.D. 107 (S.D. Tex. 1963)*, the court refused to apply the Noerr doctrine on a motion for summary judgment where the allegation was to the effect that defendants had conspired to file "false nominations" with the Texas Railroad Commission (whose regulatory **[*13]** Act provided that every oil producer should file monthly forecasts ("nominations") of the amount of gas that could be produced and sold from oil fields. In that case, however, the court, posing the question whether the conduct complained of was "political in nature" held that, if defendants were enjoined from conspiring to submit "false nominations" with the Railroad Commission, (there are no such charges in our pending case) they would not thereby be deprived of any constitutional right to petition or participate in the governmental process; that defendants would only be prohibited from undertaking "certain joint business behavior which would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr; and, further, that, assuming plaintiff's activities were "political" in nature, the complaint also tendered the issue (unlike the pending case) whether defendants had conspired in other respects , apart from the filing of false nominations, to restrain competition."

In *Harmon, supra* , a civil action brought under the antitrust laws, our Court of Appeals, reversing dismissal of the action on ground of failure to state a claim, considered an allegation **[*14]** to the effect that defendants had combined to induce the Attorney General of Arizona (alleged to have been a participant in the combination) to file a court suit under a state statute (authorizing the Attorney General to bring such action against building and loan associations in the event of certain irregularities specified in the statute) which suit resulted in placing Arizona S & L Association in receivership and closing its business. In the course of the receivership plaintiffs' contractual rights, acquired in dealings with the Arizona S & L Association, had been disallowed by the state court receiver.

The court, discussing the applicability of *Noerr, supra* , (and also of *Pennington, supra* , and *Association of Western Railways v. Riss, supra*) agreed that Noerr would apply whether or not the proceeding brought by the Attorney General had substantive merit and, that defendants' conduct (informing the Attorney General of alleged irregularities and persuading him to take the action) "would be essentially political in nature" and immune from attack for the reasons set forth in Noerr .

The court held, however, that the complaint in that particular case (unlike the First Amended **[*15]** Complaint here) could be read as alleging defendants' joint effort to influence the Attorney General "was but one element in a larger, long continued scheme to restrain and monopolize" the financial industry, pointing out that there was nothing in the complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the refinancing arrangements between plaintiff and the Arizona S & L Association.

In *Washington Brewers v. United States , 137 F.2d 964*, (9th Cir. 1943) a criminal prosecution against the defendants, Brewers Institute and others, for violation of the Sherman Act *§§ 1* and *3*, the court, although affirming the trial court's refusal to dismiss the indictment (alleging concerted fixing of prices) on demurrer, pointed out that, insofar as the indictment charged defendants with conspiring to influence the formulation of state policy concerning liquor and with combining to police the enforcement of state laws, it charged no antitrust offense saying: "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not single or in concert, aid the authorities in the **[*16]** policing of any legislation which it is within the competency of states to adopt."

Plaintiffs first contend that the doctrine of Noerr and Pennington, supra , is applicable only to activities directed to the legislative branch of government for the enactment of laws or to the executive branch for the enforcement of laws and that the doctrine is not applicable to activities conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi judicial functions are vested.

Although it is true that in Noerr and Pennington , the court was speaking in terms of the "legislative" and "executive" branches of government there involved, this Court is of the opinion that the rationale of the Noerr-Pennington doctrine is clearly and equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts.

The gist of the Noerr-Pennington doctrine is that concerted activities "conducted along lines normally accepted in our political system" are not rendered violative of the antitrust laws even though the purpose or **[*17]** result may be to injure a competitor.

The right of access to courts and regulatory agencies is just as much a political right as the right of access to the legislative and executive branches.In fact, the Supreme Court has expressly recognized that ***HN6***[] the right of access to judicial agencies is within the protection of the *First Amendment* right of petition and has held that a statute impairing such right is, therefore, unconstitutional. *NAACP v. Button , 371 U.S. 415 at 430 (1963)*.

Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere onesided proceedings.

In seems clear that, under the rationale of Noerr , the mere fact of association by defendants for the purpose of resort to the regulatory agencies of the courts in order to oppose applications by others in the manner provided **[*18]** by law could not be held a violation of the ***antitrust law*** - even if the intent of defendants is, or the result might be, the injury of competitors.

The Noerr Doctrine

Plaintiffs next contend that defendants' purported access to and use of the procedures of the regulatory agencies and of the courts in the exercise of their rights is mere "sham" within the meaning of that term as used by the Supreme Court in *Noerr, supra* .

However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them "with or without probable cause". This allegation falls far short of charging that the oppositions would not be upon probable cause. On the contrary, it implies that all or at least some of the oppositions may have been filed with probable cause.

Nor does the First Amended **[*19]** Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications "regardless of the merits of" the applications. This falls short of alleging that the applications were meritorious. On the contrary, it implies that all or at least some might be without merit.

Plaintiffs, themselves, in their Brief filed 5/16/67, p. 8, present certain exhibits showing that 21 out of 40 matters which had reached the decision stage as of 11/28/61, resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition.

In the light of the pleading, considered either alone or in the light of such exhibit, and in a light most favorable to plaintiffs, it is impossible for this Court to say that the pleading supports plaintiffs' conclusionary claim of "sham" as that term was used in Noerr **[*20]** .

On the contrary, just as the findings in Noerr negatived the theory of sham, so also the allegations here negative that theory and show, as in Noerr , that, whatever the ultimate purpose and intent of defendants may have been, the oppositions were not, so far as the pleading is concerned, sham but were genuine and in part successful.

To hold that this complaint alleges an antitrust violation would be to hold in effect that defendants are liable in damages for having associated to present their oppositions to the agencies regardless of the merit of the oppositions or lack of merit in the applications opposed solely because defendants, according to the complaint, entertained an ulterior motive of injuring or destroying defendants' competition.

Whatever the law would be without Noerr , the Supreme Court has resolved the problem of bad purpose or intent vis a vis freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competition purpose of such resort and a possible anti-competitive result.

There is no good reason why regulated business firms may not freely submit their information and **[*21]** views on public convenience and necessity to the regulatory agency without subjecting themselves to antitrust attack upon the ground that their purpose was to restrict competition - an objective which may be easily implied because it is inherently involved in the regulatory act, itself, which is designed to restrict entries into the industry to those justified by findings of public convenience and necessity. In our opinion, the rationale of Noerr is such that this result is not required.

As impliedly recognized in Noerr , the "probable cause" or "merit" of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts in the guise of an antitrust suit.

The gist of plaintiffs' complaints is that the resort of defendants to the regulatory agencies to oppose and thereby put plaintiffs to the proof in support of their applications has made it "exceedingly expensive" for plaintiffs and others to obtain certificates.

Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail **[*22]** expense in terms of time and money for both sides. But, this is inherent - so much so that, as plaintiffs say in their own brief, "Individually, the members of the Dwyer group" (defendants) "would not take the action against plaintiffs which their conspiracy has allowed them to take" (Plt. Brief of 5/16/67, p. 6, line 6) and in their Amended Complaint they make the significant statement that decisions of the agency "but for defendants' combination and conspiracy, would not have been rendered adverse to plaintiffs and other competitors of defendants, because no opposition would otherwise have been commenced." (Amended Complaint, par. 8(4)10, p. 12).

The Patent Cases

Plaintiffs mainly rely upon cases involving the claim that combinations involving the threat or actual commencement of patent infringement suits were violations of the antitrust laws.

In *United States v. Singer Manufacturing Co. , 374 U.S. 174 (1963)* the United States sued to restrain Singer, the sole American manufacturer of certain sewing machines, from conspiring with two of its competitors, an Italian manufacturer (Vigorelli) and a Swiss manufacturer (Gegauf) to restrain interstate and foreign trade in sewing **[*23]** machines, specifically certain Japanese competition.

The District Court ruled for defendants on the ground that there did not appear to be a concert between Singer and its alleged co-conspirators to restrain the Japanese competition and that Singer was merely acting within its right to protect its own patent. The Supreme Court reversed, holding that, according to its interpretation of the trial court's findings, a conspiracy to exclude Japanese competition in violation of the Sherman Act was shown.

The findings were to the effect that defendants had combined (1) to withdraw opposition to each other's applications in the Patent Office in order to secure broad claims regardless of validity; (2) to crosslicense and assign their respective patents on a world-wide royalty free basis, and (3) assignment of an American patent (owned by the

Swiss manufacturer in order that this patent could be more effectively enforced by Singer in the United States against the Japanese competition through infringement suits and certain Tariff Commission proceedings.

The Court said:

"Thus, by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose **[*24]** of protecting its own 401 machine - it was protecting Gegauf and Vigorelli, the sole licensees of the patent at the time, under the same umbrella. This the Sherman Act will not permit. * * * The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of sewing machines in the United States by placing the patent in Singer's hands the better to achieve this result.It is this concerted action to restrain trade that condemns the transaction under the Sherman Act. * * * It is well settled that 'beyond the limited monopoly which is granted, the arrangements under which the patent is utilized are subject to general law. * * * By aggregating patents in one control the holder of the patents cannot escape the prohibitions of the Sherman Act. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage."

In *Kobe v. Dempsey Pump Co. , 198 F.2d 416 (10th Cir. 1952)*, an action for patent infringement, defendants counterclaimed alleging that plaintiff's misuse of its patent monopoly, including, among other things, the bringing of an infringement **[*25]** suit, violated *Sections 1* and *2* of the Sherman Act.

Affirming a judgment for defendants on their antitrust counterclaim, the Court, dealing with plaintiff's contention that its monopolistic practices did not reach the defendants until the commencement of the infringement suit and that to allow recovery of damages would be a denial of free access to the courts, recognized that although free and unrestricted access to the courts should not be denied or imperiled in any manner, the courts should not be made a vehicle for maintaining and carrying out an unlawful monopoly having for its purpose the elimination and prevention of competition, adding, however, on p. 425:

"We have no doubt that, if there was nothing more than the bringing of the infringement action resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that, although Kobe (plaintiff) believed some of its patents were infringed, the real purpose of the infringement action … was to further the existing monopoly and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not **[*26]** unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them, we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme. …" distinguishing *Virtue v. Creamery Package Co. , 227 U.S. 8 (1913)* and *International Visible Systems v. Remington-Rand , 65 F.2d 540 (6th Cir. 1933)* as involving "single and isolated actions not preceded by a long history of unlawful monopolization," *198 F.2d 416, at 425*.

In *Lynch v. Magnavox , 94 F.2d 883, 888-890 (9th Cir. 1938)*, the Court reversed a dismissal on demurrer of an antitrust complaint which alleged that defendants, who had cross-licensed their respective patents, had combined to restrain competition and to monopolize the radio speaker business by threatening radio manufacturers with a ruinous commercial campaign of letter writing and by threatening and commencing in bad faith groundless actions against the manufacturers and their customers for infringement of their allegedly invalid patents in order to force the manufacturers to discontinue purchase of radio **[*27]** speakers from anyone but defendants.

The Court held that, assuming each of the alleged acts to be lawful in themselves, the combination would be a violation of the antitrust laws if its purpose was to restrain competition or to attempt monopoly, saying: "In other words, if the purpose of the plan is to effect a monopoly or to fix prices … then the act is violated by use of any means to that end, including a cross-licensing agreement."

The theory of these cases, as set forth in *Mercoid v. Mid-Continent , 320 U.S. 661, 665-666 (1943)*, is that ***HN7***[] a patentee has been given a privilege of limited monopoly conditioned, however, by a public purpose; that, although he may enforce his patent rights (either directly obtained or acquired from others under assignment or license), he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Further, in these cases the combinations involved other acts of the **[*28]** conspirators, e.g., illegal cross-licensing schemes and similar activities, of which the infringement suits, or threats thereof were merely the effectuating means.

In none of these patent cases did the court hold or say that mere association for the bringing or threatening of a patent infringement suit - without more - is, itself, an antitrust violation merely because the associates may contemplate injury to a competitor.

On the other hand, it was early recognized in *International Visible Systems v. Remington-Rand , 65 F.2d 540 (6th Cir. 1933)* at 542, that the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with the purpose of monopolizing an industry, does not state a violation of *Section 2* of the Sherman Act (attempt to monopolize, i.e., regardless of concert of action) the Court saying:

"The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws * * * Moreover, the declaration in the petition that the suits for infringement were brought **[*29]** against appellant 'maliciously and without probable cause' adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce", citing *Virtue v. Package Creamery , 227 U.S. 8, 38 (1912)*.

In any event, the defendants in this pending case have not combined to bring patent infringement suits nor are they grantees of any monopoly which could possibly have been misused. They are simply certificated business entities in an industry which is competitive within a framework of regulation according to standards of public convenience and necessity.

It is, therefore, unnecessary to decide whether the patent cases indicate a special area to which the immunization doctrine of Noerr does not extend.

We only hold that the narrowly framed allegations of this Amended Complaint are such that the activities for which defendants have associated are and must be held immune from the antitrust laws - even though their ultimate purpose may be to reduce, injure or destroy competition.

The pleading has already been once amended and, presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation. The First Amended **[*30]** Complaint will, therefore, be dismissed without leave to amend subject to the condition that, if plaintiffs move for leave to amend within fifteen (15) days from the date of this order, the Court will consider whether their amended pleading is sufficient to state a claim upon which relief could be granted.

Bracken's Shipping Center, Inc. v. Ruwe

United States District Court for the Southern District of Illinois, Northern Division

October 9, 1967

Civil Action No. P-2907

Reporter

273 F. Supp. 606 *; 1967 U.S. Dist. LEXIS 11215 **; 1967 Trade Cas. (CCH) P72,247

Bracken's Shopping Center, Inc., et al. v. Stuart Ruwe, et al.

Core Terms

anti-trust, municipal ordinance, motion to dismiss, shopping center, defendants', plaintiffs', probable cause, state court, trial court, good faith, invalid, motive

LexisNexis® Headnotes

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

HN1[] **Private Actions, Remedies**

Seeking lawful legislative, executive, or judicial action does not violate federal antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Governments > Local Governments > Ordinances & Regulations

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

HN2[] **Private Actions, State Regulation**

The individual citizen has a right under Illinois law to seek a declaratory judgment on the validity of a municipal ordinance. Ill. Rev. Stat. ch. 110, § 57.1. Exposing citizens who exercise that right to possible fine and imprisonment under the anti-trust laws could only be justified by plain and unmistakable language to that effect.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act (United States) does not prohibit two or more 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 > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.

Judges: [1]** Morgan, D.J.

Opinion by: MORGAN

Opinion

[*607] Opinion and Order

MORGAN, D.J.

The question whether the plaintiffs have stated a claim for relief under the Sherman and Clayton anti-trust acts arises upon defendants' several motions to dismiss. The gist of the plaintiffs' complaint is that defendants, opposing the construction of a shopping center which might reduce the business of "downtown" Kewanee merchants, conspired to file in the state court a representative suit challenging the validity of the statute under which the city fathers had vacated certain streets needed for the proposed shopping center.

Since the complaint alleges no other act or conspiracy, the court grants the defendants' motions to dismiss because it does not believe that resort to the judiciary, even in concert or in an effort to restrict competition, can violate the anti-trust laws of the United States.

The novelty of plaintiffs' argument that the filing of a suit testing the validity of a municipal ordinance constitutes an anti-trust violation may account for the dearth of judicial decisions directly in point. The Supreme Court has, however, recently enunciated on two occasions the general principle that **[**2]** *HN1*[] seeking lawful legislative, executive, or judicial action does not violate the anti-trust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition. See *Eastern Railroad 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)*.

HN2[] The individual citizen has a right under Illinois law to seek a declaratory judgment on the validity of a municipal ordinance. Ill. Rev. Stat. Ch. 110, § 57.1. Exposing citizens who exercise that right to possible fine and imprisonment under the anti-trust laws could only be justified by plain and unmistakable language to that effect. This court agrees with the Court of Appeals for the Third Circuit which said in *Citizens Wholesale Supply Co. v. Snyder, et al., (3rd. Cir.) 201 F. 907 at page 909*:

> "We cannot suppose that the general words of the Anti-Trust Act were intended **[*608]** to include an agreement in good faith to test a municipal ordinance in the courts."

Apparently recognizing the difficulty inherent in the proposition they urge, the plaintiffs **[**3]** argue that it is not the filing of the law suit itself but the common motive behind the filing thereof, arrived at by agreement, that violates the

Sherman and Clayton Acts. First, it would appear that the *Railroad Presidents* and *Pennington* cases cited above foreclose inquiry into motive. In the *Railroad Presidents* case, the Supreme Court declared *365 U.S. at page 136*:

> "We think it equally clear that ***HN3***[] the Sherman Act does not prohibit two or more 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."

And in the *Pennington* opinion the Supreme Court observed at page 670:

> ***HN4***[] "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."

Second, it appears that the trial court has rendered judgment in favor of the defendants in the state court suit complained of. At least one test of good faith is the existence of probable cause; and the judgment of the trial court in the state action, even if reversed on appeal, has conclusively shown that defendants **[**4]** had probable cause to believe that the municipal ordinance was invalid. Their decision to act on that belief, even if motivated by a desire to prevent the construction of the Bracken shopping center and thereby restrain competition, does not violate the anti-trust laws. Regardless of intent or assumed purpose, defendants have a right to have the ordinance set aside if it is invalid.

Defendants' motions to dismiss are therefore granted and the case is dismissed at plaintiffs' cost.

End of Document

Shoaf v. Triangle Publications, Inc.

United States District Court for the Eastern District of Pennsylvania

October 11, 1967

Civil Action No. 41117

Reporter

43 F.R.D. 10 *; 1967 U.S. Dist. LEXIS 11217 **; 1967 Trade Cas. (CCH) P72,251

Orville SHOAF v. TRIANGLE PUBLICATIONS, INC.

Core Terms

onions, counterclaim, Sherman Act, summary judgment, resale price, newspapers, antitrust, alleged violation, illegal contract, futures market, treble damages, market price, nondelivery, deliver, parties, promise

Judges: [1]** Masterson, District Judge.

Opinion by: MASTERSON

Opinion

[*10] Opinion

MASTERSON, District Judge.

Plaintiff, Orville Shoaf, commenced a treble damage antitrust action against the defendant, Triangle Publications, Inc., alleging a violation of §§ 1 and 2 of the Sherman Act. Defendant counterclaimed and now moves for summary judgment on Count I of his counterclaim pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure* [1] alleging that the plaintiff owes defendant $3,142.57 for newspapers sold and delivered to the plaintiff on a running account. Plaintiff has admitted by answer that he received and agreed to pay for the newspapers in question. Plaintiff defends his non-payment on the ground that the debt incurred was a result of defendant's resale price maintenance policy in violation of the Sherman Act. Plaintiff's argument made by affidavit is that defendant's fixed resale price policy forced him to sell at an unreasonably low price and thereby caused him to lose money. He maintains that, as a result of the illegal acts of defendant, he was unable to pay defendant's bills.

[2]** Plaintiff thus relies on the traditional judicial policy of not enforcing illegal contracts. He reasons that, because defendant's wholesale price was tied to defendant's allegedly illegal resale price maintenance policy, to enforce payment of plaintiff's debt would be to enforce an illegal contract.

The United States Supreme Court considered and rejected this argument in a **[*11]** closely analogous factual context in the case of *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)*. In that case Kelly, an onion grower, agreed to purchase onions at the prevailing market price. The agreement between Kelly and Kosuga

[1] *Rule 54(b)* provides that: "When more than one claim for relief is presented in an action, * * * (or) as a * * * counterclaim * * * the court may direct the entry of a final judgment upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

included reciprocal promises not to deliver onions on the futures market in order to create an artificially high market price after the onions were delivered. Kelly refused to pay the amount due on the contract. Kosuga sued on the contract and Kelly invoked an alleged violation of the Sherman Act as an affirmative defense. The Supreme Court speaking through Justice Brennan declared the agreement not to deliver the onions severable from the agreement of purchase and sale. He stated that the purchase and sale was "an intelligible economic transaction **[**3]** in itself", *Kelly, supra* page 521, despite the fact that the defendant had purchased primarily to secure the plaintiff's promise of nondelivery on the futures market. He went on to state at page 521 :

> "While the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said a violation of the Act to give legal effect to a completed sale of onions at a fair price. * * * we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question."

Kelly controls the outcome of the case at bar. Plaintiff purchased the defendant's newspapers at the price charged all other dealers of his class. Even if, as the plaintiff alleges, the contract for the purchase of papers furnished the occasion for the restrictive resale practices of the defendant, this court under the *Kelly* doctrine must enforce the contract since it is a completely separate claim for money owing on goods purchased, and there is no dispute as to a material fact with respect to this claim.

As **[**4]** Judge Freedman stated in *Lewis v. Seanor Coal Company, 382 F.2d 437, 441*, CCH Trade Cases para. 72, 189 at 84, 274, Third Circuit, 1967, relying on *Kelly*:

> "It is now well established that the remedy for violation of the ***antitrust law*** is not avoidance of payments due under a contract, but rather the redress which the antitrust statute establishes,--a private treble damage case."

The granting of summary judgment on this counterclaim settles it in its entirety, and concludes an issue which is completely separable from that raised in the principal complaint and the rest of defendant's counterclaim. It will simplify the issues and thus facilitate the conduct of the trial.

Accordingly defendant's motion for summary judgment on its counterclaim is granted.

Barr Rubber Prods. Co. v. Sun Rubber Co.

United States District Court for the Southern District of New York

October 20, 1967

No. 60 Civ. 4327

Reporter

277 F. Supp. 484 *; 1967 U.S. Dist. LEXIS 11398 **; 156 U.S.P.Q. (BNA) 374 ***; 1967 Trade Cas. (CCH) P72,248

The BARR RUBBER PRODUCTS COMPANY, Plaintiff, v. The SUN RUBBER COMPANY, and Wonder Products, Inc., Defendants

Subsequent History: **[**1]** As Modified November 21, 1967.

Core Terms

patent, rotational, casting, plastisols, invention, heating, temperature, fusion, plasticizer, cooling, molding, hollow, teachings, gelled, layer, manufactured, liquid, fuse, gel, invalid, objects, resin, deposit, taught, references, inner surface, anticipate, hardening, purported, opening

LexisNexis® Headnotes

Patent Law > Nonobviousness > Elements & Tests > Claimed Invention as a Whole

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN1[] **Elements & Tests, Claimed Invention as a Whole**

See *35 U.S.C.S. § 103*.

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN2[] **Graham Test, Secondary Considerations**

In determining whether a patent is void due to obviousness, evidence of long felt need of a product is a "secondary consideration."

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN3[] Nonobviousness, Elements & Tests

Congress is not empowered, and has never reflected a disposition, to authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN4[] Elements & Tests, Prior Art

In determining whether a patent is void due to obviousness, the fact that prior art matured later than the invention of the patented product at issue is not decisive.

Patent Law > Nonobviousness > Elements & Tests > Claimed Invention as a Whole

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

HN5[] Elements & Tests, Claimed Invention as a Whole

A patent is void for obviousness if the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. *35 U.S.C.S. § 103*.

Patent Law > Anticipation & Novelty > Description in Prior Patents

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Statutory Bars > General Overview

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN6[] Anticipation & Novelty, Description in Prior Patents

See *35 U.S.C.S. § 102(b)*.

Governments > Legislation > Vagueness

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN7[] Legislation, Vagueness

In determining whether a foreign patent under *35 U.S.C.S. § 102(b)* invalidates a later-issued United States patent on a competing product, vagueness and excessive breadth are not proper standards for the test.

Patent Law > Preclusion > Collateral Estoppel

HN8[] **Preclusion, Collateral Estoppel**

The decision on patent validity by a federal court, especially a higher one, is entitled to great weight. Where the record leads compellingly to a different conclusion, the second court is forced, with all respect, to render a conflicting judgment. It is important, however, to state the grounds on which it appears to the second court that the first court was led into error.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN9[] **Defenses, Bad Faith Enforcement**

Under the doctrine of unclean hands, a party's "tampering" with the administration of justice closes the court's doors against an affirmative claim for equitable relief pressed by such means.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN10[] **Ownership & Transfer of Rights, Licenses**

In the absence of antitrust violations, it is not illegal for a party holding a patent to obtain from its licensees the promise of licenses from them under any patented improvements in the process.

Counsel: Ely & Golrick, Cleveland, Ohio, Albert L. Ely, Jr., Cleveland, Ohio, of counsel, Darby & Darby, New York, New York, Harvey M. Brownrout, New York, New York, of counsel, Theodore A. Lazar, Columbus, Ohio, for plaintiff.

Pennie, Edmonds, Morton, Taylor & Adams, New York, New York, Thomas F. Reddy, Jr., New York, New York, of counsel, Hamilton & Cook, Akron, Ohio, Everett R. Hamilton, Phillip L. Kenner, Akron, Ohio, of counsel, for defendant.

Judges: Frankel, District Judge.

Opinion by: FRANKEL

Opinion

[*375]** **[*486]** FRANKEL, District Judge.

In this action, begun on November 3, 1960, plaintiff, Barr Rubber Products Company, sues The Sun Rubber Company for:

> (1) a declaration of invalidity and noninfringement with respect to United States Patent No. 2,629,134 relating to a method of casting plastic articles, and (2) damages and injunctive relief against alleged violations of the antitrust laws and allegedly unfair competitive practices. [1]

Defendant has counterclaimed for a judgment of validity and infringement of the patent.

[2]** I. THE PATENT CLAIMS

In brief, non-technical language, the patent in suit covers a method for the casting of fully enclosed hollow plastic objects "from a liquid mixture of a vinyl resin and a plasticizer therefor" which solidifies and hardens through the application of heat during the procedure which the patentee, Robert P. Molitor (assignor to his onetime employer, Sun), claims to have invented. The steps of the process are: the deposit of the liquid material in one section of a two-piece mold (the amount being measured to produce the desired wall thickness of the finished hollow object); the closure of the mold; rotation of the mold, **[***376]** causing the liquid to spread in a wall around the inside; the simultaneous application of heat to bring the plastic through the stages of "gelation" (in which the matter is a gelatinous or coagulated "cheesy mass") and then "fusion" (the point at which the material becomes hard, its ultimate degree of elasticity depending upon the varying proportions of solid matter and liquid "plasticizer" employed); the cooling of the mold below the "fusion" temperature; and the opening of the mold and removal of the finished object.

In the more artistic language **[**3]** of the patent, Claim 1 (of the four claims) depicts the invention as follows:

> "The process of making hollow articles from a liquid mixture of a vinyl resin and a plasticizer therefor, comprising the steps of depositing a measured charge of the said mixture in a hollow sectional mold, said charge being less in volume than the volume of the mold, said mold having non-porous **[*487]** inner surfaces, closing the mold with the charge therein to retain the charge within the cavity, rotating the mold in a multiplicity of planes to distribute the charge as a layer over the entire inner surface of the mold cavity, heating the layer to gel it against the inner surface of the mold while the mold is rotating, then applying additional heat to the closed mold to raise the temperature thereof sufficiently to fuse the gelled layer against the inner surface of the mold, cooling the mold until the temperature of the layer is below the fusing point of the material, opening the mold and removing the article therefrom." [2] **[**5]**

It will be noted that the material described in the patent claims is referred to as "a liquid mixture of a vinyl resin and a plasticizer therefor." According to defendant **[**4]** and much of the testimony, the quoted words should be read to mean, more briefly, a "plastisol," which is a small-particled polyvinyl chloride resin dispersed in a liquid plasticizer (or softening agent) containing no volatile solvents or diluents. [3] While neither the patent claims nor the specifications anywhere use the word "plastisol," and while the patent's words ("liquid mixture of a vinyl resin and a plasticizer therefor") literally include things which are not plastisols, defendant has argued persuasively that the

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[1] Wonder Products Company was also named as a defendant and charged as a conspirator with Sun in conduct said to constitute unlawful restraints and unfair competitive practices. By stipulation of the parties, Wonder Products has been permitted to stand aside awaiting the outcome of the contest between Barr and Sun. It will be sufficient, therefore, to refer to Sun as the single defendant.

[2] The quoted claim is typical; the others add nothing of consequence for present purposes. Merely to note the variations: Claims 2 and 3 describe the "liquid mixture" as "deaerated." Claims 3 and 4 describe the gelled layer as being of "uniform thickness." Claim 2 speaks of "further heating" to fuse after gelling, and Claim 4 describes the same step as the "applying" of "further heat," while the third claim, like the first, speaks of "applying additional heat."

The essential similarity of the four claims for consideration of the disputed issues is acknowledged by defendant.

[3] Close kin to a "plastisol" - or, according to some of the testimony, a more general category - is an "organosol," which differs in that its liquid phase does contain volatile elements which are freed in the course of gelation and fusion. The presence of such volatiles - and, specifically, the freeing of them when the material is solidified - renders an organosol normally unsuitable for casting in a closed mold.

references, in their context, should be deemed to focus on variously formulated plastisols. The subject is one, however, which will engage us again when we come to defendant's contention that an Italian patent claimed by plaintiff to anticipate Molitor's must be cast aside for the reason (among others) that it purports to cover an excessively broad range of materials, including many which would be unworkable.

The foregoing sketch, to be amplified as the discussion proceeds, is a sufficient background against which to consider the patent issues and explain the court's conclusions that (A) the patent is invalid and (B) assuming, for the sake of full adjudication at this level, that the patent were deemed valid, it would be held to have been infringed.

A. *Invalidity of the Patent*

1. *Obviousness*

Molitor's alleged invention was an obvious combination of old and wellknown elements, failing the test of *35 U.S.C. § 103*. [4] Despite the length of the trial and the volume of the record, the facts bearing upon this point are largely undisputed.

[6]** The technique dubbed "rotational casting" in this case is at least 100 years old. There is specific and persuasive evidence that Molitor, if he was ahead at all, barely preceded several others in applying to the infant subject of plastisols a procedure that would have been obvious "to a person having ordinary skill **[***377]** in the art * * *." Postponing that for a bit, the history of rotational casting of other **[*488]** materials goes far (probably sufficiently far) in itself to refute Molitor's claim that he invented something.

In 1855, one Peters was granted a British patent (No. 1308) for the rotational casting of "ordnance shells and other hollow vessels." Unlike (and superior to) Molitor, Peters showed equipment and a specific mode of rotation around two axes (as against Molitor's vague reference to "a multiplicity of planes") suitable for casting "metal or other substances which can be made sufficiently fluid by heat to be acted upon in the manner * * * described, and which will set or become rigid on cooling down." (P.Ex. 38, p. 4.)

Postponing plaintiff's many other references to early methods and means of rotational casting, one other may be mentioned at this point. In 1920, **[**7]** U.S. Patent No. 1,341,670 issued to Ransom Judd Powell for a machine and means "for shaping or forming plaster, metals and other plastic materials or substances." The invention was described as "particularly directed to the production of hollow objects * * * [consisting] broadly in achieving such result by the simultaneous turning of a matrix or mold on two different axes." The patented device was described as "adapted to be used in conjunction with molds for casting hollow objects which are substantially completely closed, and the selected embodiment of the invention * * * shown is directed to the casting or molding of relatively light-weight articles, such as statuary, artistic novelties, small figures, toys, etc." The invention described introduction of the liquid material into the mold, rotation (avoiding centrifugal force), and the hardening of the material against the mold wall during such rotation.

Purporting to dispose of such references, and speaking directly to the Powell patent, defendant's expert observed, correctly, that metals harden by *cooling* and plaster "by crystallization" (aside from Powell's reference to "other plastic materials or substances" and the absence **[**8]** of any reference in Powell to such obvious factors as cooling where appropriate) whereas Molitor dealt with materials which harden upon heating. (As is noted below, all are agreed that the flowing and hardening characteristics of plastisols were commonly known in the art before Molitor, and that he "invented" nothing in this respect.) But even if the Peters and Powell inventions stood alone - as they do not by any means - this asserted distinction seems trivial to the point of being regrettable. [5] Granting the

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[4] ***HN1***[] "A patent may not be obtained though the invention is not identically disclosed or described as set forth in *section 102* of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

customary (and frequently wellfounded) humility lay judges are supposed to exhibit when confronted with the mysteries of natural science, machinery, and the like, it is difficult to accept that a patent should issue because somebody applies an ancient casting technique to well-known properties of some new material.

[9]** Furthermore, among the many items undisputedly in the prior art was the **[*489]** known process of rotationally casting latex, which does require heating rather than cooling to harden it. [6]

[10]** However, before turning from the **[***378]** Peters and Powell patents, another of defendant's arguments may be noted. Defendant says Peters taught the use of centrifugal force for spreading the material on the inner mold wall whereas plastisols do not spread efficiently when subjected to such force. Instead, it is argued - and the record tends to support this - that to spread a plastisol in rotational casting, the substance should rest in a pool at the bottom of the mold and then adhere as the mold walls pass the pool in turning. There are decisive answers to the point (which is, incidentally, stressed by defendant with respect to other references plaintiff invokes, and is similarly refuted by what follows here). In the first place, Powell taught the avoidance of centrifugal force for plastic and similar materials. Secondly, the evidence establishes, as even laymen might know, that this argumentation about centrifugal force concerns a matter of degree rather than an absolute choice. All rotation produces some centrifugal force. The present point about rotational casting is that the rotation should be relatively slow, minimizing the operation of such force.

Further, and more strikingly, **[**11]** if defendant were correct on this subject, it would be acknowledging a most vital defect in Molitor's patent. There is not a word in Molitor about the speed of rotation or the necessity to avoid or minimize centrifugal force. He speaks merely, and vaguely, of "rotating the mold in a multiplicity of planes * * *." In significant contrast, the Italian Delacoste Patent, No. 440,295 of October 9, 1948 (which is claimed by plaintiff, and hereinafter found by this court, to anticipate Molitor) carefully specifies that the mold must oscillate "gently;" gives a specific speed of "uniform or cadenced" rotation in "the order of 10 revolutions per minute;" and prescribes the clear, and usually proper, procedure of rotation "around two axes preferably at right angles," a subject (among other pertinent ones) on which Molitor is also silent.

To move on now from Peters and Powell, the undisputed facts show an array of patents and other references over the years for the rotational casting of various materials capable of moving from liquid to solid form. Among the substances for which this casting technique was well known, in addition to various metals and plastics, were chocolate, wax, and, as **[**12]** mentioned above, latex.

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[5] Defendant puts heavy reliance upon its expert, urging that the force, learning, and "credibility" of his testimony should weigh heavily against plaintiff's efforts to defeat the patent in suit. Unfortunately for defendant, while its expert did not appear to depart from literal "truth" about concrete matters of fact, his ostensibly learned "opinions" were not impressive. He found himself in general incapable of learning anything useful from patents and other references invoked against Molitor. On the other hand, where Molitor's patent is obscure or silent, he was able to fill the gaps or dispel the clouds by easy reference to "common sense" or general knowledge. The example at this point in the text is by no means the most vivid, as subsequent discussion will show. It is notable, nevertheless, that a highly trained natural scientist should have found it a mark of "invention" to perceive that a technique usable for flowable materials which harden when heat is withdrawn could be transposed to liquids which harden when heat is added.

While plaintiff's expert was on the whole more helpful, he exhibited similar qualities of partisanship. Supporting the view that Delacoste anticipated Molitor, he professed a frequent inability to find meaning in the latter while the former struck him as pellucid in all vital respects.

[6] The fact that latex had been rotationally cast before Molitor is, like so much else, undisputed. In the court's view, there is no need to tarry, therefore, over one reference plaintiff offered and defendant opposed for lack of proper notice. The simplest course in the circumstances is readily justified, and the court follows it. Plaintiff's Exhibit 381, the Kay Patent, is excluded.

The evidence showed that rotational casting is a more elaborate and delicate process for latex than it is for plastisols because (1) water must be removed from the latex in casting and (2) full curing must be accomplished as a later, separate step. The utility of this point to defendant is at best debatable. It would seem to show that the ancient casting technique was more readily and simply adaptable to plastisols than to an earlier plastic that solidifies with heat.

If no more had been shown than the old age and wide application of rotational casting as a technique, plus the known and predictable qualities of plastisols, this might well have been enough to defeat Molitor's patent. Cf. *Jungersen v. Ostby & Barton Co., 335 U.S. 560, 69 S. Ct. 269, 93 L. Ed. 235 (1949)*; *Ruben Condenser Co. v. Aerovox Corporation, 77 F.2d 266* (2d Cir.), cert. denied, *296 U.S. 623, 56 S. Ct. 145, 80 L. Ed. 443 (1935)*; *Pierce v. Muehleisen, 226 F.2d 200 (9th Cir. 1955)*; *Monaplastics, Inc., v. Caldor, Inc., 378 F.2d 20 (2d Cir. 1967)*. The defendant, confusing the question of novelty with the separate and additional test of obviousness, see *Graham v. John Deere Co., 383 U.S. 1, 24, 86 S. Ct. 684, 15* **[*490]** *L. Ed. 2d 545 (1966)*; *United States v. Adams, 383 U.S. 39, 48, 86 S. Ct. 708, 15 L. Ed. 2d 572 (1966)*, argues insistently that Molitor must be deemed to have invented something because "it did not occur" to anyone before him to apply the ancient procedure to plastisols. Apart from the fact that the argument is misconceived, it is erroneous in fact. It occurred to several people, as reflected in both published and unpublished accounts, **[**13]** to adapt the old technique to the obviously workable new material. Before recounting those instances, however, some pertinent facts about plastisols should be recorded.

As has been mentioned, Molitor claims no invention with respect to the composition, formulation, or properties of plastisols. [7] This form of plastic material first came into use on any substantial scale in Europe, primarily Germany, during World War II. In the late years of that war, work and experimentation with plastisols was carried on in England, Italy, and, somewhat later, the United States. It was around 1946 and 1947 before plastisols achieved any substantial attention, even among companies which were to become important manufacturers of the component materials, in this country. Through the years until 1950, it remained in relatively short supply and was a high-cost material as compared with rubber, which **[***379]** was largely interchangeable for many uses. These factors of supply and price served to retard in some degree experimentation with new fabrication techniques and investment in new equipment for the manufacture of plastisol articles. And rotational casting equipment was relatively expensive in comparison **[**14]** with the apparatus needed for other casting techniques.

Notwithstanding such temporary inhibitions, the basic properties and utility of plastisols were well known, as defendant concedes, before Molitor's claimed invention. It was commonly known that heat in the range of 180-200 degrees F. causes a plastisol **[**15]** to "gel" - to form the "cheesy mass" mentioned earlier. It was similarly familiar that at varying temperatures in the range (usually) of 300-350 degrees, the plastisol would "fuse," the fusion temperature depending upon the particular formulation and being lower than the foregoing range for some variants. It was likewise known that a molded article had to be cooled below fusion temperature before removal from the mold to insure fixation and retention of its tensile strength.

Before the 1950's various molding techniques other than rotational casting had been adapted from their uses for other materials and were widely employed for manufacturing things from plastisols. Among these, one which has been much discussed in this case is "slush casting," a process as least as old as the work of the ancient Greeks in bronze. As transposed for use with plastisols, this process (in its most familiar variation) consists in (1) filling an open mold with plastisol, (2) heating to "gel" temperature so that a gelled layer forms around the inner surface of the mold, (3) pouring off the ungelled contents, (4) subjecting the mold to further heat sufficient to achieve fusion of the gelled layer, and, **[**16]** finally, (5) cooling so that the finished article may be removed from the mold.

A variation on the slush casting procedure made possible the manufacture of completely enclosed hollow objects. In this variation, each portion of a twosection mold would be brought to the gel **[*491]** stage following step "(3)" in the preceding paragraph; the two sections would then be clamped together to join the gelled walls before the whole mold was subjected to further heat for fusion, cooling, and removal of the finished article.

In still another version, perfected and known to others before Molitor, a mold with an aperture would be brought to an early, but still somewhat flowable, gel stage, most of the excess poured off, and the mold then inverted with its

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[7] During the early stages of his sojourn through the Patent Office - from June 27, 1950, to February 24, 1953, during which period his original claims were all stricken and entirely rewritten - Molitor asserted he "was the first to apply the deaerating step to vinyl chlorides used in the molding of hollow articles." This assertion survives vestigially in Molitor's specifications, when he says (col. 3, lines 24-26): "The final mixing of the casting batch under vacuum is an important and essential step in the process." It is now conceded, however, under the compulsion of overwhelming evidence, that the "essential" step of deaeration was common knowledge well before Molitor among those working with plastisols.

opening rested on a plate, allowing the gelled wall to flow and extend before fusion across the final enclosure formed by the plate. This procedure, like the clamping of the mold sections described above, was used to create completely enclosed hollow objects.

The three preceding paragraphs sketch very briefly some versions of a plastisol molding technique known and used in the art before 1948. Given that state of affairs and the wide **[**17]** familiarity with rotational casting as a generally usable process, it was at most a matter of brief time before people of ordinary skill came to combine these patently marriageable elements for making things from plastisols. Indeed, the alleged inventor, Molitor, in rare instances of insight and entire candor on the witness stand, twice described his achievement as "getting the jump" on the industry. This was no case of a ***HN2***[] need long felt and long unsatisfied despite vain quests - leaving aside that this would be a "secondary consideration" in any event. *Graham v. John Deere Co., supra, 383 U.S. at 17-18, 86 S. Ct. 684*; *Greening Nursery Co. v. J and R Tool and Mfg. Co., 376 F.2d 738, 742 (8th Cir. 1967)*. It was at best a successful sprint to a complaisant Patent Office, resulting in monopolization of a development that was visible and certain to be recognized in short order by anyone interested and reasonably skilled in the art. See *Ruben Condenser Co. v. Aerovox Corp., supra, 77 F.2d at 268*; *Himmel Bros. Co. v. Serrick Corporation, 122 F.2d 740, 746 (7th Cir. 1941)*; *Pierce v. American Communications Company, 169 F. Supp. 351, 355 (D.Mass.1958)*, aff'd, *280 F.2d 278* (1st Cir.), cert. **[**18]** denied, *364 U.S. 902, 81 S. Ct. 235, 5 L. Ed. 2d 195 (1960)*. To deny patentability in such a case is merely to recognize that ***HN3***[] Congress is not empowered, and has never reflected a disposition, to "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co., supra, 383 U.S. at 6, 86 S. Ct. at 688, 15 L. Ed. 2d 545*.

This conclusion is not subject to the constant worry that lay judges will substitute uncritical hindsight for a legitimate judgment of what would have been "obvious" from the vantage point of the pertinent time and place. For, contrary to defendant's assertions, others than Molitor arrived at his "invention" before him or around the same time, and wholly independently of his efforts. **[***380]**

a. American Anode, Incorporated, engaged in formulating and selling plastisols (among other materials) rather than manufacturing goods from them, experimented over the years with various molding techniques and other modes of use to increase the sales of its products. Personnel of this Company developed, publicized, made no secret of (and made no attempt to patent) **[**19]** the process of Molitor's patent over a year before the filing of Molitor's application on June 27, 1950. The oral deposition testimony supporting this finding is somewhat vague and unsatisfying when considered by itself. But the testimony does not stand alone. It is powerfully corroborated by unquestioned documentary evidence, an American Anode bulletin of July 1949 clearly and succinctly describing the technique Molitor purports to have invented. [8] **[*492]** Though less wordy than Molitor, this bulletin tersely taught everything Molitor claimed. Describing one among several molding procedures (including the technique of slush molding sketched above), it outlined the steps for rotational casting as follows (P. Ex. 33, p. 3):

> "1. Pour a premeasured amount of Ameran Resin Paste (plastisol) into the mold.
>
> "2. Rotate the mold to distribute the paste uniformly over all contact areas of the mold cavity. Provisions should be made for a heating chamber or oven in which the mold may be rotated, preferably at temperatures of 350 degrees F. Exposure for 20-40 minutes during rotation will completely fuse the plastisol.
>
> "3. Allow mold to cool (if desired, the mold may **[**20]** be cooled rapidly in cold water). Remove product from mold."

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[8] It makes no difference for the question of obviousness treated here that the bulletin failed by a narrow margin to precede Molitor's application by more than a year, and thus presented no bar under *35 U.S.C. § 102(b)*. It should be observed in this connection, however, that plaintiff has urged the assignment to Molitor of some filing date later than June 27, 1950, the contention being that the initial application was not "effective" because of certain omissions and later amendments. There is no need, all things considered, to dwell upon this argument by plaintiff beyond recording that the court has rejected it.

Defendant makes no serious attempt to question that this covered fully what Molitor undertook to patent. [9] The document leaves no doubt that it reflects work preceding its publication date, as the oral testimony affirmed. Its brief, casual, informal disclosure for all the world is strong evidence that the process should be held to have been obvious for those skilled in the art.

[21]** b. Properly invoked by plaintiff on a variety of grounds, the Italian Delacoste patent, No. 440,295, applied for on December 11, 1947, and granted October 9, 1948, adds further support to the argument of obviousness. Since this patent is more fully considered below in holding that it anticipates Molitor, it is sufficient merely to note its pertinence here as well. Cf. *Felburn v. New York Central Railroad Company, 350 F.2d 416, 424-425 (6th Cir. 1965)*, cert. denied, *383 U.S. 935, 86 S. Ct. 1063, 15 L. Ed. 2d 852 (1966)*; *Helene Curtis Industries v. Sales Affiliates, 233 F.2d 148, 154-155* (2d Cir.), cert. denied, *352 U.S. 879, 77 S. Ct. 101, 1 L. Ed. 2d 80 (1956)*; *Himmel Bros. Co. v. Serrick Corporation, supra, 122 F.2d at 745*.

c. The evidence shows, and the court finds, that several other companies and people perceived the availability of rotational casting as a procedure for manufacturing plastisols before Molitor did or at about the same time, all independently of his efforts, which were kept secret until at least 1950. It was known to a Canadian company, Reliable Toy, at least as early as 1948. It was likewise known to a New York company, Ideal Toy, at about the same time. **[**22]** It was being employed experimentally in plaintiff's laboratory in 1949 although the necessary equipment to make it effective there for commercial production was not installed until several years after that.

While these ***HN4***[] efforts may have matured later than Molitor's, this fact is scarcely decisive on the question of obviousness. What the court finds compelling is the inference that Molitor's was in no sense a unique perception - that others all around him were arriving at, or verging upon, the simple combination of familiar things he undertook to patent.

It is pertinent, too, that the experimental character of work other than Molitor's is at most an equivocal item in his favor. The evidence demonstrates that what he taught (and failed to teach) would have left a need for considerable experimentation by anyone **[***381]** seeking to use his teachings. He purported to emphasize, for example, the benefit of uniform wall thickness. But the evidence shows that he was himself unable to achieve this desideratum with any but **[*493]** the simplest of molds. [10] He spoke vaguely of rotating in a "multiplicity of planes," but his own testimony shows that experiments would be necessary with particular **[**23]** molds to achieve the kinds of rotation that might approach desirable distribution. And so, for example, when a consultant for Reliable Toy in Canada said in 1948 that rotational casting was "difficult" though feasible, he announced little, if anything, less than Molitor later purported to teach. [11]

d. An interesting chapter in the evidence on obviousness is the deposition testimony of Frank Stefanski, described by defendant as **[**24]** one who "consistently and repeatedly told a straightforward story of his experimental and developmental work in the rotational casting of vinyl plastisol." Plaintiff contends in this frequently bitter lawsuit that defendant "got to" Stefanski and caused him to lie. However that may be, the court finds it sufficient to accept what Stefanski said, because it represents, as it stands, additional support for plaintiff's assertion of obviousness.

At least as early as 1947 or 1948, using primitive equipment in the basement of his home, Stefanski proceeded to do what Molitor later patented, but with one assertedly fatal imperfection: the sections of his molds did not fit together perfectly so that, as defendant describes his plight, "he got leakage from the mold before the material

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[9] Defendant's expert made some quibbling efforts (Tr. 4131 et seq.) to show teachings in Molitor assertedly absent from (or inferior in) the American Anode bulletin. The net of his suggestions is to reenforce plaintiff's thesis that the bulletin amply covered the same thing in every pertinent respect.

[10] A "Mickey Mouse" was a central character in the trial and is pictured on Molitor's patent with the much extolled and discussed "uniform wall." Samples of this figure made in defendant's plant by Molitor's process were also in evidence. They had distinctly non-uniform walls. Molitor's quaint explanation was that a uniform wall was not really wanted for the actual toy.

[11] Pressed repeatedly to specify what Molitor taught that was new, defendant's expert came finally to say that Molitor's achievement lay in his proclaiming that rotational casting of plastisols was "possible."

gelled." (Trial Brief of Defendant, p. 199.) Confronting that disaster, this "straightforward" witness said, he despaired and gave up rotational casting. Thirty or so pages after the last-cited reference, meeting an attack by plaintiff upon the adequacy of Molitor's teachings, defendant writes (*id., p. 231*): "It doesn't take much perception to observe that the liquid material would leak out if it were not a **[**25]** completely closed mold."

It is enough to say of Stefanski that his rudimentary efforts as early as 1947 help to buttress plaintiff's demonstration that Molitor's patent is invalid because ***HN5***[] "the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art * * *." *35 U.S.C. § 103*.

Defendant's extensive efforts to show novelty and nonobviousness in Molitor's patent serve in the end to help vindicate plaintiff's contrary view. Characteristically, both in its brief and in its expert testimony, defendant tends to recite the whole of Molitor's claims to support its position on this subject. Responding, however, to the pressure to focus somewhere, defendant comes finally to the assertion that Molitor was new, original, and nonobvious because he hit upon and taught "a continuous casting process utilizing only a single temperature" - the high fusing temperature to carry the material all the way from liquid through gelation to fusion. [12] Before Molitor, the argument runs, people had gelled the plastisol at a lower temperature, around 200 degrees F., then fused it, in a second step, at the higher temperature. Defendant's **[**26]** expert said he would have been surprised to the point of incredulity to hear that the job could be done in Molitor's continuous way in a single heating step at the high temperature. And so this emerges in the end as an assertedly critical point, iterated over and over again in defendant's post-trial briefs.

But the argument is a clearly baseless afterthought for a variety of reasons.

[*494] To begin with, the text of the patent itself is inconsistent with this newly contrived theory. In each of the four claims, gelling and fusion are described as separate heating steps. Claim 1 teaches that the mold should be rotated,

> "heating the layer to gel it against the inner surface of the mold while the mold is rotating, *then applying additional heat to the closed mold* to raise the temperature thereof sufficiently to fuse the gelled layer * * *." **[***382]**

Similarly, Claim 2 describes gelling, and then prescribes "further heating * * * to fuse the gelled layer * **[**27]** * *." The two remaining claims are to the same effect. The file wrapper history shows that these references to "further" and "additional" heating were specifically and deliberately added to the final revisions toward the end of the application's tortuous journey through the Patent Office.

If the singular product of Molitor's genius was the single heat at fusion temperature for the whole process, this was a remarkably unsuitable way to teach it.

Further demonstrating the recency of defendant's insight on this subject is its inconsistency with what defendant taught the Sixth Circuit almost ten years ago in the submissions leading to the favorable decision for the patent in that Court. *National Latex Products Co. v. Sun Rubber Company, 274 F.2d 224 (1959)*, cert. denied, *362 U.S. 989, 80 S. Ct. 1078, 4 L. Ed. 2d 1022 (1960)*, a decision of major interest discussed at length hereafter. In its successful brief on that appeal, defendant enumerated the several steps of Molitor, and included (p. 5):

> "4. heating the layer to gel it against the inner surface of the mold while the mold is rotating,
>
> "5. then applying additional heat to the closed mold to raise the temperature **[**28]** thereof sufficiently to fuse the gelled layer against the inner surface of the mold * * *."

The opinion of the Sixth Circuit Court of Appeals reflects that description.

Of course, the obvious advantage of rotational casting - as against slush casting, for example - is that the process can be continuous from the time the mold is closed until the finished object is removed. But this, for reasons

[12] Trial Brief of Defendant, p. 15.

already reviewed, was not a novel or nonobvious discovery. The focus here is on the particular point defendant has chosen now to stress - the single high temperature throughout. What has been said thus far is that this has only become in this lawsuit a supposed matter of particular consequence. It was never isolated or emphasized - but actually contradicted - in the terms of the patent and its previous defense. Cf. *Graham v. John Deere Co., supra, 383 U.S. at 25, 86 S. Ct. 684, 15 L. Ed. 2d 545*.

Furthermore, the point is trivial. It is not to be supposed that defendant would concede noninfringement if the rotating mold passed through two heating chambers - one at gelling temperature, a second at the higher fusion temperature - during the continuous molding process. [13] Indeed, the **[**29]** testimony made clear the common practice in this art, as in others, of using hanger conveyors for moving molds along through the stages of the casting process.

Finally, if Molitor had claimed some invention in this respect, the claim would lack substance. The evidence shows that it was known in the art that a mold could be exposed to the high fusion temperature to achieve the earlier (gelation) stage as well as the later condition of fusion. It is sufficient here to refer to the American Anode bulletin of July 1949, quoted earlier, which described the procedure of rotational casting and plainly contemplated (unlike Molitor) handling of the whole business in a **[*495]** single heating chamber at a single high temperature - namely, "preferably at temperatures of 350 degrees F."

The subject of temperature is the **[**30]** closest defendant comes to suggesting anything nonobvious about Molitor. The suggestion must be rejected.

To conclude on the issue of obviousness, it may merit reemphasis that this barrier in *§ 103* commonly blocks patentability in cases where nobody has arrived independently at the result claimed by the alleged invention - and even in the face of evidence, absent here, of a need long recognized but unsatisfied. The evidence that has been canvassed of work by others serves more clearly to demonstrate the obviousness plaintiff asserts.

2. *Anticipation by Delacoste Italian Patent No. 440,295*

We focus more closely here upon an item noted under the preceding heading. The court holds that in light of the Italian Delacoste patent of October 9, 1948, Molitor's patent is invalid on the separate and independent ***HN6***[] ground that

> "the invention was patented or described in a printed publication in * * * a foreign country * * * more than one year prior to the date of the application for patent in the United States * * *." *35 U.S.C. § 102(b)*.

The Delacoste patent, which was not cited in the Patent Office, reads in directly pertinent part as follows:

> "This invention relates **[**31]** to a process of manufacturing hollow molded objects of natural or synthetic resin, weldless, seamless and practically without a gap * * *, as well as to a large variety of hollow molded **[***383]** objects which can be obtained by this process.
> "According to this invention, the process consists primarily in depositing in a mold, completely closed but demountable to permit extraction of the manufactured object, an amount of natural or synthetic resin necessary to obtain by deposit on the inside surface of the mold the desired wall thickness. Said resin is mixed with a plasticizer * * *. Thereafter it is heated, letting the mold oscillate gently so that the resin deposits itself uniformly on the entire surface, and the operation is prolonged until the gel has solidified (becomes firm) * * *, whereupon the mold is opened and the manufactured object is removed.
> "Thus, for example, to produce a seamless hollow object of polyvinyl resin, said resin may be kept in suspension in a suitable plasticizer * * *.

[13] Compare the converse argument of plaintiff, considered and dismissed later on, that there is no infringement because plaintiff uses a single heating step while Molitor must be read to teach two.

"The amount of resin with its desired plasticizer is placed into the mold, the latter being closed and heated and the operations continue as indicated above. The heating of the mold can be brought **[**32]** about by projection of Steam, by immersion in a hot (warm [14] liquid, electrically, electromagnetically, or by any other means.
* * *

"Whatever may be the resin used for obtaining the deposit on the surface of the mold of a uniform product layer, it is necessary to have the mold utilized oscillate in a methodical, slow and regular manner. Thus, in accordance with one of the characteristics of the invention, excellent results are **[*496]** obtained by using a mold capable of revolving in a uniform or cadenced way, at a speed which can be of the order of 10 revolutions per minute, around two axes preferably at right angles (orthogonal).
"The mold, for example, may be carried by an oscillating arm pivoted around its axis, which arm is caused to rotate around an axis perpendicular or not to the preceding one.

"One observes that the process for obtaining hollow objects or bodies without joints, by a deposit on the inside surface of a closed mold has already been suggested for other uses, and that the invention is limited to the particular and new application of this process for the purpose of obtaining objects of natural or synthetic resin capable of forming a gel or thermo-hardening. **[**33]** This invention concerns itself also with new industrial products, hollow objects, of a regular thickness and without seams, made of natural or synthetic resin, which could not be produced heretofore.
"CLAIMS
"1. The process of manufacturing hollow objects substantially closed and without seams, by a deposit of a fluid or meltable and hardening substance on the inside surface of a closed, rotatory mold, consisting in depositing in the mold the desired amount of natural or synthetic resin, to obtain on the mold a layer of convenient thickness, to which is added if required a hardening agent, by causing the mold to rotate gently in every (any) direction in order to obtain a uniform layer of resin on the entire inside surface of the mold, by heating to transform the layer of resin into gel, thereafter opening the mold and withdrawing the hollow object thus produced."

[34]** To state the court's conclusion broadly, everything Molitor purported to teach is found in the foregoing patent; the arguments of defendant for a contrary view are without merit.

a. Defendant's most insistent point - stressed in the briefs, elaborated in the testimony of defendant's expert, and deemed critical in the decision of the *Court of Appeals for the Sixth Circuit, National Latex Products Co. v. Sun Rubber Company, supra* - is that Delacoste failed to reach the target because he wrote only of causing the material to "gel," omitted the further need to fuse and cool, and so taught a futility. Delacoste not only failed to mention "fusing" and "cooling," say defendant and its expert, but he mentioned "projection of steam" among the several heating means he suggested; this *must* be read to show a temperature not greater than 212 degrees F.; and so, the argument concludes, Delacoste obviously fell **[***384]** short of fusing and cooling the object. Whatever might have been thought of these contentions on the Sixth Circuit's smaller and different record, they are exposed as frivolous on the record before this court.

If Delacoste is read with a view to learning from him - which is the assumed **[**35]** stance of one with ordinary skill viewing the prior art, cf. *Western States Mach. Co. v. S. S. Hepworth Co., 147 F.2d 345, 350* (2d Cir.), cert denied, *325 U.S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991 (1945)*; *Application of Hooker, 175 F.2d 558, 562, 36 C.C.P.A. 1164 (1949)*; *Pickering v. McCullough, 104 U.S. 310, 319, 26 L. Ed. 749 (1881)* - it is perfectly clear that he did not mean

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[14] The parenthetical word, here as elsewhere in the quoted portions of the Italian patent, represents an alternative translation of the original Italian - in this instance, the word "*caldo*." It is conceivable that daring lawyers or judges, recalling encounters with Italian sinks or Italian colleagues or Italian-English dictionaries, might deem it knowable without more that the word "*caldo*" may mean either "hot" or "warm" depending upon the context. The defendant, however, announced early in the trial a disposition to mount intensive attacks upon this word in the Italian patent. Plaintiff produced a distinguished expert in the Italian language to cope with this problem. The upshot of this effort is a finding that the Italian word "caldo" may mean either "hot" or "warm" depending upon the context.

to have the process stopped at the "gel" stage as the quoted word is currently used [15] - i.e., that he did not mean for the user to open the mold and be rewarded with only the drooling of a useless "cheesy mass" to be discarded as waste. He announced that the goal of his process was a "manufactured **[*497]** object;" that the operation should be prolonged "until the gel has [solidified] * * *, whereupon the mold is opened and the manufactured object is removed." He stated repeatedly that the last step was the opening of the mold "and withdrawing the hollow object thus produced." Defendant concedes the common understanding that plastisols had to be fused and cooled (at known temperatures) before they could be withdrawn from their molds (in any casting process) as "manufactured objects." Only a persevering **[**36]** desire to fail, or ignorance of what everyone knew, could have led to reading Delacoste as defendant insists he must be read.

The expert upon whose persuasiveness defendant puts heavy weight came slowly and grudgingly to this conclusion. He acknowledged, finally, that reading Delacoste in 1948, and knowing what was familiar to those skilled in the art about fusion and cooling, he would have carried Delacoste's teachings through these stages. He conceded, too, that Delacoste mentioned heating means clearly adequate for achieving the necessary temperatures.

After his concessions had been made, defendant's expert clung to an insistence **[**37]** that Delacoste was inferior to Molitor because only the latter taught that the whole procedure could be conducted at the single (fusion) temperature of over 300 degrees F. The character of this point as a recently contrived, trivial, misleading irrelevancy has been treated earlier at more than sufficient length.

b. It is also asserted that Delacoste could not be read to disclose what Molitor later taught because the Italian patent covers a broad range of materials, both workable and unworkable, and fails to focus with clear and exclusive precision upon "plastisols." Molitor, it is argued, displays the virtue of such a clear reference.

It is true that Delacoste covers many things more than plastisols. But his references clearly cover plastisols, as anyone in the art concerned with them would have seen promptly. On the other hand, it is not true that Molitor achieves the asserted clarity on this subject. To begin with, "plastisol" was a familiar and sufficient word to describe a "plastisol" when Molitor made his alleged invention. But Molitor's patent never uses the word. Secondly, the phrase he does use - "a liquid mixture of a vinyl resin and a plasticizer therefor" - is neither **[**38]** exclusive of other things nor an apt way of saying "plastisol." Among his possibly inadvertent concessions on cross, defendant's expert was brought to admit that Molitor's language was not well suited to describing a "plastisol." He acknowledged that the words could also refer to an "organosol," obviously unsatisfactory for rotational casting. The evidence shows, in short, that anyone bent on learning nothing from Molitor (as the defense was with respect to Delacoste) could find that he described in his general words an array of other materials unsuited to the process.

To rescue Molitor from this fate, the defense expert observed, fairly enough, that he would have brought to the patent his "common sense," his appreciation of the context, his learning about plastisols, and his interest as one skilled in the art to discover practical benefits from what was being taught. But this entirely reasonable approach gives up the ghost of the theory that nothing good could have been found in Delacoste. The record makes clear that defendant's expert, like other interested persons with ordinary skill in the art, would have perceived the utility and workability in Delacoste (and Delacoste's entirely **[**39]** ample reference to plastisols) no less than in Molitor.

Indeed, while it is not strictly essential, it bears some emphasis that Delacoste's teachings were plainly superior to Molitor's in relevant respects. Delacoste **[***385]** defined precisely the mode and speed of rotation. While defendant's expert recognized the absence of any such teaching in Molitor, he said he would have been able to supply it by again invoking his "common sense." And defense counsel - supporting an invention he repeatedly **[*498]** epitomizes as "rotational casting" - came finally to the sound view that there was no need for Molitor to tell how to rotate because "the art will tell you that" (Tr. 4261).

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[15] The record shows that when Delacoste obtained his patent, it was common, especially in Europe (including England), to use the word "gel" ambiguously, tending to bracket under it the stages now separately identified as gelation and fusion. Defendant's expert tardily conceded this. But defendant's views on the subject lack substance even apart from this pertinent item of linguistics.

Defendant formulates in various ways its attacks upon the adequacy of Delacoste's teachings. But they come in the end to the thoughts that have been discussed above. Underlying these thoughts are some legal premises on which a few words should be said. It is urged, for one thing, that foreign patents like Delacoste's should be "strictly construed." There is support in the books for this. See, e.g., *National Latex Products Co. v. Sun Rubber Company, supra, 274 F.2d at 236*; *Adler Enterprises, Inc. v. Carson, Pirie,* ***[**40]*** *Scott & Co., 218 F. Supp. 325, 330 (N.D.Ill.1963)*; *Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649, 659 (N.D.Ill.1961)*. There is a good deal of weighty sentiment to the contrary. See, e.g., *Dewey & Almy Chemical Co. v. Mimex Co., 124 F.2d 986, 989-990 (2d Cir. 1942)*; *Trussell Mfg. Co. v. Wilson-Jones Co., 50 F.2d 1027, 1029 (2d Cir. 1931)*; *Application of Moreton, 288 F.2d 708, 711, 48 C.C.P.A. 875 (1961)*. If it were necessary for this lower court to come down hard on the subject, the latter view would be followed. Where the essential inquiry is whether the subject was adequately and publicly taught over a year before the United States application - and noting that the statutory bar in *35 U.S.C. § 102(b)* applies no less to foreign "publications" than to patents - there is no good reason in our time of international business to extend patent monopolies here by artificial excisions from foreign contributions. Cf. *Greiser v. Brenner, 253 F. Supp. 906, 909 (D.D.C. 1966)*.

In any event, even "strict construction" does not entail the obstinate failure of comprehension urged by defendant and its expert. Reading Delacoste only with the understanding of those modestly skilled in the **[**41]** art, it anticipates Molitor.

Defendant has seemed sometimes to suggest (although defense counsel has explicitly and correctly disclaimed the suggestion) that Delacoste fails to anticipate because its ***HN7***[] vagueness and excessive breadth would not have met United States standards of patentability. In the circumstances, it is sufficient to note that this is not the test under *§ 102(b)*. Cf. American Infra-*Red Radiant Co. v. Lambert Industries, Inc., 360 F.2d 977* (8th Cir.), cert. denied, *385 U.S. 920, 87 S. Ct. 233, 17 L. Ed. 2d 144 (1966)*.

3. *The Sixth Circuit decision and defendant's fabrications as to date of conception*.

Already mentioned more than once, defendant's victory of almost a decade ago in the *Sixth Circuit, National Latex Products Co. v. Sun Rubber Company, supra*, has been a central subject in this lawsuit. That decision by a divided court (McAllister, J., dissenting) affirmed in all presently material respects the views of Chief Judge Jones in the *District Court for the Northern District of Ohio, 159 F. Supp. 661 (1958)*. In this court, defendant has urged at length the heavy weight of those judgments and the burdensome anomaly of having a later decision invalidate **[**42]** a patent upheld so long ago.

Somewhat more unusual is plaintiff's effort to employ that unfavorable precedent as an independent and affirmative ground for denying enforceability of the patent. Plaintiff's thesis is that defendant perjuriously misled the Sixth Circuit in material respects, that the same false evidence has infected this court's record, and that defendant is precluded as a result from seeking enforcement of the patent here. For reasons now to be stated, plaintiff prevails on this aspect of the case.

a. *Grounds for departure from the Sixth Circuit's decision*

The principles governing this aspect of our problem are familiar. ***HN8***[] The decision on patent validity of another federal court, especially a higher one, is entitled to great weight, as defendant says. See *Georgia-Pacific Corp. v. United States Plywood Corp., 258 F.2d 124, 133* (2d Cir.), cert. denied, *358 U.S. 884,* ***[*499]*** *79 S. Ct. 124, 3 L. Ed. 2d 112 (1958)*; *Cold Metal Process Company v. Republic Steel Corp., 233 F.2d 828, 837* (6th Cir.), cert. denied, *352 U.S. 891, 77 S. Ct. 128, 1 L. Ed. 2d 86 (1956)*; *Novadel-Agene Corporation v. Penn, 119 F.2d 764, 766* (5th Cir.), cert. denied, *314 U.S. 645, 62 S. Ct.* ***[**43]*** *85, 86 L. Ed. 517 (1941)*. But it is not binding. See, e.g., *Jungersen v. Baden, 69 F. Supp. 922 (S.D.N.Y.1947)*, aff'd, *166 F.2d 807 (2d Cir. 1948)*, aff'd, sub nom. *Jungersen v. Ostby & Barton Co., 335 U.S. 560, 69 S. Ct. 269, 93 L. Ed. 235 (1949)*; *Stanley Works v. Rockwell Mfg.* ***[***386]*** *Co., 203 F.2d 846, 848* (3d Cir.), cert. denied, *346 U.S. 818, 74 S. Ct. 30, 98 L. Ed. 345 (1953)*. Where, as in this case, the record leads compellingly to a different conclusion, the second court is forced, with all respect, to render a conflicting judgment. It is of importance, however, to state the grounds on which it appears to this court that the Sixth Circuit was led into error.

(1) For reasons already stated, this court has found that the Italian Delacoste patent anticipated Molitor's. Apart from the doctrine of strict construction applied by the Sixth Circuit to Delacoste (see *274 F.2d at 236*), [16] that Court seems to have erred in material respects on this question. It singled out as a critical omission from Delacoste and an "essential and non-obvious step" in Molitor "the temperature change necessary to accomplish the transition of the material from gel to fusion." *Id. at 235*. Repeatedly emphasizing **[**44]** this "all-essential feature" (ibid.), the Court said "Delacoste teaches gelling and not fusion." *Id. at 236*. In the present case, however, to go no farther than the concessions of defendant's present expert, it is perfectly clear that anyone skilled in the art would have read and used Delacoste to bring the "manufactured object" to the point of fusion, followed by cooling.

(2) The Sixth Circuit appears to have been led to an excessively expansive view of what Molitor accomplished. It observed (though he seems not to claim) that he created "a new product" (*id. at 239*). It seemed to credit him with evolving the *slush molding of plastisols* (see **[**45]** *id. at 240*), though he acknowledges here that this was no part of his achievement.

(3) The Sixth Circuit was impressed by the "enormous commercial success" of Molitor's invention. *Id. at 238*. On the evidence here, it is difficult to perceive the basis for that characterization. Defendant has shown, to be sure, that its own plant produced some millions of "pieces" by the Molitor process in the 1950's. How "successful" or profitable this was is another question, largely unanswered, though it is perhaps relevant that defendant in 1958 (five years after Molitor's patent) was undergoing a Chapter XI reorganization when the Sixth Circuit opinion was written and for some time thereafter. As to more objective measures of patent success, defendant's case is notably unimpressive. Up to the time of the Sixth Circuit decision, defendant had acquired exactly one domestic licensee, and that a most equivocal one. The single licensee, B. F. Goodrich, was in the business of supplying materials for plastisols. At the time Goodrich took a license, at a modest price, defendant contracted to purchase for a year 75% of its resins from Goodrich, agreed to promote Goodrich resins with other licensees, **[**46]** and thus made commercially attractive this means of ostensible tribute despite the view of Goodrich's counsel that the Molitor patent was not a valid one.

(4) Perhaps the most significant point of all diminishing for this court the weight of the Sixth Circuit's decision is the overwhelming demonstration by the plaintiff here that the Sixth Circuit's record, like the one now under consideration, **[*500]** was blighted by perjury in significant respects.

In the Ohio Court, as here, Sun placed Molitor's date of invention at April 10, 1948. Central to that obviously material proposition was an oddly scattered series of a few so-called "progress reports" by Molitor ranging from early April 1948 to February 1, 1949, with huge and suspicious gaps in the series. [17] For a long time, until the midst of the trial here, defendant was able to produce only copies of the papers that were before the Sixth Circuit. Employing both the copies and the ones belatedly produced - and pursuing a course of tenacious cross-examination - plaintiff was able to prove overwhelmingly the falsity of defense testimony about them and the falsity of the inference urged from them (and accepted by the Sixth Circuit) **[**47]** that Molitor made his invention in early April of 1948. [18]

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[16] A doctrine which appears, incidentally, to have had less standing in the same Circuit both before and since the decision in Sun's favor. See *Allied Wheel Products v. Rude, 206 F.2d 752, 759-760 (6th Cir. 1953)*; *Monroe Auto Equipment Co. v. Heckethorn Mfg. & Sup. Co., 332 F.2d 406, 413* (6th Cir.), cert. denied, ***379 U.S. 888, 85 S. Ct. 160, 13 L. Ed. 2d 93 (1964)***.

[17] Testimony for the defense was that Molitor was to make such reports weekly at first, later monthly. But the gaps are much larger than weeks or months. A defense witness suggested the explanation that Molitor was engrossed in his work, impatient over writing things down. Yet one of the longest of the few documents ascribed to him was shown to have been copied to a large extent from publicly available writings distributed by Goodrich.

[18] For reflections of the importance asscribed to this point and the "progress reports" by the Sixth Circuit, see *274 F.2d at 231, 233, 234*. It is unnecessary for our purposes to pinpoint exactly the extent to which the subject was deemed critical by that Court.

[*387]** To state the **[**48]** gist of what plaintiff has shown, it is that the reports prior to February 1949 were all concerned in fact with Molitor's work on such old techniques as slush casting, not rotational; that the testimony of defense witnesses attempting to show these papers as records of rotational casting is so clearly false and self-contradictory as to reveal deliberate untruthfulness; and that the efforts in this court to embellish and sustain what was told in Ohio serve only to highlight the falsity of the account in both places. These conclusions rest both upon the inherent incredibility of the testimony (analyzed in relation to the documents) and upon the demeanor of the witnesses. Without attempting to detail exhaustively the factors underlying these ultimate determinations, some important items should be recorded:

(1) The exposure of defendant's fraud as to the time of conception begins with a document which was not before the Sixth Circuit but was turned up toward the end of the present plaintiff's dogged discovery on another (and less fruitful) subject. The document relates to the prosecution of Sun's Canadian application for a patent on Molitor's process in the course of which the Italian **[**49]** Delacoste patent, considered earlier herein, was cited, as it had not been in the United States Patent Office. In the correspondence on this subject, Sun's Akron patent counsel became concerned (unnecessarily as it developed) with the possible materiality of the Italian patent's grant date (October 9, 1948) as against its printing date (July 1949). Inquiring on this subject, Akron counsel wrote to the Canadian attorneys the following letter of November 30, 1956 (P. Ex. 126X):

> "I am in receipt of an Office Action, dated November 23, 1956, in the above entitled case in which the Patent Office cites Italian Patent No. 440,295, which was granted October 9, 1948, but was not printed until July 1949. We have met this patent in connection with certain litigation on the corresponding U.S. patent in this country and are prepared:
>
> > "1. To point out the essential difference between the Delacoste patent and the disclosure in the Molitor application, and
> >
> > "2. To contest the effective date of the patent.
>
> **[*501]** "In connection with the latter matter, will you please advise me whether under the Canadian Patent Law the date of the grant is taken as the effective date of this patent **[**50]** or the date of the printing. *We can carry the date of the Molitor invention back of the printing date, but cannot carry the date of the invention back of the granting date of the Italian patent*. In this connection, of course, I will have to be advised whether an earlier invention in the United States can be used in Canada to anticipate a situation of this character."

Thus, over ten years ago, with memories fresher and all the documents more readily available, defendant acknowledged (through counsel who had obtained the United States Patent) that it could not claim a date of invention before October 1948.

Later, in the Ohio lawsuit, it became apparent that a still earlier date of invention might be necessary to defeat claims of prior invention made there. That was the inception of the false testimony about "progress reports" extending back to April 1948 found persuasive in the Sixth Circuit and perpetrated again in this court.

Plaintiff lays great stress, as well it might, upon the fatal admission in the letter of November 30, 1956, recording that the date of invention could not be placed earlier than (or, evidently, as early as) October 1948. On the other hand, defendant's **[**51]** lengthy briefs are devoid of any reference whatever to this key exhibit. There is no attempt to explain the startling contrast between

> (1) the acknowledgment closer to the events, by counsel who prosecuted the American patent application, that all the relatively recent information available to him dated the alleged invention after October 1948, and (2) the testimony here - by defendant's president, the inventor, and defendant's chief chemist, all assertedly documented by reading meanings into progress reports - that the significant and memorable achievement had been accomplished in April 1948.

The wholly unexplained contradiction goes far in itself to expose the falsity of the testimony on this subject. But the record further demonstrates this conclusion in other ways.

It is sufficient that it was obviously considered to be material and was offered by Sun, both there and here, to be so considered. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)*.

(2) Although it is testified that the progress reports, starting in April 1948, announce what was characterized by defendant's president as a major and unforgettable breakthrough to the rotational **[***388]** procedure, there is not a word about "rotation" or "rotating" (or turning or revolving or anything of the kind) in any one of them before February 1, 1949, where the simple and obvious words were used to **[**52]** describe the *then* new procedure.

(3) The Sixth Circuit found impressive, and particularly noted, Molitor's report of April 20, 1948. The Court also referred to handwritten notes in the margin of this report. See *274 F.2d at 233*. Our record - and, really, the report on its face - shows that the report was not about rotational casting at all. The addressee of the report, Mr. Cartlidge, testified on deposition in the present case that it referred to slush casting. At the trial, after consulting with counsel, he changed this testimony. His first account was the truthful one. The marginal notes were made long after the report. The passage deemed significant by the Sixth Circuit refers to "curing * * * *under* infra red lamps * * * held 4 inches *above the mold*" to produce a temperature of 450 degrees F. It would be difficult even for a layman to produce a more misleading description of "rotational casting" on a machine with heat sources all around the revolving and rotating arm holding the mold - the picture the testimony would have the court discern in the report. If there were doubt that this is a false picture, it would be ended by the shifting, evasive, and thoroughly **[**53]** incredible efforts of Molitor to sustain defendant's contention on the witness stand.

(4) Molitor testified repeatedly, but not truthfully, that he was creating hollow toy lambs by rotational casting in **[*502]** April 1948. The evidence shows that he was using a *vented* lamb mold at that time, unsuited to the claimed process. When he came finally to cast a lamb rotationally, his report of February 1, 1949, said so - for the first time. The report for April 20, 1948, alleged to reflect (though it nowhere mentioned) successful rotational casting of lambs, was amplified by Molitor's testimony that these April efforts produced a number of satisfactory toys by the new process. If the testimony were true, there would be no sense in Molitor's announcement almost a year later, in the February 1, 1949, report, which said: "Using a Rotating Machine developed in our Machine Shop and a lamb mold made of cast aluminum several lambs were cast from the Vinyl Plastisol Paste." [19]

[54]** (5) Molitor testified to pouring the plastisol into a cool mold before beginning rotation in April 1948. The contemporaneous document shows loading of the mold at 200 degrees F.

(6) Defendant's president, Smith, undertook to shore up the April 1948 story by recalling a middle-of-the-night telephone call from Molitor (then an $86-perweek employee paid by the hour, and only placed in the higher, salaried category months later) urging excitedly that Smith come from his home to the plant to see a successful sample of a rotationally cast lamb. [20] **[**55]** The call and his response were etched indelibly on his memory, Smith said: "I'll never forget it." So he went, he testified, and saw the lamb. But this vivid recollection was not given to the Ohio court when Smith testified some ten years closer to the alleged event. The story is not true. There were no rotationally cast lambs at the plant in April 1948 at any time of the day or night. [21]

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[19] Molitor was shown in other respects to have a penchant for misstatements that cannot be deemed inadvertent. He swore, for example, that a machine allegedly used in his 1948 experiments had not been known to him at the time as a "Kaysam machine" (a matter of potential consequence in the case). Confronted with a prior contradiction of this in writing, he retracted it. He swore falsely in the Patent Office to having experience working with plastisols prior to his employment by defendant. Examples could be multiplied, but it is sufficient to note that this alleged inventor was a singularly unimpressive witness whose credibility was not enhanced when he protested that he was "confused," apologized for "[appearing] so stupid," professed modesty about his ability to express himself when his explanations sounded particularly lame, and explained that the supposedly vital "progress reports" did not mean what they appeared simply to say.

[20] The evidence showed that before this nocturnal drama Molitor had little day-to-day contact with the company president, reporting normally to people lower in the hierarchy.

[21] This is not the only specific instance of false testimony by Smith. In an affidavit filed in this court to support a motion resisting *in personam* jurisdiction over defendant, he stated that Sun's only place of business was in Barberton, Ohio. The statement is now conceded to have been false. But it required an appeal from an order of dismissal to arrive at that concession. Another Smith affidavit denied the existence of a requirements contract with Goodrich. It has since been established that such a contract, negotiated by Smith, did in fact exist. The same affidavit denied, falsely, that defendant had ever licensed any company other than McNeil to make machines for Molitor's process - a denial that concealed a license with another company on

[56]** (7) On May 1, 1948, defendant's plant was struck. Molitor - allegedly having made the invention which, according to Smith, opened a whole "new panorama" for the company - went to his home in another state while others stayed close to the plant for the four months of the strike, eagerly discussing rotational casting. This odd detail, in its context, adds to the general aura of incredibility. **[***389]**

[*503] (8) Though defendant retained regular patent counsel, it was over two years after the alleged conception before Molitor's application for a patent was filed.

(9) The Sixth Circuit mentioned Molitor reports of October 5, and December 6, 1948, to show that "on Molitor's orders a number of Mickey Mouse toys were made by a method which employed rotational casting." *274 F.2d at 233*. There is nothing in these reports about rotational casting. The testimony purporting to tie them to this process, at least in this court, is untruthful.

b. Legal consequences of defendant's false evidence

Apart from its impact on the weight of the Sixth Circuit's decision as a precedent, the perjury committed in that Court and this one supplies independent grounds for refusing enforcement of defendant's **[**57]** patent against plaintiff. For reasons which have been outlined, this is not a case of isolated mistake or untruthfulness by a single witness. The picture is one of deliberately organized fabrication - with defendant's president, the alleged inventor, and the erstwhile laboratory chief combining to create a story which did not exist for the use of defendant's patent counsel as late as November of 1956.

As has been observed, defendant came here with the Sixth Circuit decision as a major weapon. For this reason alone, the exposure of the infection in that case would seem sufficient to defeat defendant's counterclaim under the closely apposite holding of *Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 54 S. Ct. 146, 78 L. Ed. 293 (1933)*.

But there is a more direct and immediate basis for the same result. Whatever has happened elsewhere, an extensive pattern of fraud affecting a material issue has been spread and laid bare on this court's record. The counterclaim seeks equitable relief. The familiar principles leading to the conclusion of the preceding paragraph, summarized in the ancient but still profoundly meaningful doctrine of "unclean hands," would apply even **[**58]** if there had never been a similar case in the Sixth Circuit. It is sufficient to defeat the counterclaim that defendant has in this very court transgressed the weighty "public policy against the assertion and enforcement of patent claims infected with fraud and perjury * * *." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 819, 65 S. Ct. 993, 999, 89 L. Ed. 1381 (1945)*; see also *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)*. Unless the courts are to sit as "mute and helpless victims of deception and fraud", ***HN9***[] the kind of "tampering" defendant has undertaken "with the administration of justice" (*id. at 246, 64 S. Ct. at 1001*) must, at a minimum, close the court's doors against an affirmative claim for equitable relief pressed by such means. *Mas v. Coca-Cola Co., 163 F.2d 505 (4th Cir. 1947)*; *Heath v. Frankel, 153 F.2d 369, 370-371* (9th Cir.), cert. denied, *328 U.S. 844, 66 S. Ct. 1025, 90 L. Ed. 1618 (1946)*; cf. *Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 534-535 (3d Cir. 1948)*, cert. denied, *335 U.S. 912, 69 S. Ct. 481, 93 L. Ed. 444 (1949)*; *Brantley v. Skeens, 105 U.S.App.D.C. **[**59]** 246, 266 F.2d 447, 452-453 (1959)*; *Brinson v. Brinson, 334 F.2d 155, 159-160, 10 A.L.R.3d 795 (4th Cir. 1964)*.

4. Plaintiff's remaining contentions as to validity

While plaintiff has prevailed on three separate and independently sufficient grounds for holding the patent unenforceable in this case, both the parties and the appellate court are entitled to a determination at this level of

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which plaintiff predicates claimed antitrust violations. Other instances, cited by plaintiff, need not be recounted. It is recorded, however, that Smith's manner, his repeated mistakes and bland "correction" of them when they became apparent, and his tendency toward argumentative oratory - in addition to the substance of his inaccuracies - all comprised a chapter of the evidence which has proved hurtful to defendant's case.

plaintiff's alternative arguments for the same result. The court's findings and conclusions on these further issues are as follows:

a. Plaintiff argues that Molitor was guilty of "late claiming" in the course of the patent's prosecution, running afoul of the rule in *Muncie Gear Works, Inc. v. Outboard Marine & Mfg. Co., 315 U.S. 759, 62 S. Ct. 865, 86 L. Ed. 1171 (1942)*. The contention is essentially **[*504]** similar to one considered at some length, and found unmeritorious, in the Sixth Circuit. See *274 F.2d at 230-231*. **[***390]** This court agrees with and follows that determination.

b. Plaintiff contends that the patent is invalid both because its teachings are insufficient and because they are excessively broad and vague. This point generates a bit of perplexity in light of plaintiff's **[**60]** successful claim of obviousness. If the court has erred on that issue, there may be substance in this one.

The evidence demonstrates, for example, that mere rotation "in a multiplicity of planes" (as Molitor vaguely described it) is not calculated to give the uniform wall thickness proclaimed by defendant as one of the patent's signal achievements. Molitor himself appears never to have achieved this result except with the simplest of spherical objects. Problems of mold wall thickness and configuration - wholly untouched by Molitor - require special handling beyond mere rotation, and modes of rotation must be experimentally tested if the claimed uniformity is actually to be achieved.

Defendant's answer is that these problems and their solution were all well known in the art, so that the claimed inadequacy of teaching is not a meritorious objection. Similarly, when plaintiff charges a failure to teach the necessity for molds completely sealed, defendant attacks this as silly, overlooking that the earlier work of Frank Stefanski (discussed above) is reported to have fallen short of Molitor for this reason alone.

The court agrees with defendant that Molitor's deficiencies were supplied **[**61]** by the knowledge of those skilled in the art. But this, the court has concluded, is true of the patent as a whole. Indeed, defendant's arguments in this aspect - excusing Molitor's vagueness or silence on matters at the heart of the alleged invention - tend to buttress the conclusion that there was nothing nonobvious anywhere in the patent.

The short of the present subject is this: if this court is mistaken in finding obviousness, plaintiff's contention as to the insufficiency of the disclosures may warrant reexamination notwithstanding the acknowledged requirement of a full adjudication at this level to the extent possible. As the decision now stands, there is neither occasion nor meaningful basis for sustaining this one of plaintiff's alternative theories.

c. Plaintiff contends that Molitor swore falsely in the Patent Office when he claimed to be the sole inventor of the process. There is substantial evidence for this view - not the least of which is found in his appearance on the witness stand and the evasive, unpersuasive testimony he gave there, including apparent ignorance of things an inventor of his claimed process would be thought to have remembered even many years **[**62]** later (e.g., what an "axis" is and how things rotate about it). The contention is also supported by (1) the demonstrated falsity of Molitor's story as to when he conceived the process (April 1948), and (2) President Smith's story that Molitor was away at home during the supposedly seminal months after April 1948 (the strike period) while others stayed on to consider rotational casting.

Plaintiff has not succeeded, however, in proving its primary contention under this heading - that the invention actually came to Sun from people, primarily a Mr. Collins and the Viceroy Company, in Canada. Thus, as the record stands, assuming the process was an invention, it came out of Sun's laboratory, was promptly assigned to Sun, and could plausibly have been attributed by Sun to Molitor's work at some time or other even if others made suggestions or contributed incidentally in some respects. Considering all the circumstances, the court does not sustain plaintiff's alternative argument that Molitor's oath claiming sole inventorship should be held false and made a separate, additional ground for invalidating the patent. Cf. *Agawam Company v. Jordan, 74 U.S. (7 Wall.) 583, 602-603, 19 L. Ed. 177* ***[**63]*** *(1868)*; *Pointer v. Six Wheel Corporation, 177 F.2d 153, 157 (9th Cir. 1949)*, cert. denied, *339 U.S. 911,* ***[*505]*** *70 S. Ct. 570, 94 L. Ed. 1338 (1950)*; *Henry J. Kaiser Company v. McLouth Steel Corp., 257 F. Supp. 372, 406 (E.D.Mich.1966)*; *Adams v. Columbus Manufacturing Co., 180 F. Supp. 921, 929*

(M.D.Ga.1960); Becton-Dickinson Co. v. Robert P. Scherer Corp., 106 F. Supp. 665, 675 (E.D.Mich.1952), aff'd, 211 F.2d 835 (6th Cir. 1954).

d. Plaintiff contends that the patent is invalid because an application for a similar Canadian patent was filed by defendant 51 rather than 60 days after the American filing. The legal issues thus raised have been thoroughly explored in an opinion of Judge Feinberg denying plaintiff's motion for summary judgment on this ground. 253 F. Supp. 12 (1966). That opinion left open, however, an opportunity for plaintiff to press the point at trial by attacking as a factual matter the Patent **[***391]** Commissioner's finding that the premature foreign filing was "inadvertent." See 253 F. Supp. at 22 n. 43.

The subject appeared on its face to pose potentially elaborate questions. For example, is the retroactive licensing, a matter seemingly confided to the Commissioner's **[**64]** discretion, reviewable at all? If so, what is the scope of review? Is the Commissioner's determination prima facie correct, final if based upon substantial evidence, or subject to the de novo finding of a district court?

As the case has developed, however, these interesting subjects may be left for another day. Plaintiff has failed to show anything but "inadvertence" to account for the solecism (a filing premature by nine days) of which it complains. Even if the matter be deemed open here for the court's independent determination, this highly technical attack upon the patent must be held unfounded.

B. *Infringement*

If defendant's patent were valid, there is no serious doubt that plaintiff would be an infringer. Attempting to fashion a shield from one of defendant's swords, plaintiff urges that Molitor's patent must be read as limited to a two-step operation for gelling and fusing. [22] If the problem were not essentially trivial, there might be substance in this contention. It is certainly true that Molitor's original (rejected) claims sounded more like a one-step heating process than those on which the patent finally issued. It is also true that at the Examiner's instance **[**65]** - very possibly to slide past a cited patent for rotationally casting latex - the Molitor claims were amended in the closing stages of the long struggle to insert deliberately and specifically the references to "additional" and "further" heating for fusion which have been considered earlier. This makes plausible at least the claim of "file wrapper estoppel" which is an elaboration of plaintiff's thesis that only two-step heating procedures could be held to infringe.

But the whole subject amounts in the end to a large quibble - generated, in fairness to plaintiff, by the patenting of a totally obvious procedure, however the well-known task of cooking was accomplished. Nevertheless, if the court's relative certainty on this score (as well as the other grounds of invalidity) should prove unfounded, it is recorded **[**66]** that plaintiff would then be an infringer of Molitor's process. [23]

II. PLAINTIFF'S ANTITRUST AND UNFAIR COMPETITION CLAIMS

Under this broad heading plaintiff has asserted and attempted to prove a variety of claims. Despite their number and the earnestness with which they have been pressed, all have proved to be baseless in fact or in law or both. They merit only brief treatment here.

A. As has been noted, the Goodrich Company took a license under the patent from defendant in 1953, and **[*506]** defendant, in a related and substantially contemporaneous contract, agreed to purchase 75% of its resins from Goodrich for a year. Plaintiff purports to find in this an unlawful "tying" agreement. The argument is scarcely intelligible. Plaintiff says further that the deal amounted to an illegal "rebate," but this thought is also difficult to follow and unmeritorious. The evidence on this subject diminishes the significance **[**67]** of the "tribute" defendant claims from Goodrich, but fails to make out the kind of unlawful exclusive dealing (or other antitrust violation)

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[22] It may be recalled that the court much earlier rejected defendant's claim to the supposedly unique, novel, and nonobvious idea of heating both to gel and fuse at the single (high) fusion temperature.

[23] Plaintiff has some other "estoppel" arguments on this subject. They are without merit.

plaintiff has sought to establish. Cf. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

B. Plaintiff also charged that defendant had unlawfully conspired with machinery makers to restrict sales of rotational casting machines to licensees under the Molitor patent. Except for a brief and debatable contract expiring in 1955 between defendant and one machinery maker (from the existence of which plaintiff has shown no damage to itself), the evidence does not sustain, but serves to refute, this charge.

C. It is further alleged that defendant Sun effected an unlawful restraint by licensing bystander defendant Wonder Products Company (see footnote 1, supra) to use the Molitor process for hobby horses while denying this mode of use to other licensees. The argument is answered, as plaintiff substantially concedes, by *General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273*, aff'd on rehearing, *305 U.S. 124, 59 S. Ct. 116, 83 L. Ed. 81 (1938)*. Moreover, plaintiff's **[**68]** claim of injury from this asserted violation is wholly unsupported by the record.

D. There is a further charge that defendant engaged in unlawful "package **[***392]** licensing," requiring licensees to take (and pay for) rights under other and lesser patents as a condition of using the Molitor process. The evidence refutes the charge.

E. Equally unsubstantial is the argument that defendant committed an unlawful restraint when it ***HN10***[] sought and obtained from its licensees the promise of licenses from them under any patented improvements in the process. At least in the absence of antitrust violations not shown here, there is nothing wrong in this. *Transparent-Wrap Machine Corp. v. Stokes Co., 329 U.S. 637, 67 S. Ct. 610, 91 L. Ed. 563 (1947)*.

F. Plaintiff accuses defendant of other things asserted to have been unfair competitive practices. The accusations are so unsubstantial on their face - or so wholly devoid of evidentiary support - as to be frivolous.

III. CONCLUSIONS OF LAW SUMMARIZED

A. Defendant's patent, No. 2,639,134, is invalid under *35 U.S.C. § 103* because its "subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill **[**69]** in the art to which said subject matter pertains."

B. The patent is also invalid on the separate and independent ground of *35 U.S.C. § 102(b)*, because the invention was patented more than a year before the Molitor application in Italian Patent No. 440,295 (Delacoste).

C. The Molitor patent would, in any event, be unenforceable, and the counterclaim for enforcement must be dismissed, for the further, separate reason that both in the Sixth Circuit and here defendant has sought enforcement by means of deliberately fabricated evidence as to date of invention, with false testimony on this subject given by defendant's president, the alleged inventor, and the man who was defendant's chief chemist during the material times.

D. Plaintiff's other grounds for holding the patent invalid are not sustained. [24]

[70]** **[*507]** E. Assuming the patent in suit is valid, plaintiff has infringed it.

F. Plaintiff's antitrust and unfair competition claims are without merit.

One task remains before the formulation of a judgment based upon the foregoing findings and conclusions. Both parties have made claims for attorneys' fees. At the conclusion of the trial, since such claims would obviously be affected by the rulings on the issues now decided, it was agreed that the problem of counsel fees should be postponed pending such rulings. Accordingly, it is directed that the parties serve and file their post-trial

[24] This summary should include, however, the court's contingent reservation on the question of allegedly vague and insufficient teachings, which would seemingly warrant further consideration if the conclusion as to obviousness is later found erroneous.

submissions on this subject by December 6, 1967, and that any reply papers be served and filed by December 13, 1967.

United States v. Crocker-Anglo Nat'l Bank

United States District Court for the Northern District of California

October 30, 1967

Civil No. 41808

Reporter

277 F. Supp. 133 *; 1967 U.S. Dist. LEXIS 9340 **; 1967 Trade Cas. (CCH) P72,258

United States, Plaintiff, v. Crocker-Anglo National Bank, Citizens National Bank and Transamerica Corp., Defendants

Core Terms

banks, merger, percent, statewide, de novo, concentration, effects, national bank, convenience, merged, loans, metropolitan area, customers, deposits, competitor, branching, service area, savings, bank merger, anticompetitive, billion, commercial bank, commerce, compete, figures, markets, resources, combined, ratio, agencies

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

The legislative language will be interpreted on the assumption that if change occurs in legislative language, a change was intended in legislative result.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] **Financial Institutions, Bank Mergers**

The intent of Congress in deleting the phrase "line of commerce" from the Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)*, was to permit an assessment of the competitive effect of a merger, not in the narrow market consisting solely of commercial banks, but in the wider and more realistic field of all institutions which compete either for the savings or investment dollar or for the extension of credit.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

HN3[] **Regulated Practices, Market Definition**

The test as to whether any given geographic area is a relevant or economically significant market or section of the country is not based on political boundaries, but is based on economic grounds. Permissive statewide branching merely extends the political boundaries in which a bank may open branches, local units, to operate in local markets. It does not bring to any particular bank or banking unit depositors or borrowers from all over the state. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their business at a distance.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Banking Law > Bank Activities > General Overview

HN4[] **Regulated Practices, Market Definition**

The fact that an area might constitute a market for the manufacturing and commerce activities of a bank's customers does not establish it as a banking market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

Geographic markets must be a product of commercial realities, rather than a formal, legalistic approach.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

Concentration is a function of a market. Combinations are to be gauged on their effect on competition generally in an economically significant market. Unless they relate to a market, both in the geographic sense and in the line of commerce or functional sense, figures purporting to show concentration ratios are meaningless.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > General Overview

HN7 [] **Financial Institutions, Bank Mergers**

The offsetting community convenience and needs, as specified in *12 U.S.C.S. § 1828(c)(5)(B)*, must be pleaded and proved by the defenders of the merger. The defendant banks, to fully sustain their required burden of proof, must establish that any hypothesized anticompetitive effects stemming from the instant merger are clearly outweighed by the merged bank's increased ability to meet the convenience and needs of the community to be served.

Judges: [1]** Pope, Circuit Judge, Sweigert and Zirpoli, District Judges.

Opinion by: ZIRPOLI

Opinion

[*138] Opinion and Order Dismissing Complaint

ZIRPOLI, District Judge.

Based upon reasonable *probabilities* arising from the actual and practical realities of the business of banking, as contrasted to *possibilities* arising from theoretical postulates, this court, on review *de novo* in the manner directed by the Supreme Court in *United States v. First City National Bank of Houston, 386 U.S. 361, 18 L. Ed. 2d 151, 87 S. Ct. 1088 (1967)*, applying the standards prescribed by the Bank Merger Act of 1966 (*12 U.S.C. § 1828(c)(5)*), concludes that the merger of the defendant banks, Crocker-Anglo National Bank (here referred to as "Crocker") and Citizens National Bank (here referred to as "Citizens") was lawful and not in violation of the Bank Merger Act of 1966 (*12 U.S.C. § 1828(c)*), *§ 7* of the Clayton Act (*15 U.S.C. § 18*), or *§ 1* of the Sherman Act (*15 U.S.C. § 1*), and in support of this conclusion, finds:

1. That prior to and at the time of the merger, defendant banks were not in actual competition with each other in any economically significant section of the country;

2. That prior **[**2]** to and at the time of the merger, defendant banks were not in substantial potential competition with each other in any economically significant section of the country;

3. That the plaintiff has failed to prove by a preponderance of evidence that but for the merger Crocker would have branched *de novo* into the Los Angeles metropolitan area or any economically significant banking market in which Citizens operated;

4. That plaintiff has failed to prove by a preponderance of evidence that but for the merger Citizens would have branched *de novo* into the San Francisco Bay area or any economically significant banking market in which Crocker operated;

[*139] 5. That the evidence shows affirmatively that in the instant case there is no reasonable probability that absent the merger Crocker would have established *de novo* branches in the Los Angeles metropolitan area or that Citizens would have established *de novo* branches in the San Francisco Bay area;

6. That the merger of defendant banks did not have a substantial adverse effect on actual or potential competition in the business of banking in any economically significant section of the country;

7. That given the **[**3]** desirability of establishing another statewide banking competitor to Bank of America National Trust and Savings Association (hereafter referred to as Bank of America), as conceded by plaintiff, the only economically feasible solution was and is the present merger; and

8. That even had a substantial lessening of competition occurred as a result of the merger of defendant banks, such anticompetitive effects were clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

History of this Litigation.

Before discussing the above stated conclusions of the court and findings in support thereof and such other findings as are appropriate and relevant to the court's decision, it would be well to review the history of this litigation to date and its relationship to the Bank Merger Act of 1966. Much of this history is set forth in the opinion of this court of October 6, 1966, when it stayed further proceedings in this cause and remanded the same to the Comptroller for further consideration in the manner indicated in the court's opinion. See *United States v. Crocker-Anglo National Bank, 263 F.* ***[**4]*** *Supp. 125 (N.D. Calif. 1966)*. We deem that history essential to a better understanding of this final decision on the merits. Rather than rely thereon by reference, the court, for convenience of the reader, and without the use of quotation marks, here repeats much of what it then said, with such modifications as are needed to meet the *de novo* review directions of the Supreme Court in *United States v. First City National Bank of Houston, supra.*

On May 13, 1963, some 34 days prior to the decision of the United States Supreme Court in *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715* (June 17, 1963), the Crocker-Anglo National Bank of San Francisco and Citizens National Bank of Los Angeles applied to the Comptroller of the Currency for permission to merge, under the charter of the former, with the title "Crocker-Citizens National Bank ". After notice and public hearing held July 30 and 31, 1963, and receipt of some 1605 pages of testimony and exhibits, the Comptroller, on September 30, 1963, made a decision approving the proposed merger, subject to certain named conditions, based on his findings, including the finding that the proposed merger **[**5]** would promote the public interest. The approval was to be effective on or after November 1, 1963. On October 8, 1963, this suit was filed attacking the proposed merger as unlawful under *§ 7* of the Clayton Act, (*15 U.S.C. § 18*) and *§ 1* of the Sherman Act, (*15 U.S.C. § 1*). A certificate under the Expediting Act (*15 U.S.C. § 28*) was filed and pursuant thereto a three judge court was named and assembled for the purpose of hearing the cause. The Government's application for a preliminary injunction was denied (*United States v. Crocker Anglo Nat. Bank, 223 F. Supp. 849 (N.D.Cal. 1963))*, and after completion of extensive pretrial proceedings and the making of a pretrial order, the cause came on for trial on the merits. The trial began June 1, 1965 and the taking of testimony was concluded on June 18, 1965, with orders fixing the time for filing of briefs and proposed findings by the parties.

While the court was thus in the process of hearing testimony, on June 11, 1965 the Senate passed, with no opposing vote, its S. 1698, a bill under whose provisions, if enacted, this case would have become moot, for, as stated in the report accompanying **[*140]** the bill, the bill "would free **[**6]** the banks involved in such suits from further proceedings under the antitrust laws." Whether it was because of their knowledge of the pendency of this legislation or otherwise, counsel by stipulation postponed the final filing of briefs and proposed findings until shortly before the passage of this proposed legislation, as amended in the House on February 9, 1966. The enactment, designated Public Law 89-356, 80 Stat. 7, was signed by the President on February 21, 1966.

The court was thus confronted with a somewhat extraordinary situation in which the law applicable to the case was changed after the testimony had been received and the cause submitted for decision. The measure, as finally enacted, made specific reference to this and other cases similarly situated in *§ 2(c)* thereof, which provides as follows: "Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in **[**7]** *section 18(c)(5)* of the Federal Deposit Insurance Act, as amended by this Act." [1] The so-called "substantive rule of law set forth in *§ 18(c)(5)*" is stated in the Act as follows: "(5) The responsible agency shall not approve -

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, **[**8]** or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served."

That language refers to the tests to be applied, in a case of this type, by the Comptroller of the Currency in passing upon an application for approval of a proposed bank merger. Not only did *§ 2(c)*, quoted above, specifically direct that this court, in respect to this case, "shall apply the substantive rule of law set forth in *§ 18(c)(5)*", but *§ 18(c)(7)(B)* provided as follows: "In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger **[**9]** transaction alone and of itself constituted a violation of any antitrust laws other than *§ 2* of the Act of July 2, 1890 (*§ 2* of the Sherman Anti-Trust Act, *15 U.S.C. 2*), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

After a special hearing conducted for that purpose, evidence was received and the parties were granted time within which to file further briefs and memoranda expounding their views as to the action which the court should take in the light of the entire testimony and in view of the new enactment.

[*141] It is the Government's view that the new statute made no substantial change in the law or standards to be applied in passing upon the issues here presented. The Government puts it thus: "It is, of course, the essential position of the Government . . . that the 1966 amendment to the Bank Merger Act (P.L. 89-356; 80 Stat. 7) has not resulted in substantial change in substantive ***antitrust law*** *or in the standards used by the courts in determining the legality of bank mergers*." Specifically, the Government took the position that the language of *§ 18(c)(5)* referring to "the convenience **[**10]** and needs of the community to be served" is but a reiteration of the "failing company doctrine" long recognized as an integral part of settled ***antitrust law***. [2]

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[1] It was noted in the congressional debates that this section referred to three so-called "post Philadelphia cases - in Nashville, San Francisco and St. Louis - where mergers were consummated after that Philadelphia decision." This is the San Francisco case there referred to. The Philadelphia case referred to is *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715*. In that connection reference was also made to *United States v. First Nat. Bank & Trust Co. of Lexington et al., 376 U.S. 665, 12 L. Ed. 2d 1, 84 S. Ct. 1033*.

[2] With this view we disagree. As the Supreme Court indicated in *United States v. First City National Bank of Houston, supra, 386 U.S. at 369*, at best, all that one can say is that the "*failing company doctrine*" is "*related, though perhaps remotely*", to the convenience and needs of the community to be served. In our view it would be absurd to find that new standards so carefully framed from the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the failing company doctrine.

[11]** **[*142]** We find no difficulty in concluding that the new enactment made substantial changes in the substantive law and in the standards to be applied in this case. Not only the language of the enactment, but its legislative history, is very compelling on this point. As we have noted, both *§ 2(c)* and *§ 18(c)(7)(B)*, quoted above, specifically direct the court in this situation to apply the new standards of this Act. (The latter refers to the standards "directed to apply under paragraph 5" and *§ 2(c)* and refers to these as "the substantive rule of law," set forth in that section.) It would be a bit startling to assume that in making this enactment, over which the congressional committees struggled long and hard, the Congress had turned up with nothing of substance, or had accomplished no change in respect to the law applicable for testing the validity of bank mergers.

The legislative history of the Act most emphatically contradicts the position now taken by the Government. The Senate Committee report, which accompanied the introduction of the bill in the Senate, took note of what Congress had contemplated would be the result of the Bank Merger Act of 1960. The Committee **[**12]** stated: "At that time it was clearly expected that the decision of the responsible Federal bank authority, based on its own investigation and on reports on competitive factors from the other two banking agencies and from the Department of Justice, would be final and conclusive. The Attorney General's report was expected to be advisory only." The report states that the uncertainty created by the situation resulting from the Philadelphia and the Lexington bank cases (supra, note 1) "is harmful to the banking industry and to its customers. . . . There was unanimous agreement by all the witnesses that the present situation was undesirable and should be changed." The House Committee report states

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There is not the slightest indication in the language of the Act, or its legislative history, to support the Government's effort to thus cancel or dissipate the declared purpose of the Act. During the debate on the bill, the question of the situation of the failing bank was mentioned, and in a colloquy between Congressman Weltner, who opposed the bill, and Congressman Multer, who supported it, it was made plain that the language referred to was not limited to the failing bank situation. After Congressman Multer had given an illustration of how this language would apply in a case not involving a failing bank, the following colloquy occurred:

> Mr. Weltner: This is a case of a failing bank, which has long been recognized by the court. It has nothing to do with this legislation. I am sure the gentleman from Wisconsin will agree with me, that we do not have to pass any bill to permit the approving agency to merge a failing bank in order to save it from insolvency. I am certain that the gentleman from New York, indeed, would say, as a well-educated lawyer, that the failing bank doctrine exists independently of any statutes which has been passed in the last 20 or 30 years. I yield to the gentleman for the purpose of responding to the correctness of that proposition.
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> Mr. Multer: The gentleman is correct as far as he goes, but I have gone beyond the failing bank theory. There are many instances where we are not concerned with the failing bank, where there is an absolute and complete diminution of competition, yet under all the circumstances and all of the factors the courts should approve that merger just as the regulatory agencies may approve the merger." Cong. Rec. Feb. 8, 1966, p. 2346.

The careful and precise description of this portion of the bill, made by Senator Robertson to the Senate as the latter body prepared to accept the House version, would clearly negative any suggestion that it was limited to the failing company situation. He said: " . . . this bill, should convince the courts that the Congress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries." (Cong. Rec. Feb. 9, 1966, p. 2541.) In short, something apart from the older antitrust considerations, (including the failing company rule) are imported here. He also said (p. 2542): "The courts will no longer be able to say - in the case of a merger which does not reach to the point of creating a monopoly - that proof that a merger will have demonstrable benefits or will be benign is irrelevant. On the contrary, the question whether there are or are not demonstrable benefits - whether the merger is benign or malignant - will be the heart of the issue." Again he said (p. 2542): "The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life."

A final answer to the Government's "failing company" theory is found in the House Report's indication as to the limited extent of the use of financial resources of the affected banks. That report states (U.S. Code, Cong. and Administrative News, 89th Cong. 2d Session, p. 337): "However, only the convenience and needs of the community to be served can be weighed against anticompetitive effects, with financial and managerial resources being considered *only* as they throw light on the capacity of the existing and proposed institutions to serve the community."

clearly the intent to make changes in the law as follows: "The intended legal effect of the bill is to modify the foregoing provision in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (*sec. 2*) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws - that substantially anticompetitive mergers are prohibited - applies to banks, but permits **[**13]** an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served - recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served, - that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies."

The most complete exposition of the congressional view in the process of this enactment is to be found in the remarks of Senator Robertson at the time the bill, as amended to conform to the House Committee report, came back to the Senate. At that time Senator Robertson, who was Chairman of the Senate Committee which had charge of the bill and who originally introduced the bill in the Senate, was recommending that the Senate accept the House amendment. No member of Congress had remained in closer touch with the bill's progress through both houses than Senator Robertson. As he put it: "I have lived with this problem day and night for months. I am convinced that **[**14]** we have a good bill." What he then had to say expounded at considerable length the ideas which had **[*143]** been expressed by various House members during consideration of the bill in the House. [3]

[15]** Senator Robertson said unequivocally that the purpose of the bill was to "reverse a decision of the Supreme Court". He said (Cong. Rec. Feb. 9, 1966, p. 2538): "The bill will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in the Philadelphia and Lexington cases and the district court decision in the New York case which followed those precedents. It will do this by establishing a uniform rule for the bank supervisory agencies and the courts to follow in bank merger cases: a rule which takes into account both the competitive factors on which the antitrust laws are based - for banks these were written into the Bank Merger Act of 1960 - and the convenience and needs of the

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[3] Representative Ashley, one of the members principally in charge of the bill in the House, stated (Cong. Rec. Feb. 8, 1966, p. 2339): "The bill would require the court to use the new standards of the bill in all . . . 'post Philadelphia' cases now pending in court. . . . The courts have repeatedly held that under the antitrust laws the social or economic benefits of a given merger cannot even be considered." The Congressman then quoted from the statement to that effect in the Philadelphia case: "It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community . . . [The] merger must be shown to be sufficiently beneficial in meeting the needs of the community to be served that, on balance, it may properly be regarded as in the public interest."

During the same discussion Rep. Stanton, a member of the Committee in charge of the bill, stated (Cong. Rec. Feb. 8, 1966, p. 2343):

> It was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position. These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advisory roles.
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> These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .
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> The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure.

public to be served by the proposed merged bank." Referring to the pendency of the suit now before us, he said: "It would permit the continuance of proceedings against the three 'post-Philadelphia' cases - in Nashville, San Francisco, and St. Louis - where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute **[**16]** for all mergers to be considered in the future." And in a prepared statement, which he incorporated in the record as a part of his remarks, he said of the bill: "It will strike the Philadelphia, Lexington, and New York decisions and opinions from the books." [4]

[17]** **[*144]** Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court said in the *Philadelphia* case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *Section 18(c)(5)*, quoted above, expressly requires a consideration of similar factors thus rejected in *Philadelphia*.

This statute makes a further alteration in the nature of the proceeding now before us. After providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, *§ 18(c)(7)(A)* stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of *§ 2(c)*, requiring this court to "apply the substantive rule of law set forth in *§ 18(c)(5)*", and to *§ 18(c)(7)(B)*, reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under **[**18]** paragraph 5," it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.

This requirement that we apply the standards under paragraph 5 presented some difficulty, since the prior decision of the Comptroller of September 30, 1963, was not made under or in the light of the New Bank Merger Act of 1966.

It is true that the Comptroller then found that the proposed merger "will promote the public interest", using the language of the 1960 Act, but his determination did not contain findings covering the precise issues required to be determined by him under the language of *§ 18(c)(5)* quoted above. Under that section it would be incumbent upon the Comptroller to determine whether any anticompetitive effects of the proposed merger were "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." We apprehended that an appropriate finding should specify in what respect the transaction would meet the convenience and needs of the community to be served.

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[4] In an effort to find some legislative history to bolster its position that this Act made no changes in the law, the Government has inserted in its brief some quotations from the remarks of individual congressmen during floor debate. Taken out of context, as they are, they prove nothing. It is true that the wording of *§ 18(c)(5)* emphasized and restated the requirement that the Comptroller, and the reviewing courts, take into consideration the antitrust laws. This was noted in debate, but it was also noted that this Act definitely and positively added a new standard. As stated in the House Report of Supplemental views of Congressman Ottinger, who helped draft the bill: "It also assures that banking services available to meet the convenience and needs of a community are considered in all cases and will prevail where they clearly outweigh nonmonopolistic anticompetitive effects of a merger." Counsel's quotations from the debate ignore the rule stated in *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-475, 65 L. Ed. 349, 41 S. Ct. 172*, as follows:

> By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. . . . And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage.

Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman, who bitterly fought the legislation, and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.

There is another respect in which the earlier finding of the Comptroller was **[**19]** inadequate and out-dated. His decision of September 30, 1963 antedated the decisions of the Supreme Court in *United States v. El Paso Natural Gas Co., 376 U.S. 651,* ***[*145]*** *12 L. Ed. 2d 12, 84 S. Ct. 1044*, decided April 6, 1964, and *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 12 L. Ed. 2d 775, 84 S. Ct. 1710*, decided June 22, 1964. In those cases the Supreme Court developed, to an extent not previously announced, the doctrine that *§ 7* of the Clayton Act is designed to preserve not merely present but potential competition in the market in question. This is the doctrine of the application of *§ 7* to potential competition. The principal argument made by the Government here relates to alleged elimination by the merger of *substantial potential competition* in the State of California.

Since the Act requires this court to proceed in this case in the same manner in which it would have to deal with some future proposed merger, we were of the view that before the court could perform the required function of reviewing the action of the Comptroller, the matter should be remanded for the consideration of the Comptroller under the provisions of the 1966 Act.

Plainly enough **[**20]** the Act is designed to set up precise rules under which the validity of proposed bank mergers may be ascertained and determined. The first required step is the application to the Comptroller of the Currency [5] for written approval of the proposed merger. Upon hearing on such an application, the Comptroller is directed to act upon the considerations set forth in *§ 18(c)(5)* above referred to. Then, as indicated, if an action be brought attacking the merger transaction, it must be brought within a limited time and in any such action "the court shall review *de novo* the issues presented." Thus the Act contemplates initial action by the Comptroller, followed by a review at the instance of the Department of Justice.

[21]** When we first faced the task of complying with these requirements, we were confronted with a difficulty arising out of the fact that the Act provides that this review shall be "*de novo*".

It will be noted that under paragraph 5 the Comptroller is charged with ascertaining two sets of facts. The first is whether the effect of the proposed merger transaction "in any section of the country may be substantially to lessen competition", and the second, whether, having found that there would be anticompetitive effects in the proposed transaction, those effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

We found no difficulty in reviewing *de novo* the first of these determinations, for this court has traditionally adjudged whether mergers have anticompetitive effects. But on the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is clearly outweighed in the public interest, and whether it meets the convenience and needs of the community to be served, we were originally of the view that this is a legislative or **[**22]** administrative determination of a type which this court, as a constitutional court, is prohibited from deciding. [6] We found an expression of this view in the **[*146]** words of the Supreme Court in the following quotation from *United States v. Philadelphia Nat. Bank, supra, 374 U.S. at 371*, which we have italicized:

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[5] It is this officer who must act if the acquiring, assuming or resulting bank is to be a national bank. Where a state bank is to be the resulting one, the decision is to be made by the Board of Governors of the Federal Reserve System. In other cases, the Federal Deposit Insurance Corporation is to make the decision.

[6] In that connection we said:

> It will be noticed that the standards of § 5 are to be applied in granting or refusing leave to merge in the future. The contemplated action "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to * * * some part of those subject to its power," as fully as the establishment of railroad rates in *Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67*. It involves a determination and establishment of a public policy.
>
> See Finfrock, "Trial de Novo - Panacea?" in Baylor Law Review, 135, where the Texas cases are discussed: "This criterion in essence classifies as administrative and non-judicial decisional functions which courts are not particularly equipped to decide while leaving to the courts that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisitorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the ordinary limits of judicial competence*, and in any event has been made for us already, by Congress when it enacted the amended *§ 7*. Congress determined to preserve our traditionally competitive economy.

[23]** This initial difficulty on the problem of reviewing the second determination of the Comptroller has since been dissipated. It is now established that the previously held view of this court must be modified, for the Supreme Court, in passing upon the very standards here involved in *United States v. First City National Bank of Houston, supra 386 U.S. at 369-370*, said:

> *The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal*. That was the practice prior to the 1966 Act; and we cannot find a purpose on the part of Congress to change the rule. This conclusion does not raise serious constitutional questions by making the courts perform nonjudicial tasks. The "rule of reason", long prevalent in the antitrust field (see, e.g., *Chicago Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242*), has been administered by the courts. A determination of the effect on competition within the meaning of *§ 7* of the Clayton Act is a familiar judicial task. *The area of "the convenience and needs of the community to be served," now in* **[**24]** *focus as part of the defense under the 1966 Act, is related, though perhaps remotely, to the failing-company doctrine, long known to the courts in antitrust merger cases*. *United States v. Diebold, Inc., 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993*. The appraisal of competitive factors is grist for the antitrust mill. See, e.g., *United States v. Philadelphia National Bank, supra, 374 U.S. at 357-367*. The courts are not left at large as planning agencies. The effect on competition is the standard; and it is a familiar one. If the anticompetitive effect is adverse, then it is to be excused only if "the convenience and needs of the community to be served" *clearly* outweigh it. *We see no problems in bringing these standards into the area of judicial competence*. There are no constitutional problems here not present in the "rule of reason" cases.

Not having had the benefit of the recent above quoted ruling of the Supreme Court and feeling as we did that a determination of "the convenience and needs of the community to be served" was an administrative, rather than a judicial function, we remanded the cause to the Comptroller with directions to proceed to make the determinations **[**25]** called for by the Bank Merger Act of 1966.

It is well that we did so, for as the Supreme Court said in the above quotation, while on review *de novo*, "it is the court's judgment, not the Comptroller's that finally determines whether the merger is legal", yet, in so determining, **[*147]** "the courts may find the Comptroller's reasons persuasive or well nigh conclusive."

On remanding the cause to the Comptroller, we suggested that he should make specific findings as to:

1. The competitive situation as to which the merger may have operative effects and particularly whether the merger will have a probable tendency to lessen or do away with competition; and

2. The probable effect of the transaction in meeting the convenience and needs of the community to be served. In this latter connection we suggested that he specify particularly what he finds to be the convenience and needs of the community, what he considers will be the effect of the merger thereon, and how and by what means he weighs these effects as against the anticompetitive effects of the transaction.

Finally, in order to avoid any possible necessity for further remand following our review of the Comptroller's order, **[**26]** he was directed to make findings as to whether, assuming that the merger has the effect upon potential

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decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the court room." (p. 160). *United States v. Crocker-Anglo National Bank, 263 F. Supp. 125, 132*, footnote 5 (N.D.Cal. 1966).

competition which the Government claims, that effect would be clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. [7]

Following the remand and after due notice to all interested parties, including the Attorney General of the United States, [8] the matter was further heard by the Comptroller on November 14, 1966, at which time he not only reviewed the record of the hearing on which he based the findings contained in his decision of September 30, 1963, but also all the material already introduced in evidence before this court in the course of its previous trial and rehearing of this case and additional information available to and presented by the Comptroller in the **[**27]** course of said hearing of November 14, 1966. The hearings of the Comptroller on this merger were probably the most extensive ever held on a bank merger. Had the Attorney General participated, it would have been an adversary proceeding equivalent to that before any administrative agency or the courts.

In the extensive findings and conclusions of law filed by the current Comptroller with this court on December 27, 1966, which this court finds from the evidence presented in this case on review *de novo* to be correct, he reaffirmed the judgment of his predecessor. **[**28]** Further hearings had been held in this court on April 19, 20, and 21, 1966, and following the filing of briefs and a limited hearing on February 3, 1967, to consider the findings of the current Comptroller, the cause was ordered submitted. However, because of the pending appeal in the case of *United States v. First City National Bank of Houston, supra*, relating to the nature of the review *de novo* and the burden of proof on "the convenience and needs of the community to be served", this court deferred any ruling on the merits to await the decision of the Supreme Court, which was entered on March 27, 1967.

With the previous history of this litigation and its relationship to the Bank Merger Act of 1966 in mind and behind us, we are prepared to decide this cause on the merits.

Before discussing the merits of the issues presented, a review of the history and operations of the defendant banks, the negotiations leading to the merger and the role of Transamerica Corporation therein, and the hard facts as to **[*148]** the nature of the business and banking in California would be helpful.

History and operations of defendant banks.

Defendant Crocker-Anglo National Bank, prior **[**29]** to November 1, 1963, was a banking association organized under the laws of the United States, with its principal place of business at San Francisco, California.

Defendant Citizens National Bank, prior to November 1, 1963, was a banking association organized under the laws of the United States, with its principal place of business at Los Angeles, California.

Transamerica Corporation (herein referred to as "Transamerica") is a holding company incorporated under the laws of Delaware, with its principal place of business at San Francisco, California. At the time of the merger Transamerica owned approximately forty-one per cent of the capital stock of Citizens, and, as a result of the merger, it received approximately 12 per cent of the stock of Crocker-Citizens National Bank (herein referred to as "Crocker-Citizens"), the title given to the new bank under the charter of Crocker. Transamerica's ownership in Citizens, which it voted in its entirety in favor of the merger, was sufficient to give it the power to prevent any merger of Citizens with any other bank. In addition to its holdings in Citizens (now in Crocker-Citizens), Transamerica holds stock in a substantial number of insurance **[**30]** companies, public utilities, industrial corporations and to a limited degree in Western Bancorporation, a holding company with subsidiary banks located throughout the western states,

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[7] Note the usefulness of findings based on assumptions made by the district court in *United States v. Philadelphia Nat. Bank, supra 374 U.S. at p. 335*.

[8] The head of the Antitrust Division of the Department of Justice in a letter to the Comptroller on November 10, 1966, took the position that "There is thus no provision for an administrative hearing by your office nor are there any standards prescribed for such a hearing", and since the court must determine *de novo* the legality of the merger, the Department of Justice saw no need for plaintiff to appear at the Comptroller's hearing. (BK-PPP)

and Bank of America. These latter two holdings made for investment purposes, the court finds to be insufficient to have any appreciable effect on banking operations in any area relevant to this case.

Crocker and Citizens were each engaged in interstate commerce. The merger of Crocker and Citizens was not a merger of necessity because of management problems or earnings, or any of the things that make a merger compelling in that respect. While both were progressive banks with a substantial future as separate institutions and while both were expanding their branching facilities within their respective areas of operation, up to the time of the merger, with the exception of Ventura County, California, where their operations were too minor to adversely affect competition in this presumed local banking market, neither bank had branched into or otherwise made any economically significant entry into the banking market of the other. The evidence, as will be hereinafter disclosed, is clearly insufficient to **[**31]** support a reasonable inference that either intended to, or that it was feasible for either to, enter the market of the other in the reasonably foreseeable future.

Crocker-Anglo was chartered in 1870. It was the fifth largest commercial bank in California and sixteenth largest in the United States in terms of deposits. It conducted a general commercial banking and trust business through 124 banking offices located in 29 California counties ranging from the California-Oregon boundary on the north to Santa Barbara County in the south. As of December 28, 1962, Crocker-Anglo had total deposits of about $2,134,002,000, total assets of about $2,360,014,000, and total loans and discounts of about $1,219,050,000.

Citizens was originally incorporated in 1890 under the laws of California; it received a national bank charter in 1901. Citizens was the eighth largest commercial bank in California and forty-third largest in the United States in terms of deposits. It conducted a general commercial banking and trust business through 78 banking offices located in Los Angeles, Orange, San Bernardino, Riverside, and Ventura counties. As of December 28, 1962, it had total deposits of about $713,793,000, **[**32]** total assets of about $791,662,000, and total loans and discounts of about $357,099,000.

A map showing the locations of the banking offices of each of the merging banks in California immediately prior to the merger can be found in the court's **[*149]** opinion in *United States v. Crocker-Anglo National Bank, 223 F. Supp. 849, 851 (N.D.Cal. 1963)*.

On February 10, 1956, Crocker First National Bank of San Francisco (herein "Crocker First National") and Anglo California National Bank (herein "Anglo California") consolidated under the name of Crocker-Anglo National Bank, combining the 47 offices of Anglo California located in 31 communities with the 3 offices of Crocker First located in San Francisco, Oakland and San Mateo. Anglo California also had offices in San Francisco and Oakland. Immediately prior to said consolidation Crocker First National had total deposits of about $430,488,000 and total loans of about $214,201,000, and Anglo California had total deposits of about $844,839,000 and total loans of about $440,461,000. On June 30, 1956, Crocker-Anglo National Bank offices located in San Francisco had 24.8 per cent of the total IPC (individual, partnerships and corporations) **[**33]** demand deposits in that City and County.

On June 22, 1956, Crocker merged with the First National Bank of Scotia and with the First National Bank in Madera. On September 7, 1956, Crocker merged with Salinas National Bank. On May 29, 1959, Crocker merged with County National Bank and Trust Company of Santa Barbara. On September 25, 1959, Crocker merged with The Bank of Carmel and with The First National Bank of Monterey, and with The First National Bank of Pacific Grove. On June 23, 1961, Crocker merged with the Bank of San Rafael and with the First National Bank in San Rafael. [9]

On November 30, 1959, Citizens merged with the **[**34]** Bank of Whittier and with the First National Bank of Vernon. On December 7, 1962, Citizens merged with the Glendora Commercial and Savings Bank.

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[9] Even though this court can no longer order a divestiture of Crocker's prior merger of these banks, it does not follow that this court may not consider these prior mergers in its evaluation of the expansion trend of Crocker and any bearing they may have on the question of whether but for the instant merger Crocker would have branched *de novo* into the banking market of Citizens.

The nine banks acquired by Crocker from June 1956 to June 1961 had, combined, deposits of about $164,371,000, loans of $79,790,000, and 20 banking offices. The three banks acquired by Citizens from November 1959 to December 1962 had, combined, about $19,977,000 in deposits, $8,880,000 in loans, and 6 banking offices. All of these banks were engaged in interstate commerce.

Negotiations leading to the merger.

The purpose of creating another statewide bank to compete with Bank of America [10] was clearly stated when the subject of the merger of Crocker and Citizens was first proposed. (Tr. 1021). In September 1958, L. O. Ivey, vice chairman of the board of Citizens National Bank and its second largest stockholder, approached Paul Hoover, president of Crocker, with regard to a merger of the two banks for the purpose of forming another statewide institution. (Tr. 1020, line 21-Tr. 1021, line 10; Tr. 1029). L. O. Ivey had no connection with Transamerica. (Tr. 1031). Although the management of Citizens may not have been favorably **[**35]** disposed to this proposal, Ivey interested Transamerica in the negotiations, but they came to an abrupt termination in March 1959, when Transamerica, as the dominant stockholder of Citizens, demanded too high an exchange ratio for the Citizens stock (Tr. 1022, 1029-1030). Although it appeared at this time that there was no possibility of merging Crocker with Citizens and although every reason now urged by plaintiff for entering Los Angeles then existed, *Crocker took no steps and made no plans to establish offices in Los Angeles or any of the other southern counties*, **[*150]** either by merger or by *de novo* branching.

> Judge Pope: I would like to ask this question: Was there any time subsequent to 1956 when the officers of your organization discussed the problem of establishing branch banks in the Los Angeles area? By that, I mean Los Angeles County, Orange County and vicinity.
> The Witness: Yes, the subject came up quite frequently, Your Honor, and was cast aside because we just didn't have the horses, we didn't have the capital, we just couldn't do it and we didn't have the personnel.
>
> Judge Pope: Was this at a time when you were generally agreed that **[**36]** it would be desirable to enter -
> The Witness: It was indeed.
> Judge Pope: To enter the Los Angeles area?
> The Witness: Yes.
> (Hoover, Tr. 1038, Lines 5-19).

In January 1962, two years and nine months later, Paul Hoover and Emmett Solomon, then chairman of the board and president, respectively, of Crocker, called on John R. Beckett, the new president of Transamerica, to discuss the possibility of merger with Citizens. At that time they were informed by Beckett that Transamerica was not interested in such a move, but that if it did become interested, he would so advise Crocker (Solomon, G-337, pp. 109-110). Prior thereto, Transamerica, for reasons relating to the accounting rules of the Securities & Exchange Commission, was interested in owning more than 50 per cent of Citizens, **[**37]** in order that it might thereby substantially increase its earnings (Beckett, Tr. 1908). Subsequently and at the meeting of its board of directors on August 31, 1962, Transamerica, fearing that its 41 per cent holding in Citizens might result in Transamerica voting more than 50 per cent of the stock of Citizens represented at an annual meeting and thereby subject it and all of its subsidiaries wherever located in the world to examination by the Federal Reserve Board at the expense of the company, decided to dispose of its Citizens holdings and instructed Mr. Beckett to see what he could do in this regard (Beckett, Tr. 1910-1913).

Pursuant to such instruction in September 1962, Beckett informed Hoover or Solomon or both that Transamerica had decided that it would be interested in a merger because Transamerica was leaning in the direction of becoming a mutual fund type operation (Solomon, G-337, p. 110; Beckett, Tr. 1913). In response to this, Hoover and Solomon negotiated with Transamerica for the purpose of determining what exchange ratio would be satisfactory to Transamerica in the event a merger was successfully negotiated with Citizens. Transamerica agreed that an exchange ratio **[**38]** of 1.8 shares of Crocker to 1 share of Citizens would be satisfactory to it (Solomon, G-337,

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[10] Bank of America, described by Mr. Ivey as "the octopus", is more commonly known in financial circles as "the Colossus of the West" and is the largest bank in America and the largest private bank in the world.

pp. 125-126). Transamerica also agreed that it would not interfere with the management of the resulting bank and that it would dispose of its shares in the resulting bank on an orderly basis (Solomon, G-337, pp. 127-128). Transamerica thereafter informed the executive committee of Citizens of Crocker's proposal and that Transamerica was in favor of it (Britt, G-334, pp. 10-12a). Hoover and Solomon then negotiated with the management of Citizens, not only as to the exchange ratio, but as to all other aspects of the merger agreement which were important to both groups (Britt, G-334, p. 12b; Solomon, G-337, pp. 124-125). Included were the composition of the board, adjustment of principal officers, employee benefits, location of directors' meetings, name of the combined bank, composition of the executive committee, functions of the advisory committees, location of the bank's headquarters and the multitude of other things, any one of which might have prevented agreement on a merger (Solomon, G-337, pp. 124-127; Clarke, Tr. 1246, line 18 - Tr. 1247, line 17). Finally, by a letter from the chairman **[**39]** of the board of directors of Crocker, dated February 6, 1963, Crocker-Anglo offered to merge at an exchange ratio of 1.9 shares of Crocker-Anglo **[*151]** to 1 share of Citizens. (Britt, G-334, p. 22-24). The proposal also contained various provisions relating to the liabilities of the two banks, the composition of the board of directors of the resulting bank, future employment and pensions of employees of both banks (Ct. Exh. 195).

In February 1963, the boards of directors of both banks approved the merger in principle and authorized and directed the officers to negotiate a definitive agreement. On February 28, 1963, Crocker initiated an examination of Citizens and discovered the possibility of exposure to liability from a certain action pending against Citizens. Being unwilling to assume, through a merger with Citizens, responsibility for that litigation and for related contingent liabilities in connection therewith unless indemnified, Crocker entered into an agreement with Transamerica whereby Transamerica, together with its subsidiaries, agreed to indemnify and save harmless Crocker against any and all liabilities which might arise from that action, to the extent of 60 per **[**40]** cent thereof. Thereafter Crocker confirmed its offer by a letter dated April 1, 1963, from the chairman of its board. In April, the board of directors of each authorized the execution of the formal agreement to merge and it was duly executed (Ct. Exh. 195, "Application for Approval of Merger", p. 4).

On May 3, 1963, the two banks submitted their Application for Approval to Merge under *section 18(c)* of the Federal Deposit Insurance Act, as amended, *12 U.S.C. § 1828(c)*, and *section 215(a) of Title 12 U.S.C.*, to the Comptroller of the Currency (Ct. Exh. 195).

Pursuant to notice, the Comptroller of the Currency held a public hearing on the proposed merger on July 30 and 31, 1963. The record developed at the hearing comprises 1,605 pages of testimony and exhibits (BK-A). On September 30, 1963, the Comptroller of the Currency rendered his decision approving the merger subject to the conditions that the board of directors of Transamerica agree: (1) that no more than one director or officer or other representative of Transamerica Corporation will serve as a director of the resulting bank, and (2) that it would dispose of substantially all of its stock holdings in the resulting bank **[**41]** by December 31, 1966. Subsequently, this provision was further changed by putting the stock in a voting trust, over which Transamerica has no control. Transamerica no longer has a director on the combined board, and the percentage of the stock it now holds under the voting trust has been reduced from 12 per cent to 8.8 per cent. The trust, which cannot be altered without approval of the Comptroller, is presumably to remain in effect until Transamerica can make a fair and equitable disposition (sale) of its holdings. The influence of Transamerica on the banking operations of the old Citizens or the new Crocker-Citizens has thus been effectively removed.

In his decision approving the merger, the Comptroller found favorably to the banks on all the banking factors involved and also found that the proposed merger would have no adverse effects on competition, that it would not tend toward monopoly, and that it would not violate *section 7* of the Clayton Act (BK-A).

On October 8, 1963, this action was commenced and the Government moved for a preliminary injunction restraining the consummation of the merger. After hearing, the Government's motion for a preliminary injunction was denied **[**42]** (*United States v. Crocker-Anglo Nat. Bank, 223 F. Supp. 849 (N.D. Calif. 1963))*, and the merger was consummated on November 1, 1963. The subsequent history of this litigation has already been recited above.

The nature of banking in California and the economic milieu in which it operates.

In view of the broad geographic distribution of the operations of the merging banks and their branches in order to better assess and render a balanced judgment on the impact of this merger, a **[*152]** review of the economic milieu in which they operated is imperative.

The geographic expanse of California, comprising 158,693 square miles of land with some 800 miles of coastline and an average width of 200 miles, with all the attendant problems created by distance, can best be appreciated if its area is transported to the east coast and overlaid on the eastern seaboard. When the north-south California axis is placed on the north-south axis of the east coast, the California overlay extends from Boston, Massachusetts on the north to Charleston, South Carolina on the south. Encompassed in this area we will find all the land area of Connecticut, Rhode Island, New Jersey and Delaware and the eastern **[**43]** half of Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina and South Carolina. It would embrace such cities as Boston, New York, New Haven, Wilmington, Philadelphia, Baltimore, Washington, D.C., Richmond, Norfolk, Charlotte, Winston-Salem and Charleston. [11]

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[11] On the characteristics of California's economy, Professor Weston testified:

Q. Are there any factors regarding the characteristics of particular areas of California's economy that you deem significant?

A. Yes. Again, it is well known that California is characterized by the two highly urbanized areas, the Bay Area and the L.A. area. Then in between, the North Coast area, lumber, fishing, the mountain area, the agricultural areas, the desert areas.

So that you have a great diversity in regional economic characteristics in California.

Q. And what significance did that have with regard to the instant merger?

A. This has a significance that a branching system is able to help mobilize the financial resources of the State more effectively. It can gather deposits in areas that generate deposits and use them in loans in areas that are growing rapidly, where loans are needed.

And this is particularly significant for a capital deficit area, such as California, that imports capital, because it enables the branch system to more effectively utilize the financial resources of the State.

Q. In considering -

Judge Zirpoli: Would this be a factor which indicates that there is such a thing as a statewide market?

The Witness: No. It indicates that where you have branching in an area with diverse economic characteristics, that you get benefits basically of diversification both on the deposit side and on the lending side. (Tr. 1486-1487)

Judge Zirpoli: But you have just indicated that there is a possibility of an intake at one section of the State and an outgo at another section.

The Witness: That is true.

Judge Zirpoli: Yes. Doesn't this give it a statewide characteristic?

The Witness: Insofar as you have statewide branching, the extent to which this activity of gathering by commercial banks and lending out in another place is restricted by law to a state area.

But insurance companies, for example, can gather in the diverse areas of California and take the money out of California. Legally they do.

Since California is a capital deficit area, insurance companies tend to do the opposite. They gather funds in other parts of the country and lend them out in California.

The fact that this commercial banking activity is co-terminus with the political boundaries of the State of California is not determined on economic grounds; it is determined on the grounds that statewide branching is the limit of the extent to which this branching can take place.

Mr. Zirpoli: All right.

The Witness: One other aspect of this is that again on the lending side the larger California banks in the national bank division do send their men out to talk to customers in other parts of the country, but again as a practical matter, to try to

[44]** It has a topography and climate probably unmatched throughout the remainder **[*153]** of the United States for its complexity and variety and thus accounts for the extraordinary expansion, growth and diversity in population, agriculture, business and industry, which for decades have made and continue to cause *California to be a substantial capital import state* (Saxon, Tr. 2066-2068). This situation, which is recognized by all the parties, is of paramount importance in any consideration of the State of California as a whole as a relevant economic section of the country in which to evaluate the competitive nature of commercial banking (the term used in the Bank Merger Act of 1966 is "the business of banking"). It is also important to the court's consideration of the convenience and needs of the community to be served.

Any attempt to divorce the entire State of California from the national market (as a submarket thereof) in assessing the anticompetitive impact of this merger by the use of concentration figures in commercial banking based upon the number of offices, assets, IPC deposits and loans of California banks alone (as plaintiff would have us do) and without consideration **[**45]** of other financial forces in and out of California which come into play and compete with such banks for the very financial services that may cause the entire state to be a relevant market (as contrasted to those which are basically local) is an oversimplification, an oversimplification which might make the court's task easier, but which would ignore a substantial and essential part of the picture and would result in a false portrayal of the hard economic facts of banking in this assumed state market. As difficult as the task may be, ours is the obligation to clarify and establish the picture with certainty. [12]

[46]** The appropriate line of commerce test.

While it is well established that commercial banking, which has as one of its prime characteristics the fact that commercial banks are the only financial institutions that can accept demand deposits, [13] **[**47]** is an appropriate

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> handle their California business, although if - again, if California were not a capital deficit area these national banking division people might well be trying to make loans to firms in New York just as the New York banks and Chicago banks make loans in California.
>
> So that from an economic standpoint there is not a statewide commercial banking activity.
>
> (Tr. 1488-1489)

[12] From our experience in this and other cases involving regulatory agencies, we agree with the observation of District Judge McMahan in *United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 881 (S.D.N.Y. 1965)*, that:

> We think that if ever there were a field requiring administrative expertise to unravel the tangled threads of the evidence and weave them into a meaningful fabric, this is it. This case involves a multitude of technical, intricate and complex problems in the field of money and banking, a subject within the special competence of the Board and outside the conventional experience of judges.

We further agree with the suggestion of Mr. Justice Harlan (dissenting) in *United States v. El Paso Natural Gas Co., 376 U.S. 651, 664, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*, that this "duplicative . . . anachronistic system of dual regulation should be re-examined."

[13] Check writing, as the most convenient way of paying debts, and the department-store-of-finance characteristics of local banks, are the basic items of convenience that make commercial banking an appropriate line of commerce in the local market. The growth of the demand deposit activity of commercial banks has lagged behind the growth of the economy as a whole. During the postwar years the economy, as measured by gross national product, has grown at a rate three or four times the growth rate of demand deposits (Weston, Tr. 1469-1470), and according to some experts, the activities of noncommercial bank financial intermediaries, have served as effective economic substitutes for the use of demand deposits (Weston, Tr. 1471). Checking accounts are sort of a loss leader. In fact, the total operating income of California commercial banks from demand deposit service charges is less than 1/20th of 1% of their total operating revenue (Weston, Tr. 1474).

As a matter of practical experience, time deposits in a savings and loan association of commercial bank are the equivalent of demand deposits in that both are paid on demand (Dirlam, Tr. 557-558). The only practical difference between a demand deposit in a commercial bank and a time deposit in commercial banks and savings and loan associations relates to the procedure by which those deposits are withdrawn. In the case of a demand deposit in a commercial bank, the procedure line of commerce within which to measure the anticompetitive **[*154]** effects of a banking merger in local markets, it does not necessarily follow under the 1966 Act that the *totality of financial activities* carried on by *commercial banks* and *their competition* in a statewide market of the magnitude of California or in the national market [14] should be ignored. It is not the view of this court that in such expanded markets commercial banking is the sole line of commerce that the court can or should consider. Hence, what we are about to say, which represents the views of the members of this court, while not essential to the findings herein made and the conclusions herein reached, is, nevertheless, clearly applicable to this case and the substantive standards by which bank mergers are to be tested under the Bank Merger Act of 1966.

In fact, the provisions and terminology of subparagraphs (A) and (B) of the Bank Merger Act of 1966, *§ 1828(c)(5) of Title 12 U.S.C.*, which set forth the substantive standards by which banking mergers are to be judged, suggest to this court that a broader test was intended and now applies. We deem the deliberate omission from the Bank Merger Act of 1966, *§ 1828(c)(5)(B)*, of the phrase "in any line of commerce" is not without significance. [15]

[48]** Plaintiff argues that "it was quite unnecessary, and indeed would have been inappropriate, for the phrase 'in *any* line of commerce' to have been included in so obviously a statute concerned exclusively with banks. To have had it there would have been out of place and would **[*155]** not have made sense". (Plaintiff's Supp. Post Reply Brief, p. 12A.)

This argument ignores the canons of statutory construction that " . . . ***HN1***[] the legislative language will be interpreted on the assumption . . . that if change occurs in legislative language, a change was intended in legislative result." [16] Furthermore, the statute itself answers plaintiff's argument. Subparagraph 5(A) immediately preceding subparagraph 5(B) provides the first substantive test for bank mergers. It is in terms of monopoly. It refers expressly

consists in the use of checks, whereas with a savings and loan or time deposit, the intervening procedure consists in presenting the necessary documents at the place of deposit (Dirlam, Tr. 558-559).

If there is an advantage to commercial banks by reason of their ability to offer the unique function or service of checking accounts, the advantage is their ability to use that function as a sort of loss leader to get the customer into the bank for the purpose of selling him some other service, for which there is fierce competition with other financial institutions (Weston, Tr. 1597). While they are the only institutions which have the benefit of that loss leader, there was no evidence that this advantage would enable a commercial bank in one section of the state to be able to successfully compete with other financial institutions located in a distant community for the business of a customer located there.

[14] In making this observation we are not unmindful of the decision in *Manufacturers Hanover, supra*, that "commercial banking" is an appropriate line of commerce, even though a geographic market as extensive as the entire nation may be involved. However, we feel that the expanded "section of the country" considerations we urge herein are essential to a true evaluation of a bank merger in a section of the country of the magnitude of the whole of California, and it is up to us to clarify any confusion Government's counsel feel will arise in the application of these considerations.

[15] The significance of the omission of this phrase so essential to *§ 7* of the Clayton Act was not decided by the *Supreme Court of the United States in United States v. First City Nat. Bank of Houston, supra.* In footnote 1 at page 369, the Court said:

> *12 U.S.C. § 1828(c)(5)(B)* provides, as we have seen, that a merger shall not be approved "whose effect in any section of the country may be substantially to lessen competition." It is pointed out that that standard omits the phrase "in any line of commerce" which is present in *§ 7* of the Clayton Act. It is argued that Congress meant that commercial banking is no longer to be considered as an area of effective competition and that the Act establishes in banking "a market test measurable only by larger commercial realities ".
>
> We do not reach this question and we intimate no opinion on it nor any views on the merits of these mergers or on the justifications that are urged in their support. All questions except the procedural ones treated in the opinion are reserved.

This court, however, if it is to provide a vehicle for finality on all the questions presented by the instant merger, must resolve this question, even though for alternative reasons hereinafter stated, such resolution of the question might prove not to have been necessary.

[16] Sutherland Statutory Construction, Section 4510, 3rd Edition, Horach.

to "the business of banking". Congress obviously thought it "made sense" and was not "out of place" to use the words "business of banking" when formulating the monopoly test. In the following paragraph Congress just as obviously must have thought it "made sense" to omit those words. This gives all the more credence to Senator Robertson's statement that Congress intentionally **[**49]** omitted "any line of commerce" (as well as "business of banking") from subparagraph 5(B) of the amendment, in order to provide a less stringent test. In his remarks on the floor of the Senate when he presented the amendments of the House of Representatives to S. 1698, the bank merger bill, Senator Robertson said:

> It will be noted that the prohibitory language is based generally on the terms of *section 1* of the Sherman Act and *section 7* of the Clayton Act. *Section 1* of the Sherman Act (*15 U.S.C. § 1*) prohibits contracts, combinations, and conspiracies "in restraint of trade or commerce" while *section 7* of the Clayton Act (*15 U.S.C. § 18*), as amended in 1950, prohibits acquisitions "where in any line of commerce in any section of the country the effect may be substantially to lessen competition, or to tend to create a monopoly."
>
> The text of paragraph (B) of the new bill follows the terms of *section 1* of the Sherman Act and *section 7* of the Clayton Act, with the exception that the reference to "any line of commerce" in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal **[**50]** of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger - the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger - are irrelevant and may not be considered.
>
> As the Banking and Currency Committee said in 1959 in reporting out the Bank Merger Act of 1960, we do not want the banking agencies and the courts to say, as did Judge Weinfeld in the Bethlehem-Youngstown merger, "If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense." (*U.S.A. v. Bethlehem Steel Corp. et al., 168 F. Supp. 576*, (D.N.Y. 1958); see Senate Report No. 196, 86th Cong., S. 1062, pp. 5-6.)
>
> We do not want the court to say, as it did in the **[**51]** Philadelphia case, that a merger which may substantially lessen competition in one line of business in one section of the country "is not saved because, on some ultimate reckoning of social debits and credits, it may be deemed beneficial." We do not want the court to apply a statute which, in the words of the court in the Philadelphia case, proscribes "anticompetitive mergers, the benign and the malignant alike." (Hearings on S. 1698, p. 403). In considering whether a proposed **[*156]** merger may lessen competition or tend to create a monopoly or be in restraint of trade, the banking agencies and the courts will, of course, take into consideration all the factors which I have discussed under the question of monopoly - the competition from other financial institutions in one or another part of its business, the competition from other banks and other financial institutions, locally, regionally, nationally and internationally, the inevitable limitations on competition imposed by statute and by regulatory authorities, with respect to entry into the business and with respect to the carrying on of the business. All of these factors must be taken into consideration in weighing the overall **[**52]** anticompetitive effects of the proposed merger. (Cong. Rec. Feb. 9, 1966, p. 2541-2.)

And Congressman Ashley, as house manager for S. 1698, in reporting out his version of that bill, commented on the problem as follows:

> The Committee recognized that commercial banks face intensive competition from other financial institutions - savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. The Committee also recognized that competition between commercial banks and other institutions includes local competition, regional competition, national competition and even international competition for one part or

> another of the business. To overlook any one of these aspects of competition, or to concentrate on one of them to the exclusion of the others, would be unrealistic and might well diminish, not increase, financial competition. [17]

[53]** In interpreting the Bank Merger Act of 1966 as it was finally enacted, plaintiff urges the court to listen only to the words of Representative Patman and his associate, Representative Reuss, who, plaintiff proposes "are the principal architects" of the legislation. Yet, anyone reading the legislative history of the Act cannot help but conclude that the language of Senator Robertson and Representative Ashley more properly defines the scope and intent of the Act.

Certain things are clear from the legislative history. The initial bill was offered by Senator Robertson. With an amendment by Senator Proxmire it passed the Senate and was offered in the House by Representative Ashley. It was not until after a majority of the House Banking and Currency Committee, in an allegedly "rump" session, had voted to approve the Ashley bill that Representative Patman agreed to let any bill come out of the committee. In reporting the bill which bears his name and which became the Bank Merger Act of 1966, Representative Patman reported to the Congress:

> Mr. Chairman, if I alone were writing this legislation and proposing it, I certainly would not propose it as it is before us. I would be **[**54]** against it as a matter of principle. (Cong. Rec., Feb. 8, 1966, p. 2357.)

We think it reflects no discredit upon Representative Patman if the court, recognizing the limitations of human nature, views his interpretations of this statute with a jaundiced eye. He opposed the bill "in principle" and with all his legendary vigor. What would be more natural than for him to attempt to shave its impact as much as possible when it reached the floor of the House?

On the other hand, Senators Robertson and Proxmire had sponsored the legislation in the Senate, as had Representative Ashley [18] in the House. When the **[*157]** House passed the amended bill, Senator Robertson quickly sponsored the House version before the Senate Banking Committee, where it was approved by a 9 to 2 vote.

[55]** Since the bill was eminently satisfactory to its original sponsors and so distasteful to Representative Patman, is it not to the "winners" that we should turn for an evaluation of the meaning of the statute?

Competing financial institutions other than banks.

The court, having concluded that ***HN2***[] the intent of Congress in deleting the phrase "line of commerce" from the Bank Merger Act of 1966 was to permit an assessment of the competitive effect of a merger, not in the narrow market consisting solely of commercial banks, but in the wider and more realistic field of all institutions which compete either for the savings or investment dollar or for the extension of credit, now reviews this wider field.

It would be appropriate to here also note that students have pointed out that because of the regulations to which banks are subjected, the character of their competition is quite different from that of other nonregulated industries or businesses and explains in part the reasons which prompted the 1966 amendments to the Bank Merger Act. [19]

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[17] H.R. No. 1179, 10/19/65. For a description of the bill's odyssey through Congress, see article from Wall Street Journal for February 8, 1966, entitled "The Bank Merger Bill's Zany Journey".

[18] In submitting H.R. 12173 to the Senate, Senator Robertson acknowledged the large role played by Representative Ashley in securing passage: "I want to pay a special tribute to Congressman Ashley of Ohio for his work in connection with this bill. His untiring and constructive efforts have brought about the virtual unanimity in the House . . . ." (Cong. Rec., Feb. 9, 1966, p. 2551.)

Congressman Grabowski, in the course of the debate, noted: "I am proud to have been associated with my colleagues . . . in helping to draft this legislation." (Cong. Rec., Feb. 8, 1966, p. 2355.)

[56]** **[*158]** The following uncontroverted data, contained in the record and appropriately cited by exhibit number, demonstrates the extent to which competition exists in the State of California between banks and various other financial institutions. The information is based upon a hypothetical statewide market and demonstrates the insignificance of Crocker-Citizens' share of the savings and credits throughout the state.

(a) In 1962, California savings amounted to $46,057,807,000, only 27.12 per cent of which were held by commercial banks and only 2.63 per cent of which were held by Crocker and Citizens (BK-E-27):

	(000 omitted)
Commercial Banks	
(IPC time deposits)	$12,493,031

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[19] For an expression of these views, see: The 1966 Amendment to the Bank Merger Act, Economic Perspective and Legal Analysis, 20 Vand.L.Rev. 200 (1966), and Phillips, Competition, Confusion and Commercial Banking, 19 J. Finance 32 (1964). The writer in the Vanderbilt Law Review article, at pages 201-203, noted in part:

> While generally the occasional failure of business concerns is not considered undesirable in light of the overall benefits to be derived from unrestricted competition, the central role of banking in the national economy has fostered widespread recognition that bank solvency and liquidity are sufficiently important to require a check on competitive forces. Therefore, public regulation of commercial banking reflects an attempt to obtain the benefits of competition while guarding against widespread bank failure as a method of eliminating the less efficient competitors from the market structure. As a result the regulatory scheme is characterized by the somewhat conflicting objectives of efficiency through competition and stability through regulation.
>
> The most fundamental regulation imposed upon the market structure of commercial banking is limitation of entry. A charter for a new national bank will not be granted unless the capital structure, earnings prospects and management capabilities of the prospective bank give adequate assurance that entry will not produce excessive competition and possible failure. Similarly, inability to meet these standards may cause the Federal Deposit Insurance Corporation (FDIC), in effect, to prevent entry by denying an application for deposit insurance. The FDIC, Federal Reserve Board (FRB), and the Comptroller of the Currency may refuse permission to open new branches on the same grounds. Furthermore, national banks are apparently subject to state law with regard to branching limitations.
>
> Banks are also subject to numerous provisions designed to insure sound banking practices. For example, banks belonging to the Federal Reserve System (member banks) and insured non-member banks are precluded from paying interest on demand deposits. This discourages competitive efforts to attract demand deposits and the correlative tendency to make speculative loans and investments to cover the interest costs. Federal law also requires the FRB and FDIC to specify maximum rates of interest that insured banks may pay on savings and time deposits. A number of states also limit the rate of interest payable, and, where the state rate is below the federal maximum, federal law requires that national banks not exceed the state maximum rate.
>
> Regulation of competition also extends to the market for bank loans. The area within which competitive forces operate is circumscribed as to maximum rates by state usury laws, and is affected as to the minimum charge by FRB manipulation of the rediscount rate, open-market operations and modification of reserve requirements. While the FRB operations are not regulatory in the strict sense, they affect the supply of money and credit in the economy and thereby influence the "prime" or minimum bank interest rate. In the range between the practical minimum set by Federal Reserve policy and the maximum allowed under state usury laws, competitive forces are free to operate. Moreover, national banks are precluded from lending more than an amount equal to ten per cent of their paid-in capital and unimpaired surplus to any one obligor, and state banks are generally subject to similar limitations. National and state member banks are also prohibited from investing in common stocks, and from holding for their own account investment securities of a single obligor in excess of ten per cent of the bank's unimpaired capital and surplus. Such investment prohibitions, while helping to insure continued stability, have the added effect of limiting the control which banks might otherwise exert over industry in general. In addition, the broad visitorial powers of federal bank examiners provide the agencies with a flow of information based on frequent and intensive examinations. The banks must furnish detailed periodic reports of their operations, and the agencies have the power to order examinations whenever they are deemed necessary. Numerous sanctions are provided, but the vast majority of banks go to great lengths to avoid grounds for criticism. The foregoing restrictions on private initiative have caused economists to question the extent to which antitrust policy can foster a type of competition conducive to improved bank performance.

	(000 omitted)
Savings and Loan Associations	
(Savings Capital)	13,400,000
U.S. Savings Bonds	
(Redemption value of bonds	
held by individuals)	4,644,000
Credit Unions	
(Share capital and member deposits)	814,463
Postal Savings	
(Balance to credit of depositors)	32,137
Life Insurance Reserves	9,646,176
Mutual Investment Funds	
(Market value of net assets)	2,279,000
U.S. Government Marketable	
Securities With Maturity Within	
1 Year from Date of Issue	2,749,000

[57]** **[*159]** As of December 28, 1962, Crocker and Citizens combined held only 2.63 per cent of the total (BK-E-27).

(b) As of January 1962, commercial banks held only 10.01 per cent of California farm mortgage loans:

	(000 omitted)
All Operating Banks	$138,604
Life Insurance Companies	208,760
Federal Land Banks	187,167
Farmers Home Administration	9,555
Individuals and Others	840,000
Total	$ 1,384,086

As to the closest available date, Crocker and Citizens together held only 1.34 per cent of California farm mortgage loans (BK-E-28).

(c) As of January 1962, total California agricultural loans amounted to $2,184,790,000, only 33.4 per cent of which were held by operating banks:

	(000 omitted)
All Operating Banks	$730,396
Life Insurance Companies	208,760
Federal Land Banks	187,167
Banks for Cooperatives	92,303
Farmers Home Administration	15,802
Rural Electrification Administration	35,020
Production Credit Associations	75,342
Individuals and Others	840,000

As of the closest available date, Crocker and Citizens combined held only 2.77 per cent of California agricultural loans (BK-E-29).

(d) As **[**58]** of 1962, California mortgage debt on non-farm real estate amounted to $32,150,162,000, only 18.6 per cent of which was held by commercial banks:

	(000 omitted)
Commercial Banks	$5,978,775
Mutual Savings Banks	2,196,000
Savings and Loan Associations	13,941,000
Life Insurance Companies	5,634,387
Others	4,400,000

As of the same date, Crocker and Citizens held only 1.80 per cent of that total (BK-E-31). [20]

[*160] (e) In 1962, commercial banks held **[**59]** only 32.74 per cent of the total California business loans and credit outstanding. The $21,276,061,000 total amount of such loans and credit was held as follows:

	(000 omitted)
Commercial Banks	$ 6,945,861
Commercial and Finance Company Paper	598,800
Small Business Administration	76,600
Finance Companies	1,111,700
Life Insurance Companies	2,064,400
Savings and Loan Associations	588,700
Trade Credit	9,830,000

Crocker and Citizens held 2.85 per cent of that total (BK-E-33).

(f) In 1962, commercial banks held only 44.36 per cent of California's $7,101,896,000 installment and non-installment consumer credit:

	(000 omitted)
Commercial Banks (Installment credit and single payment loans)	$ 3,150,596
Other Financial Institutions (Single payment loans)	87,500
Sales Finance Companies	1,219,400
Credit Unions	497,300
Consumer Finance Companies	379,900
Others - Installment Credit	160,000
Retail Outlets (Installment credit and charge accounts)	1,156,600
Credit Cards	51,200
Service Credit	399,400

Crocker and Citizens had 5.56 per cent of that total (BK-E-35).

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[20] The accuracy of the above tabulation is reflected in table 14 of the Report of the Governor's Banking Study Committee on the Future of Banking in California (January 26, 1965), which is based on data for 1951 as of March 31; for 1954 and 1960 as of September 30; and 1957 and 1962 as of October 31. The table clearly demonstrates the extent to which competition from other financial institutions has materially affected a very substantial element within the banks' line of commerce between 1951 and 1962:

[SEE TABLE IN ORIGINAL]

[*161] The financial institutions **[**60]** which compete with commercial banks are located in every part of the State of California:

(a) The Morris Plan Company has 47 offices in 46 communities located in every area of the state. Its eight San Francisco Bay area offices include at least one in each of the five counties which plaintiff claims to be the relevant local market, and its 12 offices in the Los Angeles metropolitan area include three in Orange County and nine in Los Angeles County. As of December 31, 1955, it had total assets of $115,067,049 and total loans of $116,913,051 (BK-GGG, pp. 1-2).

(b) As of December 31, 1964, there were 70 federal and 206 state chartered savings and loan associations doing business in California through 670 offices located throughout the state (BK-GGG, p. 3; Ct. 195 (Exh. 15-B, p. 2)). Their total assets amount to $23.9 billion. Of those, 43, with total loans of $3 billion and total share accounts of $2.9 billion, have their headquarters in the San Francisco Bay area. Another 112, with total loans exceeding $13 billion and total assets exceeding $12 billion, are headquartered in Los Angeles and Orange Counties (BK-GGG, p. 3).

(c) As of December 31, 1965, there were nine agencies of **[**61]** the General Motors Acceptance Corporation in California having 18 offices in the principal economic areas of the state. Their total loans and discounts exceeded $450 million and their total assets amounted to more than $460 million. The two agencies located in the San Francisco Bay area had total loans and discounts of almost $100 million and total assets exceeding that sum. In Los Angeles and Orange Counties, five General Motors Acceptance Corporation agencies with seven offices have total loans and discounts of more than $300 million and total assets of more than $306 million (BK-GGG, p. 4).

(d) The California Department of Veterans Affairs, Division of Farm and Home Purchases, has 14 offices located in the principal economic areas of the state, and as of June 1965, had 127,201 home loan purchase contracts outstanding, with a total outstanding balance of $1.3 billion, and in addition, had 1,294 farm loan purchase contracts outstanding, with a total balance of $31.5 million. Of those, almost 25,000 home loan purchase contracts, with an outstanding balance of approximately $260 million, were held by its two offices in the San Francisco Bay area. The three offices in Los Angeles **[**62]** and Orange Counties held almost 40,000 home loan purchase contracts, with an aggregate balance of more than $380 million (BK-GGG, p. 5).

(e) Finance companies are also very active in the California local markets. As of 1961, there were 1,183 finance company offices in California, with total loans of $695 million (Ct. 195 (Exh. 15-C, p. 6)).

(f) Credit unions are active throughout California. As of 1962, they numbered approximately 1,750, had total assets of $917 million, total loans of $765 million and total share accounts of $814 million (Ct. 195 (Exh. 15-C, p. 2)). As of 1965, there were 88 operating credit unions in the San Francisco Bay area, including 28 in the City and County of San Francisco, 8 in San Mateo County, 14 in Contra Costa County, 2 in Marin County and 36 in Alameda County (BK-GGG, pp. 6-8). On the same date, there were 136 operating credit unions in Los Angeles County and another 17 in Orange County, for a total of 153 in the Los Angeles metropolitan area (BK-GGG, pp. 9-12).

(g) Some 371 insurance companies do business in the State of California. Together they have total assets of $156.7 billion and total loans of $65.8 billion (BK-GGG, pp. 21-36). The assets **[**63]** of 27 of them each exceed $1 billion, 16 exceed $2 billion, 11 exceed $3 billion, 8 exceed $5 billion and 2 exceed $20 billion (BK-GGG, pp. 21-36).

(h) There is no shortage of insurance companies doing business in the local markets in California. Some 200 insurance companies are represented in the five-county San Francisco Bay area. Together they have assets in excess of **[*162]** $149 billion and loans exceed $63 billion (BK-GGG, pp. 13-16). A slightly larger number do business in Los Angeles and Orange Counties. There some 213 insurance companies are represented, with total assets exceeding $150 billion and total loans exceeding $63.8 billion (BK-GGG, pp. 17-20).

In plaintiff's hypothetical state market, where convenience is no longer a controlling factor, not only must a drastic modification (a reduction in percentage figures, as will be hereinafter shown) be made to reflect the foregoing data showing the competition given commercial banks by all financial institutions, but a further adjustment must be made to account for both out-of-state and foreign banks. Before making such necessary adjustments to plaintiff's concentration ratios, we reiterate and re-emphasize that **[**64]** were the court to confine its consideration of the facts of this case to commercial banking as the sole line of commerce, and thus accept the plaintiff's interpretation of subparagraph B of *§ 1828(c)(5) of Title 12 U.S.C.*, we would still make the same basic findings herein made and reach the same conclusion.

Adjustments to plaintiff's concentration ratios.

Throughout the trial, in its proposed findings and its brief, plaintiff has placed reliance on its concentration figures, so-called "concentration ratio", [21] as an assertedly reliable indicator of the probable competitive effects of the instant merger. One would think, therefore, that plaintiff would endeavor to present the court with a figure closely approximating the actual state of affairs, particularly since plaintiff has the burden of proof on that issue. Yet, plaintiff made no adjustment in any of its exhibits purporting to reflect concentration ratios for the business done in California by out-of-state banks, notwithstanding (1) its knowledge that the Supreme Court made a 16 2/3 per cent adjustment therefor (from 36 per cent to 30 per cent) in *United States v. Philadelphia Nat. Bank, supra 374 U.S. at 364 n. 40*; (2) **[**65]** its concession that California is a capital import state and that out-of-state **[*163]** banks solicit the loans of business firms in California; and (3) prior warning that the amount of such business would be in issue.

[66]** Even if there were no evidence on the extent of the adjustment required, some adjustment would have to be made. In the *Philadelphia* case, the Supreme Court reduced the share of the merging banks from 36 per cent to 30 per cent for business done by banks outside the relevant area, though there was no evidence reflecting the amount of that business. Since California is growing more rapidly than Pennsylvania, and since larger amounts of capital are imported to finance that growth, it would be expected that a larger percentage of bank financing would come from out of state. In an effort to make this necessary adjustment, Professor Weston not only relied upon the study of capital imports for home loans made in California by Leo Grebler, Professor of Real Estate and Urban Land Economics of the Graduate School of Business Administration at U.C.L.A., wherein he estimated that out-of-state funds provided 38 per cent of California home mortgage loan funds (and further concluded therefrom and his own knowledge and experience that a higher percentage would be expected for business loans) (Tr. 1580), but he also made an independent study based upon a 1955 loan survey of the Governors of **[**67]** the Federal Reserve

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[21] The recent case of *United States v. Von's Grocery Co., 384 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*, definitely established that concentration is a function of the market. That case involved the merger of two competing grocery chains in the Los Angeles area. Mr. Justice Black's majority opinion makes clear that *section 7* deals with the number of separate *competitors* and *market* concentration. In disregarding a finding of the district court that there had been no increase in concentration, Mr. Justice Black noted that there had been a decline of more than 1700 separate competitors in the market and, speaking for the majority, stated:

> It is thus apparent that the District Court, in finding No. 80, used the term "concentration" in some sense other than a total decrease in the number of separate competitors which is the crucial point here. (*384 U.S. at 273 n. 3*.)

He goes on to state:

> Thus, where concentration is gaining momentum *in a market*, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers. (*384 U.S. at 277*.)

In the instant case there has been at least a 35% increase in the number of separate competitors in every local banking market which plaintiff contends are relevant for judging the effects of the instant merger (BK-M; BK-N; BK-P; BK-Q; BK-OO; BK-PP). During the period 1954-1964, 706 new entries added as many "separate competitors" in various communities throughout California (BK-H; BK-I; BK-J). In the short period since the Crocker-Citizens merger, 69 new banks have been established in various sections of California, 19 of them in Los Angeles County (G-360). Interestingly enough, even if the state as a whole is taken as a market, we find that in terms of independent competitors, there has been a substantial increase in the number of competing banks since 1945 because, as Professor Dirlam had to admit, the Government overlooked the fact that its 208 "banks" in 1945 included all the Transamerica banks, as well as other affiliated banks which were not independent competitors (Dirlam, Tr. 729-733).

System (BK-Y, Tr. 1555). On the basis of that survey, which was the only source of data from which out-of-state bank loans to California borrowers might be derived, he calculated that of the total business loans made to California borrowers by commercial banks in the United States, the combined share of Crocker First National Bank and Anglo-California National Bank (which became Crocker-Anglo National Bank in 1956) and Citizens National Bank was only 6.41 per cent, which when compared with their 9 per cent share of the reported business loans by all California banks, represents an adjustment (reduction) of 28.78 per cent (BK-Y, Table 4; Tr. 1560-1568). The effect of such an adjustment, which it would be erroneous not to make, will be hereinafter shown.

The magnitude of the adjustment required to compensate for business done by out-of-state banks is itself evidence of the fact that the whole of California is not a relevant commercial banking market (Weston, Tr. 1583), a market based on economic facts that correspond to business reality.

An adjustment of Crocker-Citizens' share of the hypothetical statewide market should also be made for available resources of **[**68]** foreign banks. Such an adjustment is difficult, if not impossible, to measure, unless we resort to plaintiff's theory that every office of a bank has behind it all the resources of its whole system. In such event, if we were to postulate as the Government does, an adjustment of plaintiff's concentration figures for California would have to include resources from foreign banks. The resources of these foreign banks, with subsidiaries and agencies in California, totaled $23.23 billion as of December 31, 1962, as contrasted to $29.99 billion for all California banks. As of that date, the resources of such foreign banks were of such magnitude as to reduce Crocker-Citizens' hypothetical market share of deposits suggested by the Government from 9.6 per cent to 5.4 per cent (BK-Z, Table II). This we know would be an erroneous reduction, since a foreign bank, even more so than a statewide bank, cannot afford to risk all of its resources in a single market, nor are foreign banks generally able to do so because of capital export restrictions imposed by law in most countries. However, it is clear from the evidence in this case, including the testimony of plaintiff's witnesses Thomson and **[**69]** Goto, representatives of the Chartered Bank of London and the Bank of Tokyo, Ltd., that a part of these total resources are available as a potential factor in California competition. What part of these resources are so available and the degree to which they would require a reduction of Crocker-Citizens' **[*164]** market share in California we cannot say nor reliably estimate. What we do know is that these foreign banks already have offices, and in one case, nine locations, in California. [22] Even though only a portion of the very substantial world-wide resources of these foreign banks are available for use in California, the availability of such resources would enable these offices to participate substantially with little effort in the asserted statewide market and in the local markets where they have offices (Goodman, Tr. 1735, 1880-1881). In the same way that a branch can shift its lending power from one particular branch to another, a foreign bank with an agency in California can shift its relative lending power from Montreal or London to San Francisco or Los Angeles (Goodman, Tr. 1737). The amount of funds that an agency of a foreign bank will divert to California is, from an **[**70]** economist's standpoint, determined by the profits to be made. If there were a substantial increase in interest rates in California, there would be an immediate influx of funds brought into California for lending by foreign banks (Goodman, Tr. 1722-1723). Even plaintiff's staff economist testified that Crocker's ability to concentrate their total resources in the Los Angeles metropolitan area differed from the foreign banks' ability to concentrate their resources in California only in degree (Gaffey, Tr. 1100).

It is apparent from the foregoing that the resources of foreign banks operating in California would require some further adjustment in Crocker-Citizens' assumed market share, and while it could never equal a reduction from 9.6 per cent to 5.4 per cent, as the logic of plaintiff's theory **[**71]** of availability of total resources of a bank with branches would lead us, it would, nevertheless, be substantial. However, since we are unable to measure this reduction in percentages, we make no further reference thereto, except to note that the percentage ratio of Crocker-Citizens' share of the assumed market should in fact be slightly less than the figures hereinafter established by the court.

Plaintiff's concentration figures are unreliable.

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[22] On December 31, 1964, there were six state chartered foreign banks having 22 banking offices and agencies of seven foreign banks doing business in California. Two others had permits and stated they would open in 1965.

Primarily, for the reasons above indicated, we not only find that plaintiff's *limited* line of commerce figures purporting to show increases in concentration are unrealistic and inappropriate for the purpose of assessing the competitive effect of the instant merger, but we are further satisfied that these figures, *which are related almost wholly to the Bank of America*, are inconsistent with plaintiff's theories of market, unreliable and unsound. Furthermore, they are not supported by the banking agencies.

The trial revealed a basic inconsistency in plaintiff's theory which undermined the testimony of both its experts and its exhibits. Dirlam and Gaffey assumed that the State of California was a market and that the number of competing **[**72]** banks had declined very substantially between 1945 and 1963. This being their theory, they had to admit that affiliated banks or banks commonly owned did not compete against each other. When this fact was brought to their attention, together with the existence of Transamerica as a holding company, [23] **[**74]** they had to **[*165]** admit that instead of there being a decline in the number of banks between 1945 and 1963, there was a substantial increase in the number of competing units in California during that period. Witness the testimony of Dirlam [24] (Tr. 729, lines 20-24):

Q. How many of those 208 banks in 1945 were controlled by Transamerica Corporation?

A. That I don't know.

Q. Didn't it ever occur to you to ask that?

A. As a matter of fact, it didn't.

and (Tr. 733, lines 9-17):

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[23] In determining how many banks were controlled by Transamerica, plaintiff's expert voiced the opinion that a 20% interest would be significant (Tr. 730). In 1949, Transamerica owned at least 20% of the outstanding stock in some 27 California banks, including Bank of America and Citizens.

In reaching his opinion as to the alleged reduction in the number of banks in California, Dirlam was of the belief that the total number of banks in the state dropped from 171 in 1954 to 129 in 1962, for an overall reduction of 42 (Dirlam, Tr. 735, lines 9-12; G-25). In reaching that conclusion, Dirlam overlooked the fact that a number of the banks in existence prior to 1962 were controlled by Firstamerica (Dirlam, Tr. 735, line 9 - Tr. 736, line 5). Under this hypothesis, however, the banks controlled by it could not be regarded as independent competing units. They were not competing against each other (Dirlam, Tr. 736, lines 6-9).

It was during the period 1954-1962 that the "old" First Western purchased 23 banks from Transamerica (G-30, nn. 2, 3). It was also during that period that The California Bank and the "old" First Western acquired 33 other banks (for a total of 56) to form the present United California Bank in February 1961, with the approval of the Department of Justice (G-26, pp. 6-7).

How many other banks in existence in 1945 and which merged prior to the end of 1964 were similarly controlled by common shareholders cannot be ascertained from the evidence. Plaintiff's witness had no way of knowing (Dirlam, Tr. 731, 732).

One group of banks under common ownership which plaintiff treated as four separate banks were the Work banks in Salinas, Monterey, Carmel and Pacific Grove. All four had been controlled by the Work family prior to Crocker-Anglo's acquisition of the Salinas bank in 1956 and of the other three in 1959 (G-26, p. 2; G-337, p. 51, lines 22-24; p. 52, lines 13-18; p. 54, lines 4-6).

Plaintiff even counted the Bank of San Rafael and First National Bank in San Rafael as separate banks, although they had identical shareholders, identical officers, shared the same building and published statements in the same annual report (G-26, p. 2; G-337, p. 94, line 20 - p. 95, line 6). Moreover the Bank of San Rafael was a savings bank without demand deposits, and by Dirlam's definition "savings banks" were outside the line of commerce (G-13; Dirlam, Tr. 493, 556, 558).

[24] The testimony of Professor Joel B. Dirlam as it related to banking in California was too speculative and hypothetical to carry much weight with this court. He had only recently been concerned with the field of banking, had never been to Los Angeles, had never been to San Francisco prior to the trial, knew nothing about the various other California communities other than what was disclosed on maps, had made "no particular study of California", and did not investigate banking in California. Contrasted to his testimony is that of Professor J. Fred Weston of the Graduate School of Business Administration of the University of California, Los Angeles, who knows California well and had had many years' experience in the problems of the financial industry in California, and Associate Professor Oscar Goodman of the Graduate School of Business at Northwestern University, who was one of the experts relied upon by the Government in the *Philadelphia* and *Lexington* cases, who had resided and taught for a period in California and who had made a special, extensive and "on the ground" study of the banking situation in California for the purposes of the trial of this case.

Q. . . . Can't we agree on one other thing, Doctor, that neither you nor I know the precise number, but from the standpoint of independent competing units, the number of independent competing units is greater in 1964 than it was in 1945? How much is the only question.
A. To the extent that Transamerica has -
Q. That's right.
A. I think I would agree on that.

Q. When you originally **[**73]** testified on direct, you thought the reverse was true, did you not?
A. Yes.

[75]** Strangely enough, plaintiff, in its opening brief, still contended that " . . . the total number of competing banks actually went down from 208 in 1945." Inasmuch as the evidence shows that there were other affiliated banks in 1945 and later and that plaintiff made no attempt **[*166]** to eliminate any affiliates or subsidiaries other than those of Trans-America (Pltf. Opening Brief, p. 34, n. 1), it is apparent that plaintiff's figures are unreliable. Even on plaintiff's figures, however, the number of banks increased from 178 in 1950 to 200 in 1964 (G-25A). Dr. Gaffey, plaintiff's staff economist, testified that this trend was a favorable factor (Tr. 1145-1146).

Statistically, plaintiff's analysis of the effect of the instant merger on concentration was fallacious, as well as hypothetical. All plaintiff's figures on concentration included Crocker-Citizens with the Bank of America. On almost every basis the Bank of America has approximately a 40 per cent share of the hypothetical state market. It has more offices in Los Angeles County alone than Crocker-Citizens has in the entire state. For this reason, as Professor Goodman points out, it is statistically unsound to group **[**76]** the Bank of America together with any other bank in an attempt to analyze what effect the other bank has on markets or market structure. [25]

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[25] On this point Professor Goodman testified as follows:

Q. Now would you tell us what is involved statistically in economics whenever you take, for example, one unit, such as Crocker-Citizens, and put it with a group such as "all others" or put it with a group such as "the first five," what is a statistican [sic] or economist trying to do when he does that?

A. One has many purposes in examining data. One ordinarily groups data in order to draw off some significant conclusions relative to particular size or particular groups. When he groups data, he must group data which will lend itself to such analysis.

If one group, as we have in No. 1, the Bank of America with "all others" in this case, the two statistics taken as a group demonstrate that the Bank of America - as a result of its presence in many, many more local markets in the state of California than any other bank in the state of California, the accumulation of the sum total of the participation of the Bank of America in all of the local markets in California is so dominant a figure that if you were to add any other figures to the Bank of America, the result: No other individual banks could affect the end result that you would get, all the figures would be dominated by the Bank of America.

It is like trying to combine a giant and a pigmy and say something about the size of a man by so doing. They are two separate classes of men and you cannot draw off a conclusion as to the average of a man by combining a 20 foot giant with a 4 foot pigmy.

Statistically this is impossible, to get relevant or meaningful figures from such a combination.

Q. And is this what occurs in the category No. 3, which shows the cumulative total for the first five banks?

A. Yes. The figure is dominated completely by the Bank of America. No changes among the other four could very much affect the end result because when you add a giant, which is in a class all by itself, with the others, which fundamentally are in a completely different class, the sum total does not reflect like items. It reflects two separate groupings of items.

Q. Sort of like saying Cashus [sic] Clay and Archer and Schoepke could lick any man in the courtroom. It is a true statement but it doesn't show much about Archer's or Schoepke's physical prowess.

A. I think that's a fair statement.

(Tr. 1766-1768)

Judge Pope: On that last exhibit I would like to ask this witness a question (Exhibit BKYY).

[77]** **[*167]** Professor Goodman testified that such a grouping of the Bank of America with other banks produces what is known in statistics as an inverted "J", from which it is impossible to obtain a statistically meaningful analysis. Plaintiff's expert had to admit that if in the hypothetical California market, the Bank of America were omitted, there would be no economic basis for objecting to concentration in that market. On the other hand, if Crocker and Citizens were both excluded from plaintiff's statistical analysis of that hypothetical market, concentration would still exist. Accordingly, any concentration in the California hypothetical market is not a function of Crocker-Anglo or Citizens alone or together. And, further, there was no evidence that the merger of Crocker and Citizens created a bank, which, by itself or in combination with any other bank other than the Bank of America, could adversely affect competition in California banking. From an economist's standpoint a market in which about 155 (or more accurately, some 200) banks have 60 per cent of the market is a healthy market.

The Government attempts to make something out of the fact that the two voting FDIC directors **[**78]** "deadlocked" in reporting on the merger. We rather think that the FDIC directors stood two to one in the banks' favor because the Comptroller clearly favored the merger, and though an FDIC director, abstained from voting (BK-A, p. 54).

In 1961, the Board of Governors of the Federal Reserve System launched a new program for comprehensive research in the field of banking structure and bank competition. This research included an over-all study of the measurement of concentration which is reported in Smith, "Measures of Banking Structure and Competition," 51 Fed. Reserve Bull. 1212-1222 (Sept. 1965). The general conclusions there reached substantiate the specific

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Does your theory as to the effect of adding a very small peripheral concern to the market in which there is one dominant operator square with the theory that was developed by the Supreme Court of the United States in the Aluminum Company case in which the Court said something like this - this is quoted from the Philadelphia Bank case, with which I think you are familiar -

The Witness: Yes, sir.

Judge Pope:

"It is no answer that, among the three presently largest firms . . . there will be no increase in concentration. If this argument were valid, then once a market has become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."

And further down:

"The acquisition of Rome added, it is said, only 1.3 percent to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reasonably likely to produce a substantial lessening of competition of *Section 7*."

How does the theory that you expounded in respect to this last exhibit square with that?

The Witness: All I have been talking about so far, Your Honor, is the question of a measurement of size.

The question that you have asked me to address myself to is the significance of changes in competitors in a particular market, the effect on competition in that market of a change of competitors.

You must, in order to do that, set up some measurement of size, study the tone of competition and come to some conclusion about the effect of competition.

The example that you posed poses a situation where the number - the giant in your case, the Aluminum Company - in this case the Bank of America - were to combine with a pigmy, and the result would be an increase in the size of a giant as a result of merger on the tone of competition in that market and on the potential competition in that market.

We do not have that situation in this case. This is a completely different situation. We have a situation where we have a giant and then many much smaller other competitors, and eventually, after - I will be glad to address myself to the question, of the effect on competition in this proposed market of a change in the relative size of two of the competitors in this market which has 200 competitors, on the tone of competition in that market at the present time and on the potentiality of competition. In other words, that is the question we address ourselves to. The example in the Aluminum case does not apply to this particular set of statistics.

(Tr. 1769-1771)

conclusions we have reached regarding markets in this case. Smith points out the weaknesses of concentration ratios which fail to consider disparity in size of banks (ibid. at 1214, 1215) and which fail to consider all competitors within the market (ibid. at 1215). He affirms the necessity for a reliable definition of market area (ibid. at 1216-1217). **[*168]** He also finds banking markets to be local or national (ibid. at 1217-1218). He states (ibid. at 1216-1217): "The metropolitan area may indeed be the appropriate **[**79]** market area. If so, the State, or the nation, could not also constitute the appropriate market area." Accordingly, all plaintiff's suggested findings on concentration are without basis in fact and unsound in theory.

The largest increase in concentration in plaintiff's hypothetical statewide market in the period 1950 to 1962 was caused by the creation of United California Bank. The increase was over three times the increase in concentration caused by the merger of Crocker and Citizens. Yet none of the agencies, including the Department of Justice, viewed the creation of United California Bank as creating an increase in concentration. (1961 Ann. Report FDIC, pp. 60-62; 48th Ann. Report of Board of Governors of Fed. Reserve System, 150-52.) On the other hand, the instant merger produced only a very slight change in the market structure, even in plaintiff's hypothetical statewide market. First Western Bank was also created with Government approval.

A consistent statistical analysis of the plaintiff's hypothetical market shows that the merger was insignificant. If the statistical methods showing changes in market structure which were employed by the Department of Justice in the **[**80]** Philadelphia case, but which it elected not to employ in the instant case, were used as demonstrated by Exhibit BK-VV, [26] the change is almost imperceptible. **[*169]** The market share of the nine largest banks in the

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[26] Relative Ranking of California Banks on Theory of Government's Exhibit 32 in United States v. Philadelphia

I.

Government's Exhibit 32

Table 32

Relative Ranking of the Five Largest

Philadelphia Banks by Total Deposits

(No. 1 Bank - 100)

Before Consolidation

After Consolidation

Bank No. 1 (1st Penna.)

100

Bank No. 1 (Phila.-Girard)

100

Bank No. 2 (Phila. Nat'l)

97

Bank No. 2 (1st Penna.)

62

Bank No. 3 (Girard)

65

Bank No. 3 (Provident Trades)

28

hypothetical market at the end of 1962 was substantially the same as the market share of the nine largest banks at

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Bank No. 4 (Provident Tradesmen's)

45

Bank No. 4 (Fidelity-Phila.)

26

Bank No. 5 (Fidelity-Phila.)

42

Bank No. 5 (Central-Penn.)

15

Source: Record on Appeal, 2413

II.

Relative Ranking of the Ten Largest California Banks by Deposits

Before Merger

After Merger

First Bank

B of A

100

B of A

100

Second Bank

Security First

34

Security First

34

Third Bank

Wells Fargo

the end of 1963 after this merger. Accordingly, if there was any significant effect on concentration, it was among

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25

Wells Fargo

25

Fourth Bank

UCB

20

CROCKER-CITIZENS

25

Fifth Bank

CROCKER-ANGLO

18

UCB

20

Sixth Bank

Union

8

Union

8

Seventh Bank

Bank of California

7

Bank of California

7

Eighth Bank

CITIZENS NATIONAL

6

First Western

5

1st Nat'l,

Ninth Bank

First Western

5

San Diego

2

1st Nat'l,

Tenth Bank

San Diego

those banks which have statewide facilities and in this area the effect of the merger was obviously to decrease concentration.

[81]** Appropriate Sections of the Country.

In its complaint and in the pre-trial proceedings, plaintiff eliminated from the consideration of this court any question of the effect of the instant merger in national and international markets (Pre-Trial Order, pp. 3-4, 9, 11). At all events, the evidence will in no way support any conclusion that the instant merger had any actual or potential adverse competitive effect in either of the markets. If anything, the evidence, as will be herein shown in the court's discussion of convenience and needs of the community, affirmatively shows that California benefited by reason of the ability of Crocker-Citizens to compete a little more effectively in these markets.

The geographic market was originally limited to the State of California as a whole, the Los Angeles metropolitan area (Los Angeles and Orange Counties), and the San Francisco Bay area (City and County of San Francisco, and counties of Alameda, Contra Costa, Marin and San Mateo), (BK-AA, No. 55). At the final pre-trial conference, plaintiff added three counties as alleged separate sections of the country: Ventura, Santa Barbara, and Kern Counties. At that time the court stated that, **[**82]** if, at the close of plaintiff's case, plaintiff was relying on these three counties as markets for evaluating the instant merger, the defendant banks would be granted additional time within which to prepare; however, this proved unnecessary, for neither of plaintiff's experts testified that Ventura, Santa Barbara or Kern Counties were appropriate sections of the country for assessing the impact of the merger. The court regards plaintiff as having abandoned any contention that those counties are appropriate sections of the country within which to judge the instant merger. [27] In fact, there is no evidence on which it could be found that any one of these three counties was itself a market or a sub-market.

2

Hibernia

2

Source: Deposits December 28, 1962. G-29

[27] And if these counties could be said to be appropriate sections of the country in which to assess the impact of the merger, on the record before us, we would clearly find that any claimed lessening of competition, actual or potential, in these counties "would be *de minimis*", just as we did for Ventura County when we denied the plaintiff's motion for a preliminary injunction. *United States v. Crocker-Anglo Nat. Bank, [1963 TRADE CASES P70,934], 223 F. Supp. 849, 854* (N.D.Cal.). The record on this score is no better today than it was then.

[83]** California as a whole.

To find adverse effects of the instant merger, plaintiff asserts that the state as a whole is a section of the country. It must do this because otherwise no competition between Crocker and Citizens can be found, and if there is no competition, there can be no increase in concentration. Likewise, prior mergers in the state as a whole could not be assumed to have adversely affected competition without evidence of such effects. It is obvious, for example, and plaintiff's experts admitted, that there was no change in the banking structure in the Los Angeles metropolitan area, in the San Francisco Bay area, or in other local markets as a result of the merger (Dirlam, Tr. 638; 676).

The following pragmatic data demonstrates that the State of California is not a market or section of the country:

(1) The geographic extent of the State of California, hereinbefore described, precludes it from being a market for commercial banking services which are essentially local in nature;

(2) Notwithstanding the fact that, before the complaint in the instant case was **[*170]** filed, plaintiff had been supplied with the names and addresses of all customers for whose **[**84]** business the two banks allegedly competed and the fact that it had available to it numerous files on mergers of other banks in the State of California, plaintiff could not produce the name and address of any customer in a statewide banking market, even when ordered by the court to do so (BK-CC, Order on Bank Defendants' Motion to Compel Further Answers, Tr. 462); [28] **[**88]**

(3) The hypothesis of a statewide market assumes that banks located in different sections of the state are competing against each other (Goodman, Tr. 1870). In its exhibits purporting to show concentration ratios applicable to the statewide market, plaintiff included every bank in the state, yet:

(a) Plaintiff's expert witness had to admit that not all banks in the state were competing in metropolitan Los Angeles and that not all banks in the state were competing in the San Francisco Bay area (Tr. 732-722);

(b) In showing the structure of the San Francisco Bay area market, plaintiff's expert excluded the second largest bank in the state, Security First National Bank, which is substantially twice the size of Crocker;

(c) In showing the structure of the Los Angeles metropolitan area banking market, plaintiff's experts **[**85]** excluded the third largest bank in the state, Wells Fargo Bank, which is substantially four times the size of Citizens;

(d) Plaintiff's expert, Gaffey, had no evidence that the Union Bank in Los Angeles was competing against the Hibernia Bank in San Francisco, and he knew of no banks that were competing with the Bank of America in San Diego who did not have offices there (Tr. 1069);

(e) Plaintiff admitted that Crocker did not compete with banks in the Los Angeles metropolitan area (BK-AA, No. 15);

(f) Plaintiff admitted that Citizens did not compete with banks in the San Francisco Bay Area (BK-AA, No. 15); [29] **[**89]**

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[28] At the trial the court ruled as follows on the admissibility of customer lists (Tr. 462):

> Now, with respect to the failure of the Government to give the names of customers known to them as requested, at that stage we do not observe any prejudice to the defense. I don't know how you could ask for a better admission than, in effect, the admission by the Government, "We don't know of any such customers." In other words, it approaches a statement that, "We don't have any proof that there was such competition." At any rate, our ruling has been indicated and we will proceed from there.

That observation still applies and clearly points up plaintiff's failure to prove that there are customers in the statewide market and customers for whose business Crocker and Citizens competed.

(4) A market survey of the customers of banks made by Professor Weston, **[*171]** whom this court finds eminently qualified to make such survey and which this court deems to have been a fair, representative, and adequate economic survey, demonstrates that there were no customers in such hypothetical statewide market (and the Government never offered any proof to the contrary) (BK-G; Weston, Tr. 1682-1686);

(5) The survey of the customers of Crocker First National Bank and Anglo California National Bank in December 1955 showed a very small number outside the five Bay Area **[**86]** counties and none in a statewide banking market;

(6) If the State of California were itself a market, the creation of United California Bank would have caused the largest increase in concentration in that hypothetical market in recent years. Plaintiff's expert admitted that there are no factors suggesting the existence of a statewide banking market at the present time which did not exist in 1962 when the United California Bank was created (Dirlam, Tr. 742). It is therefore inconceivable that a banking market of the magnitude of that now asserted by plaintiff could have existed and gone undetected by the FDIC, the Federal Reserve Board and the Department of Justice, all three of which passed upon the creation of the United California Bank. Yet not one of those agencies stated in its report that there was a statewide banking market in California (other than for banks with statewide facilities) which would be adversely affected by the creation of that bank, nor did any of them state that concentration was increased or that earlier mergers had adversely affected any such market. (48th Ann. Report, Board of Governors, pp. 150-152; 1961 Ann. Report FDIC, pp. 60-62). It is also inconceivable **[**87]** that plaintiff would have failed to call the court's attention to that increase in concentration at the time the settlement of the *Firstamerica* case was submitted to the court for approval if there had been such a market. It did not do so. United States v. Firstamerica Corp., Civil No. 38139, N.D.Cal., and letter on file therein dated September 27, 1960, from the Department of Justice. [30] The market, therefore, did not exist then, and it does not exist now.

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[29] After admitting that Crocker and Citizens competed in different geographic areas, Professor Nicols suggested that some significance might be attached to the fact that both banks competed with branches of the Bank of America (Tr. 2276). Citizens, however, was in direct competition with 50 to 80 other banks in the Los Angeles area, including some of the largest banks in the state and in the world (BK-Q; BK-Z; BK-PP). Under those circumstances, a bank not actually operating in the area would have no effect upon local market conditions. One could as well argue that because Crocker-Citizens competes with The Bank of California, and because The Bank of California competes with banks in Seattle and Portland, Crocker-Citizens competes with banks in Portland and Seattle. A similar argument could be made with respect to the foreign banks having offices in California. It appears to us this argument was, in effect, made by other defendants and rejected in *Crown Zellerbach v. FTC, 296 F.2d 800 (9th Cir. 1961)*, cert. denied, *370 U.S. 937, 8 L. Ed. 2d 807, 82 S. Ct. 1581 (1962)*, and in *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*.

Accordingly, this is not a case like *United States v. Pabst Brewing Co., 384 U.S. 546, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)*, where the Government proved a state market by showing actual competition between the two beer companies throughout Wisconsin, and in fact, the nation. Instead, this is a case in which the Government's expert admitted that the defendants were not operating in the same geographical markets, the defendants proved that the combined banks did not compete against each other, and a survey of bank customers themselves showed that such competition did not exist. In addition, at the second trial it was proved that the difference in interest rates (or conversely, risks) between Los Angeles and the Bay Area was further proof that they are different markets (Goodman, Tr. 2198).

Neither can it be said that California is "any section of the country ", in which Crocker and Citizens were competing against each other and in which the merger could reduce competition, as in *Pabst*. The fact that beer manufactured in Milwaukee can be sold not only throughout Wisconsin but throughout the nation (e.g., Miller's High Life "brewed in Milwaukee") does not mean that the same is true of banking services. Plaintiff has successfully and correctly proved that banking services are primarily local and that banks do business where they have offices.

[30] Copies of the reports of the regulatory agencies and the Department of Justice letter referred to are attached to the Memorandum of Crocker-Anglo National Bank and Citizens National Bank in Opposition to Motion for Preliminary Injunction filed herein on October 8, 1963.

From the standpoint of opinion evidence, as we pointed out in footnote 24, supra, plaintiff relied on an expert who had absolutely no familiarity with the State of California and who could not claim to be a financial expert.

On the other hand, defendant banks' expert, Goodman, although he was far more familiar with California and California banking than plaintiff's expert, Dirlam, declined to render an opinion or otherwise aid the defense before making an exhaustive study of California and banking in California, which included making on-the-site visits to banking offices, inspecting bank loan files, interviewing loan officers, and obtaining deposit **[*172]** data for every bank in every area in the state. On the basis of that study and experience, he reached the same conclusion as to which he testified for the Government **[**90]** in the *Philadelphia* case: banking markets are local, national and international. His opinion was that the state is neither a local market nor a relevant section of the country for the purpose of judging the effect of a change among competitors in the instant case. The court concurs in this view.

The defendant banks' expert, Professor Weston, qualifies as one of the leading financial experts in the country. His opinion that the state was not a market was supported not only by his experience but by his survey.

We find that the substantial weight of the evidence shows that there was no statewide market for Crocker or Citizens. If there was no statewide market for Crocker or Citizens or for any bank that did not have branches throughout the entire state, the fact that Bank of America had over 800 branches scattered throughout the state and in every county and that two other banks to a lesser degree had branches in many counties throughout the state does not thereby convert the entire state into a meaningful economic market. All that you actually have is three banks able to service numerous local markets throughout the state. [31]

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[31] As to banks able to give local services throughout the state, Professor Weston testified:

> Judge Zirpoli: This is what is disturbing me. If you have a capacity to mobilize throughout the state in this fashion, such as Bank of America can do, why can it not be said that there is a relevant market, certainly as far as the Bank of America is concerned in the State of California.
>
> The Witness: For the reason that with regard to mobilizing funds, a bank is able to mobilize funds to the extent that it can locate offices to generate the acquisition of the funds.
>
> Now, the flow of funds into California, however, comes from outside the state as well, so even focusing on the flow of funds, the flow of funds real magnitude or his loans get into the insurance money flows into the state, and so the point I am making is that in a capital deficit state in the supply of funds market that is national it is still desirable from the standpoint of that state to mobilize as effectively as possible the funds within the state area since the state must depend for financing its business and commercial and individual activities in substantial measure on funds outside the state, and I am saying that it is important that the funds within the state be mobilized as efficiently as possible. But this doesn't indicate that this market is statewide because you have a flow of funds from outside the state from numerous types of institutions.
>
> Mr. Archer: Q. Well, Professor Weston, what would you say about a state-wide market from the standpoint of a company that wanted to deal with only one bank in the state and had facilities throughout the state which could be served only by the Bank of America? Would you consider that to be a market or - how would you consider that?
>
> A. I would not consider that a market either. There is a distinction that must be drawn between the performance of a particular type of banking service and the existence of a market. For example, the national banking divisions of banks in California in seeking to obtain business in California from national accounts will stress the services that they can perform in California for these customers in connection with their California business. Nevertheless, they still have to compete with out-of-state banks for the business of those national accounts in California, so that even though Bank of America might have the U.S. Steel account, it is subject to continuous competition with the Chicago and New York banks to handle the U.S. Steel account both nationally and even for their California activity.
>
> Q. Well, suppose U.S. Steel, however, determines from the standpoint of its own policy that it is going to have its deposits made daily and its payrolls paid from its various locations in California: In Pittsburg, San Francisco, Los Angeles and Torrence?
>
> A. Well, then, when you talk in those terms, I can see a basis on which one might argue that in connection with these services that there exists a market in some sense. But in that market you have only the Bank of America, United California Bank, and, to some degree, First Western. This merger would add a fourth competitor to that market, if that market exists

[91]** **[*173]** While it may very well be true, as plaintiff contends, that commercial banking can appropriately be divided into three geographic areas, local, regional and national, ***HN3***[] the test as to whether any given geographic area is a relevant (economically significant) market or section of the country is not based on political boundaries, but is based on economic grounds. Therefore, even though the laws of California permit statewide branching, this factor, which undeniably must be considered, does not in and of itself make the whole of California a relevant market or section of the country in which to measure the competitive effects of a merger. The same can be said for the whole of the State of New York. Permissive statewide branching merely extends the political boundaries in which a bank may open branches, local units, to operate in local markets. It does not bring to any particular bank or banking unit depositors or borrowers from all over the state. "Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their business at a distance." *United States v. Philadelphia Nat. Bank, supra 374* ***[**92]*** *U.S. at 358*. Persons and corporations in San Diego do not normally deposit their funds in San Francisco or Sacramento. Persons and corporations in San Diego do not normally borrow from banks in San Francisco.

When a customer's deposits become of real magnitude or his loans get into the category of $100,000 or more (which some economists use as an indicium of wholesale banking), cross-elasticity comes into play and extends the geographic limits and the field of financial institutions to which such depositors or borrowers will go. They will go where they can get the maximum return on their deposits and borrow from those who are prepared to take the risk at the lowest possible interest rate. The market then becomes national. These very factors prompted Professor Weston to conclude "that from an economic standpoint there is not a statewide commercial banking activity." (Tr. 1489).

As to plaintiff's contention that the application itself established the state as a market in which Crocker and Citizens competed against each other, the Comptroller to whom it was submitted did not so understand it (BK-A, p. 34). The fact that the resulting bank, Crocker-Citizens, would compete (a) in the **[**93]** area where Citizens competed prior to the merger, (b) in the area where Crocker competed prior to the merger, and (c) with banks which offer statewide banking facilities, does not mean that each of the merging banks was competing in *all* of these respects prior to the merger (Ct. 195, Exh. 13, pp. 1, 7). The references to the dependence of both banks, for their future growth and strength, "upon their ability to extend their services throughout the major commercial areas of California - the North and South - as demanded by the needs of their present and potential customers", were expressly related to the necessity from a bank's standpoint of having offices where the need arises in a growing and industrially expanding state (Ct. 195, "Application for Approval of Merger", pp. 5, 6; Exh. 13, pp. 74, 87). One cannot fairly imply from the application that there is anything in California's economy which destroys the local nature of banking services. The substance of the entire application is clearly to the contrary; each bank desired to merge in **[*174]** order to have offices in areas it was then unable to serve (Ct. 195, Exh. 15-J, pp. 4-11). In a sense each bank wanted to further **[**94]** emulate the Bank of America and take advantage of the benefits of commercial banking by offering the essential ingredient of "convenience" in more local markets throughout the growing and expanding state. [32]

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at all, and if that is regarded as a market under some definition, then this merger would decrease competition because it would add a fourth bank to a bank service activity in which only three banks exist today.

Judge Pope: You said "decrease competition".

The Witness: "Decrease concentration." I'm sorry.

Increase competition and decrease concentration.

(Weston, Tr. 1584-1587, line 3)

[32] The Bank of America grew to be the largest private bank in the world because its founder, A. P. Giannini, the greatest innovator in modern banking, recognized the need to serve "the little fellow" and understood that this could be effectively accomplished only through local branches offering a "convenience of location" to persons of moderate means. That is why the House of Morgan declined as the Bank of America came up. J. P. Morgan, the elder, was the banker for men of great wealth. Giannini was the banker for the locomotive firemen, who worked on the railroad systems Morgan unified, and the puddlers in the Morgan-financed steel mills. The times favored Giannini and the leveling process, as far as money goes, less for the Haves and more for the Have Nots, proved to be a good thing for branch banking, for the Bank of America and for California. And it is still

[95]** The court concludes that the State of California as a whole is not a relevant market or section of the country in which to measure the competitive effect, actual or potential, of the instant merger. Nonetheless, bearing in mind Professor Weston's observation (note 31, supra) that the services rendered by a bank operating a statewide system may be "a market in a sense" or "a market under some definition", the court, in order to finalize all the issues presented, will hereinafter assume the entire state to be a relevant market or section of the country and evaluate the competitive effect of the merger in such assumed market.

The Los Angeles metropolitan area.

Inasmuch as there was no competition between Crocker and Citizens in either the Los Angeles metropolitan area (Los Angeles and Orange counties) or the San Francisco Bay area (City and County of San Francisco and counties of Alameda, Contra Costa, Marin and San Mateo), the instant merger could not have affected actual competition in either of these assumed markets; however, since the main thrust of the Government's claim is that this merger forecloses potential competition, and will result in a "reasonable likelihood" of **[**96]** a substantial lessening of competition in these sections, as well as in the whole of California, the court deems it advisable to review the economic realities in these sections in terms of "the business of banking".

Subsequently in this opinion we will call attention to the facts which demonstrate that potentially Crocker would not have entered the Los Angeles metropolitan area and that Citizens would not have entered the San Francisco Bay area. Accordingly, while Citizens may have had prior mergers in what plaintiff asserts to be the Los Angeles metropolitan area, and Crocker may have had mergers in certain counties of the San Francisco Bay area, we do not see how these can be relevant in adjudicating the validity of the instant merger which does not involve the same markets.

Plaintiff proved many things about the population, business and industries of metropolitan Los Angeles and the rate of its growth, but the essential thing it failed to prove is that the Los Angeles metropolitan area, as defined by it to include **[*175]** Los Angeles and Orange Counties, is in fact a relevant market in "the banking business".

The opinion of plaintiff's expert, Gaffey, that Los Angeles and **[**97]** Orange Counties constituted a banking market was based upon the fact that the Bureau of the Budget at one time included those two counties in its definition of the Los Angeles-Long Beach Standard Metropolitan Statistical Area (Gaffey, Tr. 924-926). At the time of the Crocker-Citizens merger, however, such was not the case. The Bureau of the Budget itself states that standard metropolitan statistical areas are not intended to be market areas, and Gaffey testified that the geographic boundaries of those areas are often determined by factors wholly unrelated to those which would determine a market area. Gaffey also relied on the fact that Citizens conducted its business in Los Angeles and Orange Counties, but Citizens also had branches in San Bernardino and Riverside Counties which were located so close to Los Angeles as to be considered a part of Los Angeles metropolitan area. Plaintiff's reliance on economic data relating solely to Los Angeles County certainly does not prove that Los Angeles and Orange Counties together constitute a single banking market.

Another factor which Gaffey relied upon as establishing Los Angeles and Orange Counties as a relevant banking market was the **[**98]** fact that the banks, in their application to merge, represented that the State of California lends itself to a rough division into nine more or less distinct geographical and economic areas, including one denominated the Los Angeles metropolitan area and composed of Los Angeles and Orange Counties (Ct. 195, Exh. 13, pp. 72, 73; Gaffey, Tr. 926, 927). Nowhere in the application did the merging banks characterize any of those so-called economic areas as banking markets or submarkets, and ***HN4***[] the fact that an area might constitute a

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the " convenience of location" through its branches serving local needs that makes the Bank of America strong. It should be noted further that neither the dominant Bank of America, nor either of its two smaller statewide competitors, United California Bank or First Western Bank and Trust Co., was the product of *de novo* branch banking. Each achieved statewide status essentially through mergers, and in the case of United California Bank, as pointed out above, with the approval of the Department of Justice, FDIC and the Federal Reserve Board. This court is of the view that, giving proper consideration to problems of allocation of permits by the regulatory agencies, costs, location, personnel and the training thereof, it would not have been feasible to have created, as of this date, a truly statewide system of branch banking.

market for the manufacturing and commerce activities of a bank's customers does not establish it as a banking market.

Plaintiff's reliance on economic data relating solely to Los Angeles County as evidence that Los Angeles and Orange Counties constituted a single banking market is unfounded. Data relating to one county cannot prove that two constitute a banking market.

Professor Goodman was of the opinion that the Los Angeles metropolitan area includes many local markets but is not itself a banking market (Tr. 1836). We agree. A banking office on Wilshire Boulevard would not be in competition with banking offices in other parts of Los Angeles County, let **[**99]** alone Orange County (Rhorer, Tr. 1357-1358).

In any event, Los Angeles and Orange Counties, separately or together, are not appropriate markets within which to judge the instant merger because, as plaintiff's experts admitted, the instant merger did not change the banking structure in any community within those counties.

The San Francisco Bay area.

Plaintiff contends that five counties in the San Francisco Bay area, the City and County of San Francisco, Alameda, Contra Costa, Marin and San Mateo, constitute a relevant market to be used in testing the competitive effects of the Crocker-Citizens merger and that it was the relevant market to be used in testing the competitive effects of the 1956 consolidation of Crocker First and Anglo California. On its very face, the suggestion that those five counties constitute a Bay area market violates the mandate expressed in *Brown Shoe* that ***HN5***[] geographic markets must be a product of "commercial realities", rather than a "formal, legalistic" approach. *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 336, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. What possible basis can there be for drawing the boundaries of the so-called San Francisco **[**100]** Bay area market so as to include communities like Antioch and Pittsburg in Contra Costa County, while excluding Palo Alto and Los Altos in Santa Clara County? The San Francisco **[*176]** Bay is bordered by nine counties; namely, Marin, Sonoma, Napa, Solano, Contra Costa, Alameda, Santa Clara, San Mateo and the City and County of San Francisco. Prior to October 18, 1963, the San Francisco Standard Metropolitan Statistical Area, as defined by the Bureau of the Budget, encompassed six of the nine counties bordering the Bay, namely, Alameda, Contra Costa, Marin, San Mateo, Solano and the City and County of San Francisco. The San Francisco Bay area is normally regarded as including also Santa Clara as well.

In asserting that the five counties constituted a market for judging the Crocker First - Anglo California consolidation, plaintiff's witness, Dirlam, based his opinion on three premises, none of which supports his conclusion that such a market existed or that if it did exist, it was limited to those five counties. One of the factors he relied on was that the five-county area was the area in which Crocker First and Anglo California had offices. Neither bank had offices in all five **[**101]** counties, and Anglo California, in addition to its offices located in other more remote counties, had offices in the other two Bay area counties of Santa Clara and Solano. The second factor on which Dirlam relied consisted of data designed to show that some of the Bay area offices of each consolidating bank derived the bulk of their business from customers having record addresses in those five counties. None of the tables, however, included data showing the record addresses of customers of Anglo California's Bay area offices in Palo Alto and San Jose in Santa Clara County, and Vallejo in Solano County. Whatever they may have shown, if anything, they did not provide a rational basis for excluding either Solano County or Santa Clara County. The only other factor which Dirlam cited as showing a five-county market was his belief that these five counties constituted the San Francisco Standard Metropolitan Statistical Area, as defined by the Bureau of the Budget at the time of the Crocker First - Anglo California consolidation. In that, too, he was mistaken.

There was even less reason for restricting the San Francisco Bay area market to five counties at the time of the Crocker-Citizens **[**102]** merger. By that time the Bay area counties in which Crocker-Anglo did business had increased from six to nine. There was no evidence that the bulk of the banking business of its offices in nine Bay area counties was derived from customers located in only five of those counties. While it is true that the Bureau of the Budget changed its definition of the San Francisco Standard Metropolitan Statistical Area less than two weeks (October 18, 1963) prior to include only the five counties, Gaffey testified that such changes are frequently made for reasons wholly unrelated to those which would be determinative of a market area (Gaffey, Tr. 925, 926). Also, we doubt that plaintiff contends that the Bay area market was growing smaller. In this connection, we would point out that the larger the San Francisco Bay area market is assumed to be, the smaller would be the effect of the Crocker First - Anglo California consolidation and the acquisition of the San Rafael banks.

As in the situation applicable to the Los Angeles metropolitan area, this court finds that the San Francisco Bay area includes many local markets and that some of these local markets may include parts of an adjoining county **[**103]** (e.g., the San Francisco market overflows into and encompasses the adjoining San Mateo County communities of Daly City, Colma and South San Francisco, with no discernible indication of where one stops and the other begins), but the San Francisco Bay area in and of itself, whether we include five, six or all nine counties bordering the Bay, is not a banking market.

In any event, it is admitted that the instant merger did not change the structure **[*177]** of any Bay area banking markets, regardless of which counties are in the Bay area.

There was no competition between Crocker and Citizens in any of the relevant markets referred to in the complaint.

There was no competitive overlap between the merging banks. Plaintiff offered no substantial evidence of actual competition between Crocker and Citizens in any of the relevant markets referred to in the complaint. As Dirlam testified, banks can never engage in very substantial competition in areas where they do not have offices (Dirlam, Tr. 875-876). The nature of banking markets is peculiarly local in California because of the large number of banking offices operating in virtually every area of the state. Customers in one **[**104]** community have no need to, and ordinarily do not, go to another community to do their banking and in many localities the number of banking offices is such that customers will not consider doing their banking at an office more than a few city blocks distant. California has in excess of 200 banks and about 2400 branches, local banking offices (Saxon, Tr. 2051).

There was no evidence that any branch of Crocker was so located as to be in competition with a branch of Citizens. There was no city, town or community in which both banks had offices. Ventura County was the only one of California's 58 counties where both banks had an office at the time of the merger. The Thousand Oaks office of Citizens was some 23 miles northwest of and outside the service area of the Ventura office of Crocker and outside the service area of the subsequently established office of Crocker in Oxnard and of the town of Camarillo, where it was denied a permit. Even if that were not true and even if it were assumed that there was competition between one or even both of the Crocker offices in Ventura County and the Citizens office at Thousand Oaks, such competition was insignificant. By June 1964, these three **[**105]** offices of Crocker-Citizens had only 7/10th of 1 per cent of the total deposits in Ventura County (BK-EE).

The California Superintendent of Banks found that Crocker and Citizens were not in competition and their merger would not lessen competition (BK-A, p. 44).

From the standpoint of economics, evidence of the record addresses of customers shows nothing as to competition or the areas in which either bank did business. The fact that the banks had customers with record addresses in areas where the other bank had offices did not indicate that either bank was performing a service at the location of the record address. Likewise, the fact that each of the banks had the same customers did not indicate that they were competing for the business of that customer. Either the banks were performing local services or they were competing for this business with most of the other banks in the country. The same would, of course, be true for correspondent bank customers; Citizens could not provide collection or other services in San Francisco nor could Crocker provide such services in Los Angeles.

Plaintiff, of course, argues to the contrary, but the argument sounds strange indeed coming from **[**106]** plaintiff. One of its experts testified that the record address of a bank's borrower does not delimit the market within which the bank is doing business, and its other expert testified that the services performed for such customers were performed in the vicinity of the banking office and not the address of the customer (Dirlam, Tr. 533; Gaffey, Tr. 1067-1068).

Plaintiff's expert staff economist, Gaffey, testified that the question of whether there exists a class of customers **[*178]** in a statewide market is a subject of observation and not a subject of hypothesis (Tr. 1004). He further testified that such customers could be identified (Tr. 1001-1002), and that it was his business as an expert to engage in such work (Tr. 1003). Defendant banks submitted to the plaintiff thousands of names of their customers, and this court entered an order requiring plaintiff to identify every customer of which it had knowledge for whose business Crocker and Citizens competed. Notwithstanding all this and the burden of proof which rests with plaintiff, *plaintiff was unable to identify any customers for whose business the two banks competed*, other than those in the national market, such **[**107]** as Tidewater Oil Company and C.I.T. Corporation.

By reason of the foregoing, as we stated in the beginning of this opinion, the court finds that Crocker and Citizens were not in actual competition prior to or at the time of the merger in any relevant market alleged in the complaint.

The merger did not increase concentration in California.

HN6[] Concentration is a function of a market. As stated in *Brown Shoe*, combinations are to be gauged on "their effect on competition generally in an economically significant market." *370 U.S. at 335*. Unless they relate to a market, both in the geographic sense and in the line of commerce (or functional sense), figures purporting to show concentration ratios are meaningless.

Plaintiff's and defendant banks' experts all agreed that the instant merger did not increase concentration in the local markets (Dirlam, Tr. 676; Gaffey, Tr. 1085-1086 and 1097-1099; Weston, Tr. 1491, 1625-1626).

The evidence in the instant case, including the Weston survey, his ten year study of the question, and Goodman's investigation, shows that the characteristics of California borrowers with state mobility are such that they have national mobility and are in fact **[**108]** in the national market. It follows that there is no statewide banking market in California, that plaintiff's statewide concentration ratios are, in the words of David A. Alhadeff of the Bureau of Business and Economic Research of the University of California, [33] "meaningless, or worse", and that the merger of Crocker and Citizens could not possibly have increased concentration. Nevertheless, we will consider plaintiff's concentration figures.

[109]** **[*179]** The following table, adapted from Government's Exhibit 30A, shows the percentages of total deposits of all banks of the state held by the largest banks before and after the merger.

DISTRIBUTION OF DEPOSITS IN CALIFORNIA BANKS AS OF END OF YEAR 1962 AND 1963

1962

33

The concentration statistics in this chapter are highly unorthodox. Conventional concentration statistics in the field of banking are usually computed on a legalistic or political-jurisdictional base; hence, the common practice of showing concentration of banking resources on a statewide basis. Statistics computed in this manner may conceivably serve legalistic or political purposes. For economic analysis, such statistics are meaningless, or worse. It is only by chance that statistics thus computed may sometimes find a place in economic investigations." (Alhadeff, Monopoly and Competition in Banking, at p. 52, (1954)).

The fallacy of using concentration figures *alone* to measure the impact of a merger in bank cases was pointed out by Chief Judge William E. Miller in the *Nashville* case referred to in note 1, supra. In *United States v. Third National Bank of Nashville, 260 F. Supp. 869, 883* (M.D.Tenn.), he said:

> As already stated, no reliable extrapolation as to future prospects may safely be predicted upon concentration or market share figures alone. But considering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

	Rank In California	% of Total California Each Bank	Cumulative
Bank of America	1	39.9	39.9
Security First National	2	13.5	53.4
Wells Fargo	3	9.9	63.3
United California Bank	4	8.0	71.3
Crocker	5	7.4	78.7
Union Bank	6	3.1	81.8
Bank of California, N.A.	7	2.6	84.4
Citizens	8	2.5	86.9
First Western	9	2.0	88.9
All Other Banks	10-129	11.1	100.0

DISTRIBUTION OF DEPOSITS IN CALIFORNIA BANKS AS OF END OF YEAR 1962 AND 1963

1963

	Rank In California	% of Total California Each Bank	Cumulative
Bank of America	1	40.6	40.6
Security First National	2	12.7	53.3
Wells Fargo	3	9.6	62.9
United California Bank	5	8.0	80.1
Crocker	4	9.2	72.1
Union Bank	6	3.2	83.3
Bank of California, N.A.	7	2.7	86.0
Citizens	Merged with Crocker (11-1-63)		
First Western	8	1.9	87.9
All Other Banks	9-155	12.1	100.0

[110]** The foregoing table, dominated by the Bank of America figures, clearly shows how meaningless the Government's figures are, since the concentration arises not by reason of the deposits of the next leading seven banks (or the remaining 154 banks) in 1963 but because of Bank of America's 40.6 per cent. The concentration is caused by Bank of America. No one of the other banks is responsible for the concentration. Bank of America alone or Bank of America in combination with even the smallest bank would be concentration. That is why Professor Goodman said that using a table of this character without giving proper consideration to Bank of America's dominance is like using a giant with a group of eight pigmies to show the average size of nine men. It just doesn't make sense. Furthermore, it will be noted that as of the end of 1962 the seven next leading banks combined with Bank of America showed a cumulative percentage total of 86.9 per cent, and at the end of 1963 the seven next leading banks combined with Bank of America showed a cumulative percentage total of 87.9 per cent, a gain of 1 per cent; however, since Bank of America's deposits rose from 39.9 per cent at the end of 1962 to **[**111]** 40.6 per cent at the end of 1963, we find that Bank of America's deposits account for 70 per cent of this 1 per cent increase. This change, based upon commercial banking alone as the line of commerce, and without consideration of those factors heretofore set forth which call for an expansion of the line of commerce when we consider the state as a whole as the market, completely fails to satisfy this court that such change reflects a substantial lessening of competition in commercial banking. It should be noted that the fact situation presented by the present record is quite different from that which was presented in *United States v. Philadelphia Nat. Bank, supra.* In that case the merging banks were not only located in the same city and direct competitors of each other, but the result of the merger was a significant concentration with the merged bank controlling at least 30 per cent of the commercial banking business in the relevant area. The merger there would have resulted in an increase of more than 33 per cent in concentration (*374 U.S. at 364-365*). Here, in contrast, Crocker-Citizens would have 9.7 per cent (using the figures 7.2 per cent for Crocker and 2.5 per cent for Citizens, **[**112]** as used throughout the trial, rather than the combined figure of 9.2 per cent reflected in Government's Exhibit 30A on which the foregoing table was prepared) of the deposits in the relevant area. This reflects an increase of Crocker's percentage of deposits by 2.5 per cent through the addition of the deposits **[*180]** of Citizens. In view of these statistics and the extent of the other banks listed in the foregoing tabulation, there can be no inherent likelihood that competition will be substantially lessened, for it is readily obvious that the merger will not produce a bank controlling an undue percentage share of the relevant market and will not result in a significant increase in the concentration of banks in that area. Furthermore, as we previously noted, had the Government employed the statistical method employed in its Exhibit 32 in the *Philadelphia* case (here note 26), there was no perceptible change in concentration by reason of the instant merger.

Also, as we previously noted, the Government's figures are misleading and fail to make necessary adjustments. The Government's figures show the ratio of Citizens' loans and discounts to be 2.1 per cent on all California **[**113]** loans and discounts before the merger, with that of Crocker at 7.2 per cent for a total for Crocker-Citizens to be 9.3 per cent; however, if we adjust this figure for loans and discounts for out-of-state banks, as was done in the *Philadelphia* case, we find that the combined figure of 9.3 per cent tabulated by the Government should be reduced, as Professor Weston satisfactorily demonstrated, by 28.78 per cent and we arrive at a figure of 6.6 per cent. And if we apply the same percentage adjustment to Crocker-Citizens' percentage of total deposits of all California banks, we arrive at a figure of 6.8 per cent of total deposits.

An adjustment for available resources of foreign bank subsidiaries and representatives, as we previously noted, would result in a further reduction. Since no one can realistically compute or even estimate the extent of this reduction, we reject defendant banks' exhibit BK-2, table 3, and Professor Goodman's finding that an adjustment for both out-of-state banks *and foreign banks and agencies* would reduce Crocker-Citizens' share of the relevant market to 3.8 per cent. We find no need to adjust for this further unknown figure, since we are clearly satisfied **[**114]** that on the Government's figures alone the record fails to reflect a merger controlling an undue percentage of the relevant market.

More significant than any of the foregoing is the fact that if the competitive impact of the instant merger is to be meaningfully measured in plaintiff's hypothetical state market (in which convenience is no longer the important factor), cross-elasticity comes into play and increases the degree of substitutability of products of other financial institutions and thereby appropriately extends the line of commerce to meet the realities of this extended market. In our previous review of this wider field in which other institutions compete with commercial banks for the savings and investment dollar or for the extension of credit, we found that in 1962 Crocker and Citizens combined held:

(1) Only 2.63 per cent of the total of California savings;

(2) Only 1.34 per cent of the total of California farm mortgage loans;

(3) Only 2.7 per cent of California agricultural loans;

(4) Only 1.8 per cent of California mortgage debt on non-farm real estate (this is a rather significant figure when one considers that savings and loan associations held $13.9 billions **[**115]** of such loans as against $5.9 billions for commercial banks);

(5) Only 2.8 per cent of California business loans and credits; and

(6) Only 5.56 per cent of California's installment and non-installment consumer credit.

If the foregoing inter-institutional competition is taken into account, the combined share of Crocker and Citizens in each of these savings and lending activities in no case exceeded 5.56 per cent of the total in the case of installment and non-installment consumer credit, and in the case of real estate loans dropped as low as 1.8 per cent of the total. These figures, which are unchallenged, call for a conservative adjustment of plaintiff's concentration figures to at least one-half **[*181]** that fixed by the Government (if not to less than 2 per cent, as claimed by defendant banks). A market share of this limited magnitude can have no adverse competitive effect in a market like California with in excess of 200 banks and over 2400 branches and where ease of entry and demands for entry are probably greater than in any other section of the country. [34]

[116]** Finally and before leaving our discussion of California as a relevant market, we find persuasive the testimony of the Comptroller [35] that, if there is a state market for some form of banking service, yet to be clearly defined and identified, at the time of the merger there were three (if not only two) competitors in that market, and the testimony of Professor Weston that *the merger*, if **[*182]** it affected competition at all, *in the California market "increased competition and decreased concentration*." The merger served an immediate need, which even the Government on more than one occasion conceded, by giving us a fourth competitor among the banks capable of giving statewide service *now* and not ten or twenty years from now by *de novo* branching, assuming contrary to past history that this could be done.

[117]** The large number of successful new entries distinguishes markets in California.

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[34] In this regard we note that one of the most significant of the Court's findings in *Philadelphia Bank* is absent, indeed is negatived here. The number of banks in the Philadelphia area had been dropping precipitously, from 108 in 1947 to 42 in 1961. But in California, the number of banks and trust companies rose from 117 in 1960 to 200 in 1964. (Annual Report of FDIC (1964), Chart on p. 144 measuring changes between December 31, 1960 and December 31, 1964). This important factor runs directly contrary to plaintiff's theory of reduction of consumer choice.

[35] The Comptroller testified:

> A. This case was the subject of long, extensive public hearing by our office, during which these factors were gone into at great length by various witnesses.
>
> One of the prime considerations was the question of possible lessening of competition, and our conclusion at that time was that there were no two offices - or no single office, indeed, of these two institutions which were in competitive conflict, and therefore there was no competitive overlap and there could not be any elimination of competition, and certainly, a fortiori, any substantial lessening of competition in the circumstance. This same factor applies here today, since the adoption of the new Bank Merger Act.
>
> Additionally, we have, as reaffirmed, in terms in the balancing test provided by the new statute, in other words, that the convenience and needs to the public clearly outweighs any lessening of competition, we affirm that the convenience and needs is amply demonstrated and will be more and more so in the years ahead; that while the Bank of America, as it sits in this banking structure in California, has done a formidable job, one not matched by any other commercial bank in the country, and a bank which I would in no sense ever derogate, does sit in a dominant position in this banking structure with competition of any effective sort arising only from one bank, namely, the United California Bank.
>
> I do not believe, on the basis of our day-to-day examination of and dealings with banks, that the First Western Bank and Trust Company, as alleged, is a substantial state-wide competitor and I do not believe that anyone who follows this developing picture here could so demonstrate.
>
> So that we are faced here with one really great institution, not only domestically, but internationally, the Bank of America, with but one formidable state-wide competitor, as that term is so loosely used throughout the parlance of ***antitrust law***, in this case and also the banking business. I say the United California Bank because it, as the keystone of a large bank-holding company, the largest in the United States, Western Bank Corporation, actually has a competitive reach far exceeding any bank short of the Bank of America. Reaches into 12 states and more than 25 banking institutions, and has the benefit of controlling the flow of loans and deposits and new business and other developments.
>
> Accordingly, we would change our opinion, original opinion, to the extent of stating that the merged bank is not the fourth largest bank as the result of the merger but, indeed, the fifth, since the United California Bank resource position would have to be measured by substantially all of the resources of the Western Bank Corporation amounting now to close to $7 billion, which would put it next to the Bank of America in size.
>
> Accordingly, therefore, it seems to us, as this matter has been continuously reexamined, that this merger affords the only second substantial possibility of founding a substantial, quote, state-wide, unquote, competitor to the Bank of America.
>
> (Tr. 2036-2038)

For the period January 1, 1954 to December 31, 1964, 706 new banking office entries were made in 375 different communities in California; 91 of these were by Crocker-Citizens or its predecessors (BK-H; BK-I; BK-J). This is dramatic evidence that the banking system in California provides more banking alternatives where they are needed than do the banking systems found elsewhere in the United States. In the very years during which plaintiff asserts that the number of banks was declining, the number of competing banks in banking markets throughout the state was increasing substantially. This is true in particular of every community in the San Francisco Bay area, the Los Angeles metropolitan area, Kern County, Santa Barbara County and Ventura County (BK-M - BK-Q).

During the period 1953 through 1964, 120 new banks were established and accumulated over $1.5 billion in deposits and established 208 banking offices, including their home offices. (BK-J). Since the Crocker-Citizens merger, some 20 new banks have been established in Los Angeles and Orange Counties alone (BK-I). These new banks have shown **[**118]** progressively larger annual increases in deposits during each of the last five years. Their rate of growth has exceeded that of California banks generally. In fact, the seventh largest bank in Los Angeles and Orange Counties as of December 31, 1962, was the City National Bank of Beverly Hills, which was established in 1953.

By way of contrast, in *Philadelphia* the number of banks had declined by more than 50 per cent (*374 U.S. at 331*), and in the ten-year period ending in 1961, only one new bank had opened in the Philadelphia four-county area, and it was established in 1951. (*374 U.S. at 367 n. 44*). In *Lexington*, there were only four other banks and apparently no new entries (*376 U.S. at 668-669*). In *Manufacturers Hanover*, there had been a 38.6 per cent decline in the number of banks, and in the decade prior to the merger only two new banks had opened and they were established by existing banks (*240 F. Supp. 867, 943)*.

It is apparent from plaintiff's own exhibits that the only limit to the number of banking offices in any area is the number of offices which the banking authorities will permit (B-22A; G-23). In every year, the number of applications has far exceeded **[**119]** the number of permits and charters granted (G-37). The fact that in years when the number of permits increases, there are a still larger number of denials, demonstrates that the only reason there aren't more denials is that those seeking new offices and new charters are discouraged from applying more frequently than they do. In view of the large number of denials during 1963 and 1964, it would appear that applications will exceed the number of permits which plaintiff predicts will be authorized prior to 1980 by close to 500 per cent (BK-K; BK-L; G-23A). These facts only serve to confirm the Comptroller's views of the matter (BK-A, pp. 50-53, 59-60). Accordingly, it is pure speculation, if not nonsense, to say that the merger caused a reduction in the potential number of banking alternatives in any area of the state, even if it could be assumed that Crocker or Citizens had formulated a definite plan to establish offices in the service area of the other. For example, plaintiff's expert, Gaffey, could offer no satisfactory basis for concluding that Crocker would have, by *de novo* branching, accumulated a larger market share than the new banks which **[*183]** were in fact established **[**120]** in Citizens' service area after the instant merger (Gaffey, Tr. 1089-1093; cf. Dirlam, Tr. 841). And can anyone now say that the regulatory authorities would have authorized those new banks had the merger not occurred or that they would have permitted the establishment of those banks and a substantial number of Crocker offices as well? Cf. Dirlam, Tra. 735, lines 1-9.

Plaintiff and its experts admitted the truth of the proposition that no area will be lacking an alternative banking office because of the merger (BK-AA, Nos. 84, 85). That being the case, the number of different banks in any banking market in California will not be determined by how this court decides this case. It will be determined, instead, by whether the regulatory agencies decide to permit a new branch or to charter a new bank and what selection they make among the various banks or promoters applying. This is not a situation where there are only four *(El Paso)* or six *(Penn-Olin)* actual and potential competitors. In such cases the court might properly concern itself with effect of mergers in stifling internal growth. In this case, however, there are more people knocking at the door than can possibly **[**121]** be admitted.

Neither bank had approved plans to enter nor was it feasible for either to enter the service area of the other.

Plaintiff argues that the evidence in this case shows that but for its merger with Citizens, Crocker would have expanded *de novo* and become competitive in the highly concentrated Los Angeles metropolitan area. [36] This it asserts is the most important issue in the case. It further argues that the evidence also shows that but for its merger with Crocker, Citizens would have expanded *de novo* into the service area of Crocker. The substantial facts to which plaintiff refuses to give consideration are that neither bank would have moved into the area of the other *de novo*; that it was neither desirable nor feasible to do so; and that even if they wanted to, the Comptroller would not have permitted any of the entries needed to create a statewide system.

[122]** As a result of the hearing after remand, we have before us not only the official report of the Comptroller that he would not have permitted Crocker to branch into Los Angeles and Orange **[*184]** Counties on any basis which would have made a *de novo* entry economically worthwhile to applicant, but also the testimony of the Comptroller tested by cross-examination to the same effect. Important sections of the metropolitan areas have in effect been closed to additional branching by the regulatory authorities (Saxon, Tr. 2041, 2048). In addition, preference in establishing branches in those areas will be given to the newly established small banks (Saxon, Tr. 2058-2059).

During 1965 the number of applications for new branch offices throughout the state exceeded the number of applications granted by 60 per cent (BK-LLL; Stipulation of Counsel, Tr. 2229-2230). If anything, the excess of applications was higher in Los Angeles. In 1965 the number of applications for new branch permits and new bank charters in Los Angeles which were denied exceeded the number of new banking offices established (BK-LLL; G-360).

The effect of the loss of the mere presence of a potential competitor, **[**123]** even of the size of Crocker, on the periphery of the Los Angeles market is minimal at best. The fact that competition was already vigorous, that there were at least 75 to 80 banks operating in the area, that the number of banks had increased by 50 per cent in two years, that there were at least two applications for new banking offices for each permit that became available, and that the potential competitors included some of the world's largest banks, shows that the presence or absence of one potential competitor could have no material effect upon the conduct of those competing in the market, no effect upon the tone of competition in the market and no effect upon the price or supply in that market. There are more than enough banks in and around the market, ready, willing and able to take advantage of every competitive opportunity that might become available. If one bank does not, another one will. There is no apparent limit to those seeking banking offices.

It seems to us that defendant banks are one very large step removed from *Penn-Olin*. In *Penn-Olin* the debate revolved around how much weight should be given to an unaccepted recommendation from lower echelons to

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[36] Long after this case was submitted on briefs counsel for plaintiff sent to each member of this court copies of articles from The Wall Street Journal and the American Banker of June 9, 1967. These articles, which are identical in language, state that Wells Fargo Bank, with its main office in San Francisco, announced plans for a major *de novo* branching campaign in Southern California, which *if successful*, would give California its sixth statewide commercial bank. The President of the bank said the campaign program "*probably* will get started early in 1968, with the opening of *a* major Los Angeles headquarters." The program calls for the annual establishment of five or six offices. The sending of these articles to influence the court is of questionable propriety. They form no part of the record in this case, are hearsay, have not been subject to cross-examination, contemplate the opening of *a* branch *five years after* the instant merger, and their presentation to us *now* is rather presumptuous, when we consider that during the discovery proceedings and in the course of the trial of this case plaintiff branded as "irrelevant" its files on Wells Fargo.

Furthermore, the establishment of a branch in Los Angeles in 1968 and a program for the possible establishment of five or six branches thereafter annually, even if a true expression of the bank's intent, proves nothing of true relevancy to this case, except possibly that if successful in its campaign to get permits (in an already overcrowded area where many others besides Wells Fargo will be permit applicants), locations and personnel, it can hope to have enough branches to qualify as a statewide in ten or twenty years, or, as the Comptroller put it, "it would take Wells Fargo 136 years to become a branch by branch statewide competitor with Bank of America ". As we previously stated, the need for another competitor to the Bank of America was already urgent at the time of the merger, November 1, 1963, and not one to be achieved ten or twenty or 136 years thereafter.

move **[**124]** *de novo* into a new geographic area. In our case, the lower echelons did not make anything rising to the level of recommendations of programs which would have brought the two banks into competition, and even the lower echelons rejected the thought of their respective banks becoming statewide *de novo*. Accordingly, under the Supreme Court's rationale in *Penn-Olin*, the evidence does not sustain plaintiff's case. There the Court stated (*378 U.S. at 166*):

> Pennsalt claims that it finally decided . . . that it should not build a plant itself and that this decision was never reconsidered or changed. But the District Court found to the contrary.

There can be no doubt that Crocker-Anglo unequivocally rejected the idea of building even one branch in Los Angeles and adopted a *de novo* branching plan which excluded this possibility (Dirlam, Tr. 866-868; G-114; G-117; G-118).

The second proposition is that proof of entry or desire to enter by *merger* does not by itself prove the ability or desire to enter *de novo*. Many of plaintiff's proposed findings are based on this premise. If this line of reasoning were followed, all mergers would be illegal. In all cases **[**125]** the fact of merger, or contemplated merger, demonstrates a desire to achieve the advantages of the merger. Plaintiff states: "Crocker-Anglo had long been interested in moving into the rapidly expanding Los Angeles area", and it speaks of "Crocker-Anglo's desire to move into Los Angeles". The Government's propositions are true only if we add, "by merger", to them. Upon analysis, therefore, the Government's propositions are simply another way of stating that all mergers (except of failing businesses), are illegal or that "the most obviously **[*185]** illegal aspect of the proposed merger is the merger agreement itself." This approach was clearly rejected in the majority opinion in *Penn-Olin*.

The third proposition is that if "potential competition" is defined as in *El Paso*, the Government's case clearly fails. In *El Paso* the Government proved potential competition by showing actual negotiation by Pacific Northwest with an El Paso customer for its business in the relevant market with tangible results: El Paso reduced its price (*376 U.S. at 659*). Elsewhere in this opinion we have shown that plaintiff has failed to produce (even when ordered to do so) a single customer **[**126]** in the relevant market for whose custom both defendant banks competed. One purpose of the discovery order of this court was to determine whether plaintiff had an *El Paso* type case (Tr. of June 17, 1964; Tr. 16-17, 71, 73-74, 77-83). The Government's staff economist admitted he had no evidence, after searching the banks' files, that either bank was ever notified of the other's applications for branches, although such was the practice of the Comptroller in cases of competing branches. Plaintiff failed completely to prove any actual effect of potential competition such as was shown in *El Paso*.

The fourth proposition is that in this case the court knows what Crocker would have done had the instant merger been forbidden. This, in effect, was what happened in 1959 when Belgrano demanded too high a price for Transamerica's interest in Citizens and Hoover thought that all possibilities of merger with Citizens were gone. At that time every reason which the plaintiff and plaintiff's experts now assert for Crocker's moving into Southern California then existed. At the trial the court asked Mr. Hoover whether plans were made to move into Los Angeles at that time. As previously shown, **[**127]** Hoover explained that:

> The subject came up quite frequently, your Honor, and was cast aside because we didn't have the horses, we didn't have the personnel.

Prior to that time, the former Chief National Bank Examiner for the area, who had had the opportunity and duty to examine all the applications for branches, had advised Hoover that it would not be economically sound for Crocker to enter this area *de novo* (Hudspeth G-338, pp. 18, 21). If this is not enough, we have additional proof that when Harry Rhorer, who had been hired from the Bank of America to recommend locations for the establishment of branches, developed an ambitious program of 30 branches a year, he specifically excluded the southern counties from the program. Moreover, management cut Rhorer's program approximately in half, so that for the foreseeable future Crocker would be expending all its *de novo* efforts in counties north of Los Angeles and expending 87 per cent of its efforts north of San Luis Obispo (G-115; G-117). In the final analysis, "desire" did not produce action and that in itself tends to negative the claim that Crocker would have entered Los Angeles *de novo*.

Accordingly, the **[**128]** voluminous findings that plaintiff proposes which show that subordinate officials in Crocker considered various areas in Ventura County; that *de novo* branching in communities contiguous to its service areas was profitable; that Crocker was interested in areas north of Los Angeles where population was expanding (principally Fresno, the Bay area, Sacramento and San Jose); and that when merger opportunities presented themselves, Crocker was interested in expanding into smaller metropolitan areas, are not particularly relevant to show that Crocker would have entered Los Angeles *de novo. The plain fact of the matter is that Crocker never established a branch in an area remotely similar to the Los Angeles metropolitan area and repeatedly rejected the idea*.

Plaintiff's "evidence" that eventually Crocker would have established a branch in the service area of Citizens or that **[*186]** Citizens would have eventually established a branch in the service area of Crocker is speculative.

As we have already found, Crocker had no plans to enter Los Angeles other than by merger. Likewise, Citizens had no plans for establishing any branch north of Thousand Oaks in the Conejo Valley; Citizens **[**129]** had no plans for establishing *de novo* offices in the San Francisco Bay area or other areas of northern and central California (Hamilton, G-335, p. 19). The only suggestion that Citizens consider a location in San Francisco did not even go beyond the lower echelon committee which was to consider it (G-60; Gaffey, Tr. 1112). Dirlam testified that he was unable to predict when, if ever, Citizens would become a statewide bank (Dirlam, Tr. 840, 841). The Government's own exhibits and testimony show that Citizens' primary *de novo* activity was in Los Angeles County and south into Orange County. Similarly, Crocker's past *de novo* activity was devoted to the addition of needed branches within its own service area. Crocker generally entered the small metropolitan areas in its service area only by merger and established *de novo* branches contiguous to its administrative "hubs". When pressed to identify which *de novo* entries by Crocker were most comparable to what would be required for entry into Los Angeles, plaintiff could identify only Tulare and the City of Ventura. Accordingly, plaintiff's evidence consists of speculations by two economists with very limited experience **[**130]** with banking in California and with no branching experience at all. Thus, the "policies, program and history" of branch expansion by Crocker and by Citizens are valid indications only of what each bank would do within its respective areas. What factual basis does plaintiff have for saying it was more likely, advantageous or desirable for Crocker to establish branches in Los Angeles than within its own service area as it was planning to do? How can Crocker's financial success in establishing *de novo* branches in the smaller contiguous communities in its service area be projected into the Los Angeles metropolitan area? Are the North Coast, Sacramento Valley, San Joaquin Valley, Mountain Counties and the South Coast really like the Los Angeles metropolitan area? All of plaintiff's data on the economics of Crocker's branching is speculative and carries little weight when projected into a wholly different area.

If, as in the case of Crocker, the files showed no surveys or other documents relating to Los Angeles, plaintiff would have the court conclude that Crocker had not considered and therefore had not rejected the idea of entering Los Angeles *de novo*. If, on the other hand, **[**131]** the files revealed a single sheet of paper referring to a particular locality, then the bank involved is said to have given "serious consideration" to establishing an office there, regardless of the fact that the document relied upon showed that the bank actually rejected the location as a branch site. Thus, plaintiff proposes a finding that Citizens had a "strong interest . . . in the Bay Area" because a single sheet of paper bears a notation suggesting that Citizens' bank premises committee should seriously discuss the advantages of establishing offices in downtown San Francisco and downtown San Diego (G-60; Gaffey, Tr. 1112). Similarly, plaintiff argues that Citizens was developing an interest in expanding into Porterville (it is in Tulare County) because Citizens' bank premises committee rejected a real estate broker's offer of property there (G-50).

The speculative nature of plaintiff's evidence is further demonstrated by its reliance on "half truths ". Plaintiff proposes a finding: "In September 1962, it was the opinion of Crocker's branch locations specialist Harry M. Rhorer that Crocker should make 'special effort' in the 'major growth counties' of California, as these were **[**132]** the counties where the bank's location program had and, in Rhorer's opinion, should continue to have the greatest emphasis (Exh. G-117, **[*187]** p. 4)." It is in this very exhibit that Rhorer proposes some 60 locations, *all in Crocker's service area*, most of them north of Santa Barbara; he also states, "our need to catch up in adequate representation throughout our present service area can support this magnitude of a program ". Is it not pure speculation to rely on the so-called "policies" expressed in this document to show that Crocker-Anglo planned to go outside its service area, particularly when those "policies" are derived by misquoting the words of the document?

Rhorer's memorandum stated that "special effort should be made in *our* major growth counties ", not, as plaintiff would have it, in "*the* 'major growth counties '". (G-117, p. 4).

Plaintiff proposes a finding: "Crocker-Anglo had considered *de novo* branching as a *possible* means of expanding into the Los Angeles area. (Solomon, Tr. 1288, lines 3-15)." The full context of the reference follows (Tr. 1287, line 2 - Tr. 1288, line 15):

Q. Yes. Mr. Solomon, may I show you, please, Government's Exhibit **[**133]** No. G-265 in evidence which you will recognize, I'm sure, as a letter signed by you to the shareholders of Crocker-Anglo Bank concerning the proposed Crocker-Citizens merger and I invite your attention to the next to the last paragraph.
A. Yes.
Q. Now, in that regard I'd just like to direct your more specific attention to one sentence in that paragraph:
"From our point of view the merger affords the most practical and economical way of immediately establishing our facilities on a large scale in the extraordinary growth areas centered in Los Angeles."
Now, you say there that this offers the most practical way. Having made a statement like that, am I correct that there were other ways that you had considered in making this statement?
A. I don't think it logically follows, Mr. Schoepke, that if this route had not been opened to us that there would have been other means which we would have availed ourselves of to get into that Los Angeles area. There was no question in our minds that the only way of getting into that area was through the merger route.

Q. Now, in making up your mind that this was the best alternative inevitably you must have considered some other alternative **[**134]** with which you compared this in stating that it was the most economical route.
A. I don't think there is any question but what if one considers an area attractive he explores all avenues that give any possibility whatsoever for accomplishing those objectives. In the process we gave consideration to the possibility of de novo but did not entertain it as constituting a reasonable answer to our problem at any time.
Q. But you did consider it?
A. As one of the alternatives, yes.

Solomon also testified (Tr. 1281, lines 4-12):

Q. Would it have been financially disastrous for Crocker-Anglo to attempt to include Los Angeles and Orange in its service area without a merger?
A. Well, probably not, but I think it would have been so unsound from the standpoint of Crocker-Anglo to have recommended that course of action that I would not have proposed it and even though I had proposed it I would have expected our Board of Directors not to approve it.

Plaintiff's reliance on Solomon's testimony to show that Crocker would have branched *de novo* into Los Angeles is worse than sheer speculation because his testimony is to the contrary; possibilities don't become probabilities, **[**135]** especially when they are rejected.

The Government's brief asserts that Crocker would have branched into Los Angeles because the Los Angeles metropolitan **[*188]** area "has long been noted for its tremendous economic growth and expansion"; because Crocker has long been interested in moving into the area; because Crocker was capable of entering into Los Angeles by itself; because Crocker had a nucleus of customers with record addresses in the area; because Crocker was operating offices in "Southern California". Every one of these reasons existed prior to 1959 and thereafter. Yet what happened in 1959, when after being approached by Citizens with regard to a proposed merger, the negotiations came to an "abrupt termination". Did Crocker make alternative plans to enter Los Angeles *de novo*? The 1959 to 1962 period is, in effect, an experimental period by which the validity of all plaintiff's theories can be tested. Being unable to enter Los Angeles by merger, Crocker nevertheless determined that the most profitable course for it was *de novo* branching in its then existing service area. It was not economically sound or feasible for Crocker to enter Los Angeles and it lacked **[**136]** the necessary personnel. Accordingly, plaintiff's statement, "There is nothing in the evidence to show that Crocker-Anglo, but for the merger, would not have done what the Bank of California did . . ." is demonstrably false. Government Exhibits G-114 and G-117 show the extreme outer limits of what Crocker would have done; they do not include Los Angeles or the other southern counties.

As heretofore noted, the population and other economic growth of the Los Angeles metropolitan area has been common knowledge since long before World War II. Yet Crocker made no attempt to establish *de novo* offices in that area. The reason for this is quite obvious; there are many growth areas in the former service area of Crocker, and while they may not be quite as dramatic as Los Angeles, their proximity and reduced cost of entry did and would continue to make them more profitable, particularly as part of an integrated system. The record shows that there were more than enough opportunities in Crocker's service area to keep it busy for the foreseeable future. The $12 million premium in terms of stockholders' equity running from the Crocker stockholders to Citizens shows only that the Crocker **[**137]** shareholders were willing to take a book loss in this amount in order to have the opportunity of having a well-organized and integrated bank of sound management with statewide facilities and offices in the Los Angeles metropolitan area. It does not prove that it was feasible for Crocker to so enter *de novo* or that it would have been advisable to expend that amount of money or the $30 million that *might* have duplicated such a system *if* they could get the permits, the locations and the personnel within the next eight or ten years at the very best. Our previous review of the situation in Los Angeles and the position of the Comptroller's office relative to this overbanked area pretty much proved Solomon's statement that any such program would have been economically unsound.

The "policies, program and history" of the Bank of California are wholly different from those of Crocker-Anglo. The Bank of California is a coastwide bank. The Bank of California had not committed its resources to a branch expansion program like that of Crocker-Anglo. Accordingly, at the time it established an office in Los Angeles, its resources in money and personnel were not otherwise committed. **[**138]** Dirlam testified that for Crocker-Anglo to enter Los Angeles it would have had to terminate its branch program elsewhere (Dirlam, Tr. 866-868, 625-626). Thus, it cannot be said that because The Bank of California thought it economical to enter Los Angeles, it was economical for Crocker to do so. As we pointed out in *United States v. Crocker-Anglo Nat'l Bank, 223 F. Supp. 849, 859 (N.D.Cal. 1963)*, "the Bank of California is a very special institution having the unique privilege of maintaining branches in several states, at Seattle, Portland, San Francisco and Los Angeles. One branch in Los Angeles **[*189]** for that bank may well be worthwhile to permit it to advertise its interstate services and representation in all large metropolitan centers up and down the Pacific Coast. But for the purpose of furnishing a substantial competition in such a metropolitan area by *de novo* branching it is obvious that multiple branches would be required to take care of the very considerable business communities in Los Angeles County, such as Beverly Hills, Hollywood, Westwood, Burbank, Inglewood, Whittier, Glendora, Torrence, and the like, not to mention numerous centers in Orange and Riverside **[**139]** Counties."

Plaintiff concedes that the motivation for The Bank of California's entry into Los Angeles was "its own particular business reasons", which would not apply to Crocker.

If plaintiff were serious in its Bank of California analogy, it would have complied with the request of defendant banks to produce its files on The Bank of California's mergers with the Bank of Turlock, American National Bank of San Bernardino, Hollister National Bank and First National Bank of Long Beach to prove any alleged similarity to Crocker and Bank of California's alleged economic success in Los Angeles.

As we previously pointed out, had Crocker wanted to branch *de novo* into the Los Angeles area, it would have encountered serious difficulty because of the lack of available permits for which it would have been in competition with many others. The Comptroller has a policy of protecting smaller financial institutions in local markets from *de novo* branching by the larger banks. This being the case, Crocker could hardly expect favorable treatment in entering Los Angeles. Furthermore, it would be limited by initial costs, operating losses during the start-up period, availability of locations **[**140]** and personnel to staff branch offices. We know from the evidence that even though in 1962 Harry Rhorer had advocated a program of 30 branches a year to "catch up" in Crocker's *then existing service area*, management cut the program back to a goal of approximately 18 branches a year to be attained in one or two years. One could, of course, speculate on the basis of arithmetic alone that any bank could establish any number of branches and that eventually the operation would be profitable. Practical limitations of personnel and the need for current earnings and dividends, however, set a limit on a bank's ability to expand and, accordingly, Crocker's ability on the basis of the substantial evidence in the case would seem to have been about 10 a year with a potential of approximately 18 a year. By 1963 the cost of physical facilities, already high, had gone higher; the time required to reach profitability and to recoup initial operating losses had lengthened substantially; and at the same time Crocker's management was confronted with the problem of maintaining earnings in the face of higher operating costs resulting from an increase in the rate of interest paid on savings deposits. **[**141]** It would seem that Crocker's branch program in its existing service area was clearly all that management could (and certainly all that it would) authorize. Therefore, any further plans would have required curtailing an existing, successful program in favor of one which it believed was economically unsound.

We have previously pointed out that Crocker decided not to establish *de novo* branches in Los Angeles. Crocker had tremendous opportunities to branch within its then existing service area and these it decided to exploit. It was necessary to do so to remain competitive. Thus, Crocker-Anglo was not in the position of Pennsalt, which enjoyed 57.8 per cent of its existing market at the time it decided to enter southeastern United States in the joint venture with Olin-Mathieson Company (*378 U.S. at 162*). Pennsalt might well have exhausted its opportunities at home. Crocker was obviously not in this position, and its studies showed not only that there were opportunities in its existing service area, but that it would **[*190]** be disadvantageous to the bank if they were not developed as soon as possible. Thus, Rhorer found that Crocker was under-represented in communities **[**142]** in eight important counties: Alameda, Butte, Contra Costa, Merced, San Joaquin, San Mateo, Sonoma and Stanislaus (G-114). As of the date of their merger there were at least 255 communities in Crocker's service area which had banks but in which Crocker was not represented (Tr. 1415-1417). In Rhorer's recommendation of September 1962, he listed 62 priority locations for future branching, which, with 21 outstanding permits and two pending applications for other locations, provided a backlog of 85 locations having immediate priority, none of which were south of Ventura County and only 11 were south of San Luis Obispo (G-115; G-117). In addition to those locations having immediate priority, there were sufficient other possibilities for profitable expansion within its own service area which could not be exhausted for at least 15 years (BK-U; Solomon, Tr. 1283). Thus, Crocker had adopted a specific program of future expansion which would have occupied it for the foreseeable future, which specifically excluded the southern counties.

Plaintiff's own exhibits show that the principal branching activity of Citizens during the period 1950 to 1963 was in Los Angeles County and south into Orange **[**143]** County. Of the 51 branches added to its system in that period of time, all but one were in Los Angeles, Orange, San Bernardino and Riverside Counties (G-15; G-16). Citizens' one branch in Ventura County was 20 minutes from Los Angeles. The predominant share of its branch location surveys and investigations concerned areas in Los Angeles and Orange Counties. Regardless of various locations considered by various members of the bank premises committee, Citizens did not adopt any plan to establish a branch in the service area of a branch of Crocker-Anglo. Although some of the lower echelon officials in the bank premises committee considered locations at places such as Bakersfield, Ventura, Oxnard and Santa Barbara, the committee at no time recommended to management that a branch be established in any of these locations and its recommendation that Citizens apply for Simi was rejected by management. Of the 19 permits of Citizens pending at the time of the application to merge, one was in Orange County, one in Riverside, one was in the Agoura area of Los Angeles near the Ventura County line, and the remaining 16 were in other sections of Los Angeles County (Ct. 195, Exh. 13, p. 70; **[**144]** Dirlam, Tr. 770). At the time of the merger there were at least 171 southern California communities having one or more banking offices in which Citizens did not have a branch, and many of these would have been desirable locations for Citizens (BK-T; Rhorer, Tr. 1413-1414, 1373). Plaintiff's expert, Dirlam, was unable to predict when, if ever, Citizens would have become a statewide bank (Tr. 840, 841). Hamilton's vague suggestion that Citizens' bank premises committee discuss the advantages of establishing a branch in downtown San Francisco was never seriously considered even by the bank premises committee.

Insofar as the economics of the situation are concerned, plaintiff is faced with the experience of Security First National Bank. It has had one or more offices as far north as Fresno since prior to 1946 and is much larger than Citizens. It has not yet established a branch in San Francisco. What makes plaintiff think that Citizens would precede Security in establishing offices in northern California? And if it did not, how many permits would be left for Citizens? As it is, plaintiff's own exhibits show that Citizens would be competing with 42 other banks in attempting to obtain **[**145]** the one or two permits which plaintiff estimates will be authorized for San Francisco prior to December 1, 1980. Accordingly, there is no reasonable probability that Citizens would have become a statewide bank absent the instant merger **[*191]** or that Citizens would have established branches in Crocker's service area.

Convenience and needs of the community to be served.

Pursuant to the mandate of the Supreme Court that ***HN7***[] "the offsetting community 'convenience and needs,' as specified in *12 U.S.C. § 1828(c)(5)(B)*, must be pleaded and proved by the defenders of the merger", *United States v. First City National Bank, 386 U.S. 361, 364, 18 L. Ed. 2d 151, 87 S. Ct. 1088 (1967)*, on review *de novo* we find that the defendant banks fully sustained their required burden of proof and unequivocally established that any hypothesized anticompetitive effects stemming from the instant merger were clearly outweighed by the merged bank's increased ability to meet the convenience and needs of the community to be served.

The merger of Crocker and Citizens was clearly beneficial in that it (a) caused an immediate increase in the number of statewide banks competing within the state, (b) produced **[**146]** a bank having increased ability to mobilize financial resources in a capital deficit area, (c) created a bank which is better equipped and therefore more likely to engage in credit gap financing, (d) created another substantial competitor in the underwriting of municipal bonds, and (e) enhanced the merged bank's ability to compete more vigorously in international banking and to provide additional services to those engaged in international trade.

The evidence in this case establishes that each of the above enumerated conveniences and needs of the community to be served was beneficially served by the instant merger. Each will be separately considered.

A. *The merger met the need in California for another bank with statewide facilities*.

Prior to the merger, the Bank of America had a near monopoly among banks capable of performing a statewide banking service (Nicols, Tr. 2263, 2264). From the standpoint of California's banking structure, the merger was desirable in that it provided an additional statewide competitor for the Bank of America (Saxon, Tr. 2062-2063, 2066). There was a need for another statewide bank to provide some statewide balance in California banking (Saxon, **[**147]** Tr. 2066). Plaintiff concedes this (Plaintiff's Response to Request for Admission of Fact No. 6, filed July 11, 1964). The immediate and certain offset of the merger was to create a bank capable of meeting the convenience and needs of communities in California for another bank with statewide facilities (Ct. 195, Exh. 13, p. 9; BK-A, p. 59; Nicols, Tr. 2265).

The merger of Crocker and Citizens caused an immediate 50 per cent increase in the number of statewide institutions and doubled the number of effective, formidable statewide competitors of the Bank of America (Goodman, Tr. 2171; Saxon, Tr. 2037), an effect which would not have been possible by *de novo* branching. Had that method been attempted, it would have taken eight to ten years without any assurance that an effective statewide system would be achieved even then (Weston, Tr. 2162).

In addition to the many communities where the merged bank constitutes a second or a third statewide competitor of the Bank of America, there are many others where it provides the only statewide competition to the Bank of America. Crocker-Citizens is the only statewide competitor of the Bank of America in communities in seven counties (Colusa, **[**148]** El Dorado, Napa, Sutter, Tehama and Yolo) (BK-QQ). Even in counties where the United California Bank or First Western have one or more offices, there are many communities where Crocker-Citizens is the Bank of America's only statewide competitor. Examples are Oxnard in Ventura County, Taft in Kern County, and Lompoc in Santa Barbara County (BK-M; BK-N; BK-O). By creating another statewide bank, the Crocker-Citizens merger improved upon the existing banking structure in **[*192]** California (Ct. 195, Exh. 13, p. 9; Nicols, Tr. 2265).

The merger of Crocker and Citizens afforded the only practical possibility of founding another substantial statewide competitor to the Bank of America (Saxon, Tr. 2038). No bank in California has ever become statewide *de novo* (Nicols, Tr. 2268, 2269; Weston, Tr. 2157). The Bank of America achieved a statewide system in the 1930s only after very extensive acquisitions consummated during the 1920s (Weston, Tr. 2157, 2158). The present First Western Bank and Trust Company and the United California Bank were both the progeny of mergers (G-26).

The public interest and the needs and convenience of the many communities where Crocker-Citizens now has **[**149]** or will in the future establish offices will be better served by reason of the merger. The existence of a bank with statewide facilities is a distinct benefit to all users of banking services, including both borrowers and depositors (Nicols, Tr. 2255; Lishan, Tr. 2341; BK-A, p. 59).

B. *The merger provides more effective mobilization of financial resources*.

California is a capital import state and will be such for years to come, since it is unable to generate sufficient capital to accommodate the public and private needs to sustain the growth of the state (Saxon, Tr. 2039). The creation of another statewide bank helped to alleviate this adverse situation and served the convenience and needs of California by providing a more effective mobilization of the financial resources within the state. The importance of mobilization of funds to the state and local communities is reflected in the very substantial amount of bonds issued by the state and its political subdivisions each year (G-353; Saxon, Tr. 2067-2068). The substantial amount of federal funds imported into California is also a reflection of the need for funds to finance highways, schools and the growth of the state in general **[**150]** (Saxon, Tr. 2070).

It is, of course, true that California was not totally lacking in institutions capable of mobilizing financial resources within the state (Weston, Tr. 2137). Other financial intermediaries contribute to mobility of funds. Correspondent banking also provides some mobility of funds (Weston, Tr. 2139). However, a statewide branching system permits more effective mobilization of funds than correspondent banking in that transfer of credits by statewide banks is less cumbersome and can be made more quickly and at less expense than through the correspondent banking system (Goodman, Tr. 2213-2215). Thus the creation of another statewide bank constitutes a substantial improvement upon the ability of California banks to mobilize the state's resources (Saxon, Tr. 2047). And if the contribution of other financial intermediaries is excluded, the resulting bank's increased ability to distribute surplus funds to areas having needs for loans in excess of deposits is a particularly significant benefit, especially to the potential borrowers affected (Weston, Tr. 2169).

In adopting laws permitting statewide branch banking, California endeavored to achieve the most efficient **[**151]** allocation and distribution of financial resources within the state, that being one of the principal attributes of statewide branching (Goodman, Tr. 2172, 2173; Saxon, Tr. 2047, 2048). Thus the merger of Crocker and Citizens improves upon the banking structure by creating a bank of a type the state has found to be beneficial (Saxon, Tr. 2047).

The Crocker-Citizens merger enabled the resulting bank to make more effective use of the state's financial resources by permitting the bank to transfer funds from areas in which there may be an excess of deposits to areas where there is a greater need for loans (Weston, Tr. 2168, 2169). Lending credits not needed in an agricultural area can be transferred to an industrial area experiencing more rapid growth, and seasonal credit needs in one area can be met with seasonal **[*193]** surpluses in another (Goodman, Tr. 2172).

The merger also had the effect of increasing the banks' aggressiveness in meeting the convenience and needs of the community for loans in another respect. Crocker-Citizens now has a loan to deposit ratio of approximately 70-71 percent, which is in line with that of other California banks. Had there been no merger, Citizens' **[**152]** ratio would have remained substantially lower. It followed a much more conservative loan policy than Crocker, as indicated by the contrast between its pre-merger ratio of 56 per cent and Crocker's pre-merger ratio of 64 per cent. (Solomon, Tr. 2095, 2096). Thus the merger has resulted in a larger amount of funds available for loans in southern California communities.

The Government sought to meet the effect of this evidence by asserting through Professor Nicols that the capital deficit in California was a consequence of high concentration. Nicols admitted, however, that his opinion was contrary to the general opinion, that the subject was highly controversial and that his opinion assumed that the state as a whole was a market. But there is no convincing evidence that the state is a market; the only empirical evidence is to the contrary. The substantial evidence leads this court to find that the instant merger provides a more effective and needed mobilization of financial resources.

C. The increased size and geographical and industrial diversification of the merged bank increases its ability to engage in credit gap financing and the probability of its doing so.

Credit gaps **[**153]** exist for various kinds of loans for which the amount of financing available is not as large as is thought socially desirable. That such credit gaps exist and that it is socially desirable to fill those gaps is shown by federal programs aggregating over one hundred billion dollars in direct and insured loans in housing, small business and transportation (Weston, Tr. 2122). Geographical diversification increases a bank's ability to engage in credit gap financing and to undertake a volume of higher-than-normal risk loans because of the principle of statistical averaging. The increased size and geographical and industrial diversification resulting from the merger will not only increase the merged banks' ability to undertake credit gap financing but it will also increase the probability of its doing so (Weston, Tr. 2139-2140). This has been the experience of the Bank of America (Weston, Tr. 2124). Professor Nicols admitted that large banks provide more financing for small businessmen than do smaller banks. From an economic standpoint, it is desirable to increase the number of institutions willing to undertake filling of the credit gaps. Large risks are associated with loans to new **[**154]** industry and new and small businesses. Yet their contributions to the economy are substantial. Therefore, any increase in the number of banks willing to undertake financing small business is beneficial.

D. The merger created increased competition among underwriters of municipal bonds.

There can be no doubt that since the merger Crocker-Citizens has become a significant competitor in municipal bond underwriting. Prior to the merger, Citizens did not engage in this business and Crocker was not a significant competitor. There was no actual or potential competition between Crocker and Citizens in the municipal bond business. The effect of additional competitors for municipal bonds is demonstrated by the fact that the creation of United California Bank and the creation of Crocker-Citizens and the resulting increased activity in bidding for bonds coincided in each instance with a substantial drop in the cost of municipal bond financing to California communities.

To illustrate the effect of increased competition upon the cost of bond financing for California municipalities, defendant banks prepared an exhibit comparing **[*194]** the yield (interest costs) of California municipal **[**155]** bonds with the national average yield, which, for purposes of comparison, was shown as "100". Plaintiff had no question as to its accuracy (Statement of Plaintiff's Counsel, Tr. 2024). The exhibit shows that prior to February 1961, when the United California Bank was formed (G-30, n. 2), the yield on California bonds was seldom below 102 per cent of the national average, that it was frequently above 104 per cent and averaged approximately 103.4 per cent of the national average (BK-HHH). During the period February 1961 to February 1963 there was a sharp drop in the California bond yield. During that period of time the California yield was in excess of 102 per cent of the national average in only five months, was less than 101 per cent of the national average in eleven months and averaged 100.96 per cent of the national average. In February 1963 Crocker sharply increased its competition in the underwriting of municipal bonds in anticipation of the pending merger (Solomon, Tr. 2085, 2086). The yield on California bonds again took a sharp drop and at no time since has the yield ever gone as high as 102 per cent of the national average. Notwithstanding an almost 50 per cent increase **[**156]** in the total amount of municipal bonds sold during the period 1963 to 1965 (G-353) and an increasingly tighter money market and rising interest rates (G-361, pp. 9, 11), the average yield on California municipal bonds during this period dropped to 100.31 per cent of the national average. This reduction in the yield on California municipal bonds is a direct result of increased competition (Goodman, Tr. 2179). Although other factors undoubtedly affect the yield on California municipal bonds, the lower interest rates of California municipal bonds was in large part due to the increasing competition by United California Bank and the advent of Crocker-Citizens as a substantial underwriter of California municipal issues.

California municipalities are now issuing bonds at a rate in excess of $1.5 billion a year (G-353; Goodman, Tr. 2182). If increased competition results in lowering the interest cost of those bonds by fifteen basis points, the resulting savings to California municipalities would amount to approximately $22.5 million, which might then be more beneficially employed for better schools and similar undertakings (Goodman, Tr. 2182).

Plaintiff's witness, Lishan, characterized **[**157]** most of the municipal bond issues on which Crocker-Citizens bid as being small (Lishan, Tr. 2344). It is on just such issues where increased competition might have the most beneficial effects. As a general rule, municipalities have to pay higher interest costs on small issues (Lishan, Tr. 2333).

The merger was particularly important to southern California communities because as a result of the merger Crocker-Citizens has submitted bids in smaller southern California communities in which neither Crocker nor Citizens submitted bids prior to the merger.

Plaintiff's attempt to contradict this showing was less than candid; its evidence omitted dollar amount; it used 1963 as the base year, when in fact Crocker stepped up its underwriting activities that year in anticipation of the merger; it omits many smaller issues of bonds; it omits two purchases totaling $510,000 in 1965; it excludes all out-of-state issues; and one exhibit purporting to show the effect of Crocker-Citizens' competition omits every issue on which Crocker-Citizens had submitted the highest bid other than one or two which were included by mistake. Considering the fact that unsuccessful bidders provide effective competition, **[**158]** *United States v. El Paso Natural Gas Co., 376 U.S. 651, 661, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*, it is unrealistic to say that Crocker-Citizens has not been a highly competitive and effective bidder. Since 1962 it has more than tripled the dollar value of its successful bids, made more than a tenfold increase in the dollar value of bonds it has helped underwrite as a comanager, established itself as a first or second bidder from 25 **[*195]** to 40 per cent of the time and cut deeply into the Bank of America's share.

E. The merger created a bank capable of substantially greater participation in international banking.

Neither Crocker nor Citizens were substantial factors in international banking prior to the merger. It is desirable to have another bank in California endeavor to become a substantial factor in international banking so as to provide better service to exporters and an additional competitor to the Bank of America.

Lishan's initial opinion that prior to the merger each of the merging banks had substantial international business was based on a misconception. On cross-examination, however, it became apparent that he had misread certain figures and that his conclusion **[**159]** was admittedly based on erroneous assumptions and would have to be modified (Tr. 2357, 2359). The increase in the merged bank's financial base resulting from the merger enabled the merged bank to undertake expansion of its international banking business consistent with prudence and sound banking. As Mr. Solomon testified, it would not have been prudent for Crocker to have undertaken such expansion prior to the merger (Tr. 2107-2109). Banks the size of Crocker are not significant in the international banking business. Size is of great importance in international banking because of the risks involved, the need for specialized experts, and the desirability of opening foreign offices. Significantly, the foreign banks doing business in California have a substantial number of offices in their home territories and elsewhere. Since the merger, Crocker-Citizens has definitely indicated its interest and desire to expand into the international banking field. It has formed an Edge Act corporation; it has established foreign offices in Manila and London and has taken steps to open an office in Brussels; it has substantially increased the amount of funds available for use in international **[**160]** banking; the total footings of the balance sheet of the merged bank's international department have increased more than 50 per cent. Crocker-Citizens' expansion in international banking would have progressed further were it not for the restrictions imposed by the Government's voluntary restraint program. Even so, its record is one of solid achievement and in at least one respect Crocker-Citizens has surpassed all California banks other than the Bank of America. No other California bank has more than one foreign office. With the opening of its Brussels office in June, Crocker-Citizens now has three.

Plaintiff's attempt to minimize the progress which Crocker-Citizens has made in this field by an exhibit purporting to show the amount of acceptances held by defendant banks and the eight largest banks is incomplete and deceptive because it reflects very substantial domestic as well as foreign trade acceptances, because the amount of acceptances held on specific dates shows neither the bank's commitment to international banking nor the volume of business handled and because acceptances purchased by the bank or sold on the open market are transferred to loan accounts.

While there may **[**161]** be some argument as to whether a particular transaction may or may not benefit the balance of payments problem, there can be no serious argument that the creation of another competitor to the Bank of America in various communities in California in this field and the stimulation of additional international banking activity is other than desirable.

F. These benefits clearly outweigh any hypothesized anti-competitive effects of the merger.

Plaintiff produced no direct evidence on the "weighing" issue. Plaintiff sought only to minimize the beneficial effects of the merger. On the other hand, both Professors Goodman and Weston rendered opinions as to whether the admitted benefits clearly outweighed the alleged anticompetitive effects. Consistent with his original hypothesis that there were no anticompetitive effects and **[*196]** that the effects of the merger had to be weighed in the total financial market, Professor Weston opined that the merger was desirable from a competitive standpoint and that it had neither immediate nor potential anticompetitive effects (Weston, Tr. 2136). Because he viewed the effects of the merger in the context of a line of commerce which included **[**162]** all competing financial institutions, he readily admitted that the benefits accruing from the merger would be small in relationship to the total line of commerce, but by the same token, he testified that any assumed anticompetitive effects could not be large. In his opinion the overall effects of the merger were procompetitive, in the right direction and beneficial (Weston, Tr. 2145-2146).

Professor Goodman went further in hypothesizing anticompetitive effects in order to obtain a relationship to permit a "weighing". From an economic standpoint, Professor Goodman carefully attempted to weigh the alleged anti-competitive effects against the benefits to the public interest in meeting the needs and convenience of the communities to be served by the resulting bank. It is something new in ***antitrust law*** (Goodman, Tr. 2194-2195). He drew upon his experience in other fields and in particular upon the economic "cost-benefit theory", which was developed to determine the relative advantages and disadvantages of public projects. This theory provides a method of weighing the costs in terms of existing advantages which will be lost by a particular public project against the benefits to be **[**163]** gained by it. Familiar examples involve freeway construction where the costs include the removal of property from the tax roll and the eviction of people from their homes and where the benefit is increased speed of transportation through the community and lowering of transportation costs (Goodman, Tr. 2195). In using that theory, Goodman assumed (contrary to his opinion) that the merger had anticompetitive effects (Goodman, Tr. 2186, 2194). As costs, he weighed these effects against the merger's benefits set forth in A through E immediately above and concluded that when the costs were balanced against the benefits, the benefits clearly outweighed any and all the anticompetitive effects which could be hypothesized (Goodman, Tr. 2197). The Government's witnesses did not render any countervailing opinions encompassing these aspects of the case. Furthermore, the Comptroller of the Currency reached a similar conclusion in his decision and at the trial testified that the benefits of the merger clearly outweighed any possible anticompetitive effects and will do so to an even greater extent in the years ahead (Tr. 2036-2037, 2066; BK-A, pp. 58-60).

The Government's principal attack on **[**164]** this conclusion seemed to be the assertion that this particular merger was not an absolute necessity in order to obtain these desirable results. Yet plaintiff conceded the need for additional statewide banks and its expert, Professor Lishan, readily testified that in considering the matter of convenience and needs from an economic standpoint, he would admit that an additional competitor met the convenience and needs of a community, even though existing facilities were adequate to handle existing trade and the establishment of an additional competitor was not an absolute necessity (Tr. 2278).

Before concluding our discussion of the convenience and needs of the community to be served, we note that in the laboratory of two and one-half years' experience since the merger, [37] the Government has failed to produce any instance of any adverse effect of this merger, while defendant banks have produced evidence of substantial, tangible benefits to the communities served by the resulting bank. Even if we were to accept the Government's allegations at face value, the benefits of immediately adding an additional competitor, in markets consisting of three (statewide facilities) or six or seven **[**165]** (municipal bonds and international finance) competitors, would clearly outweigh **[*197]** the possible loss of an additional competitor in markets consisting of 85-90 (Los Angeles and Orange Counties) and over 200 (state as a whole).

The Clarke Memoranda.

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[37] Plaintiff's expert, Gaffey, testified that such harmful effects should be observable in two or three years.

Before concluding, the court deems it advisable to briefly review the memoranda of Dwight Clarke (G-329; G-330), upon which plaintiff so heavily relies. The review is made at the close of this opinion, in order that it may be more effectively weighed in the light of the preceding pertinent facts. These two documents are virtually identical and were prepared to present Clarke's reasons "Why shareholders of Citizens National Bank would benefit from an exchange of their stock for that of Crocker Anglo National Bank in a merger where 'Citizens' would appear prominently in the new bank's name." The first was prepared for presentation to the Executive **[**166]** Committee of Citizens on December 6, 1962, and was based upon the then exchange offer of 1.8 shares of the combined bank for 1 share of the then Citizens National Bank, and the second was presented to the Board of Directors of Citizens on February 7, 1963, and was based upon the exchange offer of 1.9 shares of the combined bank for 1 share of the then Citizens National Bank. The essential portion of the memorandum of February 7, 1963 recites:

> In only a little more than a decade, Los Angeles and San Francisco have grown much closer geographically. A very few years back it required an eleven or twelve hour journey to go from one city to the other; now it takes a little over an hour, and who is bold enough to say that that time will not continue to shrink? The completion of the vast Central Valley-Feather River water project will eventually bring greater unity of interests to the entire state.
>
> Considering the policy of the federal government concerning mergers and anti-trust, we may never again have as happy a conjunction of events enabling us to become part of what would be the second largest statewide bank in California and the third or fourth largest bank in the state. **[**167]** Citizens and Crocker at present do not compete, yet the territory separating our two systems is constantly narrowing. When either bank goes very far north or south of their present areas, a serious bar to any merger would automatically be created.
>
> If we make no deal with Crocker, our future possible choices for a merger would be extremely limited. None of these other possibilities would be as mutually complementary as a Citizens-Crocker marriage. There is such a thing as compatibility among banks. Citizens and Crocker-Anglo have progressed along similar enough lines in the development of new business, credit policies and branch expansion to lead one to believe that in a merger the two managements would establish a harmonious basis for cooperation. As correspondents participating in loans, the officers of the two institutions have become well acquainted so would start their combined management with probably the minimum of friction.
>
> Only a few days ago the Bank of California announced that it will open its first branch in Los Angeles. That means one more competitor and one less possibility of a merger. Since Crocker has stated its desire to enter Southern California, **[**168]** it is inevitable that if the present proposal is not concluded, Crocker will otherwise enter this area through merger or through de novo branches. Also the recent sale of the First Western Bank suggests that this statewide bank may be expected to become a more aggressive competitor.
>
> All these facts impel me to urge that this subject be given very serious study lest we gravely cripple the future progress of our institution.

When called as a witness by plaintiff, Clarke testified as to his position with **[*198]** Citizens, the circumstances relating to the preparation of the memorandum and the purpose he hoped to achieve thereby. [38] Now, who was

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[38] Clarke testified as follows:

> Q. Now, during the time, that period of time that you were a director [of Citizens], would you say that you were a representative of Transamerica on the Board?
>
> A. I suppose I could be called that. I was elected by their stock, stock they controlled, together with some other people.
>
> . . . .
>
> A. I was on their Executive Committee . . . . (Tr. 1235)
>
> Q. Could you tell us how you went about preparing this document?
>
> A. Well, at this time, the date on this is December 1962, at this time active consideration was being given to the offer that had been made of an exchange of stock of Crocker for Citizens and I was very much convinced of the desirability of such an exchange. I felt it was greatly in the interest of the stockholders of the bank, of the staff of the bank and of the customers and the general public, and I was an active and vigorous proponent of the merger.

Dwight Clarke? True, he **[*199]** was a banker of thirty years' experience and a member of the Board of Directors

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> There was opposition in the beginning, considerable serious opposition on the part of some of the other directors, some of the members of the Executive Committee, and we had many meetings about it and much discussion. . . .
>
> . . . .
>
> Therefore, I do this as a, what I considered like a sales approach, *it was a sales approach, it was all the arguments I could think of* to back up my claim that the merger was most desirable and *I tried to do a selling job* in preparing this argument and develop the various facts that appear in it as to - from data of various sorts that I gathered, had gathered. (Tr. 1238-1239).
>
> A. Yes, that's right, this is dated February 7, 1963. This is the one that I read aloud to the Board of Directors and provided each, presented each one of them with a copy of it. (Tr. 1241)
>
> A. I showed a copy of it to - in fact, gave a copy of it to Mr. Brauer as a Chairman of the Board of Transamerica and a copy to Mr. John Beckett, the President of Transamerica, because they were such large stockholders and *they were cognizant of what I was doing* and I gave them copies of it about the time they were made.
>
> . . . .
>
> A. . . . the merger could not be made without their full cooperation, full approval, and so *they knew everything I was doing about that because I had originally heard about the offer through Mr. Beckett*. (Tr. 1242).
>
> A. Yes, it was voted on after this was presented, this second document dated February 7, it was voted on in a meeting, I think, the 19th of February 1963 and both the argument for and the argument against were presented at that time. (Tr. 1247-1248).
>
> Q. Then, Mr. Clarke, since you prepared these two documents, the opinions that appear in there are yours, are they not?
>
> A. They are my opinions, they are *my guesses* as to a lot of things. *It was my sales argument*. (Tr. 1249).
>
> Mr. Archer: May I ask one question?
>
> Q. Mr. Clarke, do you have any information about what Crocker-Anglo's plans for branching were other than what appears right in the memorandum itself?
>
> A. None whatsoever.
>
> Q. Did you negotiate this at all with either Mr. Hoover or Mr. Solomon?
>
> A. I never saw nor talked to nor had correspondence with either Mr. Hoover or Mr. Solomon during the negotiations. In fact, I had never met Mr. Solomon until after the merger agreement was signed . . . . And only saw Mr. Hoover, although I knew him, I had known him a number of years before, but I only saw them for the first time sometime after the merger agreement in the spring of '63. (Tr. 1250-1251).

The court thereafter, ruling on the offer of G-329 and G-330 in evidence, through Judge Pope, said:

> Now, this tends to confirm what he has said in respect to his activities, and we therefore think that it is admissible solely for the purpose, as against Transamerica and as against Citizens, to show that they collaborated in bringing about this merger.
>
> So far as the opinions in there are expressed, we regard those as wholly inadmissible and they will be disregarded by the Court, particularly the opinion as to what Crocker-Anglo might do, because this witness has not shown himself to be privy to the inter-workings of the management of Crocker-Anglo.
>
> So if it is expected by the Government that this will tend to prove what the plans and purposes and intent of Crocker-Anglo would have been at that time, we regard that as wholly inadmissible and when it was first offered we regarded that as so entirely inadmissible and prejudicial that we first ruled that it would not be admitted for any purpose.
>
> But for the limited purposes which I have just stated, it will be received. We do not regard it as any proof whatsoever as to the purposes and intentions of Crocker-Anglo, in fact, the witness, if I heard him accurately, said it contained some of his guesses.
>
> That is the ruling of the Court. It is admissible for the limited purposes indicated as against Transamerica and Citizens only. (Tr. 1253-1254).

and the Executive Committee of Citizens, but his basic role in Citizens was that of representative and spokesman of Transamerica (he was placed there by Transamerica and was referred to by Mr. Britt, President of Citizens, as the "Transamerica representative" on the Board) and protector of Transamerica's 41 per cent interest in Citizens. When he prepared the memoranda and before presenting them to the Citizens organization, **[**169]** he discussed them with Beckett and Brauer of Transamerica and secured their approval. The success of the merger was vital to Transamerica because (1) it wanted to divest itself of its 41 per cent interest in Citizens for fear that by voting it at a meeting of the stockholders it might turn out to be a vote in excess of 50 per cent of the stockholders voting at a meeting and thereby make Transamerica a bank holding corporation with all its enterprises and subsidiaries throughout the world subject to examination by the Federal Reserve Board at the expense of Transamerica, and (2) because it was getting the equivalent of 41 per cent of a $12 million premium, a sum equal to $4,920,000. This was the interest for which he was making his "sales pitch" against considerable opposition. Hence, it matters not how you characterize his memorandum of February 7, 1963, whether as an opinion, sales approach, selling job or guess, it was a statement made purely in the interest of Transamerica and could never qualify as an unbiased, objective opinion of probative value. We attach very little weight to Mr. Clarke's statements, for his words do not begin to speak as loudly as the deeds of Crocker in **[**170]** centering its branching activities within present service areas and its refusal to entertain or make plans for entry into the Los Angeles service area of Citizens. In view of the banking situation in the Los Angeles area, his statement could not have affected knowledgeable bankers in that already over-banked area, since new competition is ever present at the periphery, and it makes little difference who that competition is, since, as we already know and previously related, in recent years there have been twice as many applicants as there have been permits granted for the Los Angeles area.

[171]** Conclusion.

Throughout the trial plaintiff contended that a decision in this case upholding the legality of the instant merger would violate the basic legal principles on potential competition enunciated in the more recent opinions of the Supreme Court. The short answer to this contention is that plaintiff failed to prove that the probable effect of the merger would be a substantial lessening of competition in any section of the country. This is a fact question. Our decision in this case in no way runs counter to the teachings of the Supreme Court, since it turns not on any differing legal principles, but upon a particular factual situation which is entirely different from that prevailing in any of the cases relied upon by plaintiff and one from which no potential adverse competitive effect in any section of the country may be reasonably inferred. A further detailed analysis of these factual differences beyond **[*200]** that already herein expressed would serve only to encumber what is already an all too voluminous opinion.

The court repeats that plaintiff has failed to prove that the instant merger may tend substantially to lessen competition, actual or potential, or **[**172]** tend to create a monopoly, in any section of the country, and that even if we were to hypothesize any such anticompetitive effects, such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Accordingly, judgment is granted in favor of defendants and against plaintiff and the complaint is dismissed. Defendant banks shall prepare and submit an appropriate form of judgment to the court.

The foregoing opinion and footnotes constitute the court's findings of fact and conclusions of law, as required by *Fed. R. Civ. P. 52(a)*.

Austin v. House of Vision, Inc.

United States Court of Appeals for the Seventh Circuit

November 1, 1967

No. 16098

Reporter

385 F.2d 171 *; 1967 U.S. App. LEXIS 4664 **; 1967 Trade Cas. (CCH) P72,259; 11 Fed. R. Serv. 2d (Callaghan) 249

Richard D. Austin, Plaintiff-Appellant v. The House of Vision, Inc., et al., Defendants

Disposition: **[**1]** Vacated and remanded.

Core Terms

interstate commerce, amended complaint, employees, second amended complaint, defendant corporation, trial court, antitrust, restrain, alleges, amend, summary disposition, cause of action, anti trust law, district court, treble damages, grant leave, Conspiracy, competitor, conspiring, unmindful, notified, Vacated, grounds, optical

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Standing, Sherman Act**

To state a claim on which relief can be granted under *15 U.S.C.S. § 1*, allegations adequate to show a violation. In a private treble damage action, that plaintiff was damaged thereby is all that the law requires.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Complaints, Requirements for Complaint**

Under the Federal Rules of Civil Procedure, a plaintiff is not required to allege the detailed facts which support his claim; he need only make a brief, plain statement sufficient to notify the defendant of the theory of his claim and the grounds which support it.

Judges: Hastings, Chief Judge, and Castle and Fairchild, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*171] On July 20, 1966, plaintiff-appellant filed a complaint for treble damages under *15 U.S.C.A. § 15* against defendants The House of Vision and The House of Vision Employees' Benefit Trust.

The trial court granted plaintiff leave to amend his complaint to substitute the five trustees of the Employees' Benefit Trust for the Trust itself.

As amended, the complaint alleges that for ten years plaintiff worked as an optical technician and dispenser in defendant company's Chicago area stores; that he and other employees were members of the Trust, to which contributions were made by both the defendant company and the employees; that the Trust was amended in 1958 to provide that any employee-beneficiary who goes to work for a competitor of the defendant company will lose his beneficial interest in the Trust; that plaintiff left defendant company's employ on June 15, 1966, and became an employee of a competitor of defendant company; that thereafter plaintiff was notified by the defendant trustees that **[*172]** his interest in the **[**2]** Trust was terminated; and that "the defendant corporation has been and is through its officers, agents and related personnel, conspiring with the defendant Trustees to restrain competition in interstate commerce, by preventing former employees of the defendant corporation from competing with the defendant corporation, and by reason of such conspiracy have actually used its employment contracts, Trust provisions in conjunction with various forms of coercive activity in an illegal manner which has resulted in an actual restraint of competition in interstate commerce by reason of defendants' monopolization and control of the availability of optical industry employees in interstate commerce."

Upon motion of defendants, the trial court dismissed the complaint, on the grounds that "an essential element of any private antitrust action under *15 U.S.C. § 15* is an explicit allegation of facts showing injury to the public as a result of the alleged antitrust violation charged," and that "there is no allegation in the instant complaint that the plaintiff has been unable to compete as a result of the alleged monopolistic practices."

Subsequently, the court denied plaintiff's **[**3]** motion for leave to file a second amended complaint on the ground that given the facts of this case, plaintiff could not state a cause of action under the antitrust laws.

Plaintiff appeals from the dismissal of his amended complaint and the denial of leave to file a second amended complaint.

Although plaintiff prays for relief under *15 U.S.C.A. § 2*, he alleges in the body of his complaint that defendants are conspiring to restrain competition in interstate commerce. Conspiracy to restrain trade falls within the ambit of *15 U.S.C.A. § 1*.

We are not unmindful of the Supreme Court's decision in *Radiant Burners v. Peoples Gas, Light and Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1960)*, in which the Court stated that ***HN1***[] "to state a claim on which relief can be granted under *[section 1]*, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all that the law requires." *Id. at 660*.

Nor are we unmindful of the Court's decision in *Simpson v. Union Oil Co. of California, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1963)*. **[**4]** There the lessee of a service station selling gasoline on a consignment basis lost his lease because he refused to maintain the prices established by the lessor-consignor oil company. The Court reversed the decision below that plaintiff had not alleged an actionable injury.

HN2[] Under the Federal Rules of Civil Procedure, 28 U.S.C.A., a plaintiff is not required to allege the detailed facts which support his claim; he need only make a brief, plain statement sufficient to notify the defendant of the theory of his claim and the grounds which support it. *Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*.

Where, as here, plaintiff seeks an opportunity to amend his complaint in order to meet the objections stated by the trial court, we feel that he should be accorded such an opportunity. Whether such an amended complaint will state a cause of action cannot be determined unless and until such an amended complaint is filed and tested.

The dismissal of a complaint for failure to state a claim is an even more stringent and summary disposition than is summary judgment. In the antitrust area, which has seen rapid and sometimes surprising development in **[**5]** recent years, there has developed resistance to summary disposition, at least until a full exploration of the law and the facts has been afforded. Cf. *Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*.

In view of our disposition of this appeal, we need not now decide the question of whether the present amended complaint **[*173]** sufficiently states a claim under the federal antitrust laws.

We think the issues here involved may be more thoroughly considered if plaintiff is granted leave to further amend his complaint.

Accordingly, the judgment of the district court is vacated and this cause is remanded to the district court with directions to grant leave to plaintiff to file a second amended complaint, and for such further proceedings as may be deemed appropriate.

Vacated and remanded.

Kaplan v. Lehman Bros.

Supreme Court of the United States

November 13, 1967, Decided

No. 197

Reporter

389 U.S. 954 *; 88 S. Ct. 320 **; 19 L. Ed. 2d 365 ***; 1967 U.S. LEXIS 2997 ****; 1967 Trade Cas. (CCH) P72,272

KAPLAN ET AL. v. LEHMAN BROTHERS ET AL.

Prior History: [**1]** C. A. 7th Cir. Reported below: *371 F.2d 409*.

Core Terms

rates, anti trust law, Stock, Securities Exchange Act, shares

Counsel: Anthony Bradley Eben and Peyton Ford for petitioners. Hammond E. Chaffetz for respondents Lehman Brothers et al., and John T. Chadwell and Richard M. Keck for respondent New York Stock Exchange.

Opinion

[*954] [*365]** Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Dissent by: WARREN

Dissent

MR. CHIEF JUSTICE WARREN, dissenting.

This is no ordinary case. It is of utmost importance to millions of investors, and concerns practices which have an impact on the entire economy of the Nation. It presents for consideration basic principles of ***antitrust law*** not previously decided by this Court, and, consequently, is not controlled by precedent. It comes here without representation of the public interest by an agency charged with enforcement of the antitrust laws.

This case draws into question the legality under the Sherman Act of the practice of the New York Stock Exchange in adopting rules fixing minimum rates for the commissions charged by Exchange members for the purchase and sale of securities on the Exchange. Petitioners brought this action pursuant **[****2]** to § 4 of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 15*, derivatively on behalf of five mutual fund investment companies of which they are shareholders and representatively on behalf of other shareholders against the New York Stock Exchange and five of its member firms. Their complaint charges that the practice of the Exchange in fixing minimum commission rates for transactions in securities listed on the Exchange constitutes a price-fixing conspiracy under *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 1*. They sought treble damages, a declaratory judgment, and an injunction, the effect of which would be to restrain the Exchange from interfering with the rights of individual Exchange members to set their **[*955]** own competitive rates of commission. The District Court granted summary judgment for the Exchange and member firms. The Court of Appeals for the Seventh Circuit affirmed.

Members of the New York Stock Exchange transact over 90% of all brokerage business in stocks in the United States. Based on the current trading volume, the investing public is now paying over $ 1,200,000,000 annually, at the uniform **[****3]** minimum rate, for the privilege of trading on the Exchange. More than 12,000,000 persons own shares listed on the Exchange. Mutual investment funds pay about $ 100,000,000 annually in commissions to trade on the Exchange, and over 3,000,000 persons own shares in mutual funds.

Only members can trade on the New York Stock Exchange, and its constitution severely limits membership. Exchange rules set uniform minimum commission rates to be charged by members for transactions on the Exchange. The same commission rate is charged, based **[**322]** on the value of the round lot (100 shares), for each transaction regardless of size; the commission on an order for 10,000 shares is 100 times that on an order for 100 shares. Exchange rules prohibit any "member, **[***366]** allied member, member firm or member corporation" from making "a proposition for the transaction of business at less than the minimum rates of commission." Before a member is allowed trading privileges he must sign a pledge to abide by the constitution and rules of the Exchange, and any member or allied member adjudged guilty of violating the constitution or a rule may be suspended or expelled by the Board of Governors.

[**4]** This Court has long held that rates fixed by agreement are unreasonable *per se.* *United States* v. *National Assn. of* *Real Estate Boards, 339 U.S. 485, 489 (1950)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 396-398* ***[*956]*** *(1927)*. Therefore, the Exchange practice here attacked, just as that in *Silver v. New York Stock Exchange, 373 U.S. 341 (1963)*, would, "had it occurred in a context free from other federal regulation, constitute a *per se* violation of *§ 1* of the Sherman Act." *Id., at 347*. Here, as in *Silver*, the other federal regulatory scheme is the Securities Exchange Act of 1934, and the clear question presented is whether there is anything "built into the regulatory scheme which performs the antitrust function . . . ." *Id., at 358*.

Section 19 (b) of the Securities Exchange Act, 48 Stat. 898, *15 U. S. C. § 78s (b)*, authorizes the SEC by certain procedures "to alter or supplement the rules" of the Exchange "in respect of such matters as . **[****5]** . . (9) the fixing of reasonable rates of commission . . . ." Respondents contend that this provision sufficiently demonstrates the SEC performs a supervisory function in respect of the Exchange's rate-fixing to exempt the practice from review under the antitrust laws. Petitioners claim that for many reasons the possibility of SEC review is an insufficient substitute for application of the antitrust laws. For example, the SEC's review of rates is discretionary. Further, the regulatory scheme fails specifically to enjoin the SEC, in determining what rates are reasonable, to "enforce the competitive standard," *United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963)*, and furthermore neither the SEC nor the Exchange has ever articulated any standard of reasonableness. Petitioners also claim that the underlying data used by the SEC in reviewing each of the five rate increases since 1934 have been essentially those supplied by the Exchange, and have been very limited in scope and content. Finally, they claim that if and when the SEC exercises its discretion to review rates, it is not required to hold a hearing, and because the matter is committed to **[****6]** the **[*957]** SEC's discretion, there is no effective **[***367]** judicial remedy to require it to initiate a rate proceeding.

If, as petitioners claim, the regulatory scheme provides no assurance that antitrust policy will be implemented, perhaps a repeal of the ***antitrust law*** may be implied "if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange, supra, at 357*. However, "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States v. Philadelphia National Bank, supra, at 350*. Moreover, petitioners claim that nothing about the Securities Exchange Act or the workings of the Exchange requires that the Exchange set minimum rates.

The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that "the self-regulatory function of the exchange has been exercised by virtue of § 19 (b)," *371 F.2d, at 411*. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated **[****7]** by this Court's opinion in *Silver*.

The importance of the New York Stock Exchange in the functioning and livelihood of this Nation cannot be gainsaid. Ever-increasing millions of persons and billions of dollars are affected by the Exchange's practices. Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below. In my judgment, the claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, **[*958]** but also as to the fulfillment of the goal of investor protection embodied in the securities laws.

I would grant certiorari and invite the Solicitor General to participate in argument so that the public interest may be fully explored.

LexisNexis

Wurzberg Bros., Inc. v. Head Ski Co.

United States District Court for the District of New Jersey

November 15, 1967

Civil Action No. 832-66

Reporter

276 F. Supp. 142 *; 1967 U.S. Dist. LEXIS 11554 **; 1967 Trade Cas. (CCH) P72,294

Wurzberg Brothers, Inc. v. Head Ski Co., Inc.

Core Terms

Ski, Dealer, products, franchise, manufacturer, retail, prices, terminated, Sherman Act, summary judgment, parties, renew, shop, entitled to judgment, matter of law, customers, commerce, seller

Judges: **[**1]** Wortendyke, District Judge.

Opinion by: WORTENDYKE

Opinion

[*143] WORTENDYKE, District Judge:

Plaintiff, Wurzberg Brothers, Inc. (hereinafter Wurzberg), a New Jersey corporation, with its principal place of business in the City of Paterson, in that State, is engaged in the business of selling sporting goods equipment at retail. Defendant Head Ski Co., Inc. (hereinafter Head), a Delaware corporation, having its principal place of business in Maryland, is engaged in the manufacture and nationwide distribution of metal skis and ski poles.

Wurzberg invokes this Court's jurisdiction under *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*) and Section 4 of the Clayton Act (*15 U.S.C. § 15*). Wurzberg seeks the recovery of treble damages from Head and also injunctive relief.

The complaint alleges that the skis and ski poles manufactured by Head have gained national acceptance, and that the public demand therefor is such that sporting goods stores or ski shops which are unable to obtain Head cannot compete in the sale of metal skis or other ski products. It is charged that Head, for the purposes of eliminating competition and creating a monopoly in the sale of metal skis and ski **[**2]** poles, developed a franchise system whereby certain limited business entities are granted yearly franchises, terminable at the will of Head which permit a dealer to sell "Head" ski products. It is further alleged that the policy of Head under its franchise system is to (a) maintain uniform retail prices on all Head products; (b) prohibit discounts on any ski products when sold with a product manufactured or distributed by Head; (c) control the advertisement of Head and other ski products; (d) eliminate all competition between retail outlets of Head Ski products; (e) deprive the general public of discounts on ski products not manufactured by Head, when such products are sold with any **[*144]** Head products; and (f) eliminate competition in the sale of Head products by limiting the number of its authorized dealers.

Wurzberg had been an authorized franchise dealer of Head prior to June 8, 1966, and as such had become a successful and profitable outlet for Head's products. During the period of the franchise, Wurzberg adhered to the retail prices suggested by Head, but refused to participate in Head's program which prohibited Wurzberg or any other store from offering discounts to **[**3]** the general public on any ski products when that product was sold with a product manufactured by the defendant.

The complaint charges that the Head franchise system and its program restrain interstate commerce and have "tended to and actually created a monopoly in the line of interstate commerce in this State" to the injury of the plaintiff in its business and property. Wurzberg charges that on June 8, 1966 Head terminated Wurzberg's Franchise and refused to sell any Head products to Wurzberg; thereby eliminating Wurzberg's ability to compete with other sporting goods and/or ski shops in the market for metal skis controlled by Head. Wurzberg contends that, in consequence of the termination of its franchise by Head, Wurzberg lost and will continue to lose great profits and good will and has suffered destruction of its reputation in the retail distribution of ski products of all types. The foregoing allegations were thereafter repeated by incorporation by reference in the succeeding counts of the complaint, which, respectively, seek damages and other relief for the impairment of Wurzberg's ability to compete and to sell to the general public nationally known-products such as those **[**4]** manufactured by Head.

Head has moved this Court for summary judgment upon the asserted grounds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. In support of the motion, movant relies upon the pleadings, various depositions on file and affidavits annexed to the motion papers. A sample, but unexecuted copy of the franchise agreement between the parties for the season 1965-1966, entitled "Statement Of Mutual Agreement Between Head Ski Co., Inc. And Authorized Head Ski Dealer", concededly executed in behalf of each of the parties to this litigation, and terminated June 8, 1966, provided in pertinent part as follows:

> "This Agreement when signed by an officer or principal of the Dealer and by Howard Head, President, Head Ski Co., Inc. constitutes the establishment of the Dealer as an Authorized Head Ski Dealer, and confers on the Dealer the right to sell Head Ski Products at retail.
> This Agreement shall be in effect from date of acceptance by Head Ski Co., Inc. until July 31, 1966, unless otherwise terminated as herein provided.
>
> Dealerships may be renewed from year to year only by mutual agreement **[**5]** and by the execution of a new agreement form between Head Ski Co., Inc. and the Dealer.
> This Agreement between Head Ski Co., Inc. and the Authorized Head Ski Dealer becomes invalid with any change of ownership or change of management of the Dealer, and may not be assigned or passed on to any other Dealer or management without the written consent of Head Ski Co., Inc.
> This Agreement may be terminated without cause at any time on written notice either by Head Ski Co., Inc. or by the Authorized Head Ski Dealer.
>
> In the event of termination of this Agreement by either party, Head Ski Co., Inc. will have the prior right, but not the obligation, to repurchase from the Dealer any Head Ski Co. products then in possession of the Dealer at the original cost to the Dealer. In the event of the Authorized Head Ski Dealer terminating, liquidating, or selling his business, the Dealer agrees to notify Head Ski Co., Inc. in writing **[*145]** and to offer for sale to Head Ski Co., Inc. any and all Head Ski products then in the Dealer's possession at the original cost of the products to the Dealer.
>
> This agreement does not confer any specific or implied exclusive territorial rights **[**6]** to the Authorized Head Ski Dealer. Head Ski Co., Inc. reserves the right to appoint additional Dealers from time to time in locations of its choice where in the judgment of Head Ski Co., Inc., a valid reason for such appointment exists.
> A separate Agreement with the consent of the Head Ski Co., Inc. is required for each principal place of business, and for each branch shop where Head Ski Co., Inc. products are to be displayed and sold, by the Authorized Head Ski Dealer.
> The Authorized Head Ski Dealer agrees not to sell or transfer Head Ski Products to any shop other than an Authorized Head Ski Dealer."

Head's argument in support of its motion is subdivided into four grounds, viz: (1) "Consideration of plaintiff's claim is limited to the legal effect of the reasons for defendant's refusal to renew plaintiff's franchise." (2) "There is no violation of Section One of the Sherman Act." (3) "There is no violation of Section Two of the Sherman Act." (4) "Plaintiff is not entitled to additional discovery before the Court rules on this motion for summary judgment."

With respect to the fourth ground above-stated, the Court is neither aware of, nor has it considered, for the **[**7]** purposes of this motion, anything other than "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits" submitted in support of and *contra* the motion. *F.R.C.P. 56(c)*. This being a civil suit under the Antitrust Laws, "Summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case '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.' *Rule 56(c) Fed. Rules Civ. Proc.* This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is * * * no genuine issue remains for trial * * * the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. Summary judgments are not appropriate "'where motive and intent play leading roles.'" *White Motor Co. v. United States, 372 U.S. 253, 259, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*.

In *Dr. Miles Medical Co. v. Park & Sons* ***[**8]*** *Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)* Miles maintained a system of contracts between itself as manufacturer and retail merchants by which Miles attempted to control, not merely the prices at which its agents might sell its products, but also the prices for all sales by all of its dealers at retail, whether such Dealers were purchasers or sub-purchasers from the manufacturer. That system of contractual relationship was held to be invalid under the Sherman Act because it eliminated all competition and fixed the amount which the consumer was required to pay. In so doing the imposition of the terms of such contracts amounted to restraint of trade and, insofar as it affected interstate commerce, was invalid under the Sherman Act. In *White Motor, supra*, which was a Government civil Antitrust Action, a summary judgment for the defendant was reversed where it was based upon agreements between the truck manufacturer and its distributors and dealers by the terms of which territorial limitations were imposed upon the distributors and sales to governmental departments were forbidden. Although the manufacturer did not appeal from the trial court's ruling that the contracts **[**9]** fixing retail prices were unlawful, the Opinion in the Supreme **[*146]** Court at p. 260 stated:

> "Price-fixing arrangements, both vertical (*United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503*; *Dr. Miles Medical Co. v. Park & Sons, 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376*) and horizontal (*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811*; *Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259*), have also been held to be *per se* violations of the antitrust laws; and a trial to show their nature, extent, and degree is no longer necessary."

Consideration of plaintiff's claim is not to be limited to the legal effect of the reasons for defendant's refusal to renew the plaintiff's franchise. If, as plaintiff contends, the defendant required that the plaintiff enter into the Dealer's Agreement as a condition precedent to the grant and/or renewal of a franchise to sell the defendant's products, the terms of that agreement operated in restraint of trade and constituted a *per se* violation of Section One of the Sherman Act. If so, it follows that the reasons for defendant's refusal **[**10]** to renew the plaintiff's franchise become immaterial and irrelevant.

In support of defendant's contention that no violation of the ***Antitrust law*** arises from the unilateral refusal of a seller to deal with a potential purchaser regardless of the seller's reasons, Head cites *United States v. Colgate & Company, 250 U.S. 300, 307 63 L. Ed. 992, 39 S. Ct. 465 (1919)* and quotes from the Opinion therein that:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

In *Colgate* the Court quoted from Dr. Miles at p. 306:

> "'The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right **[**11]** to do.'"

The *Colgate* decision however was construed in *United States v. Bausch & Lomb Co., 321 U.S. 707, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)* and *Federal Trade Comm. v. Beech-Nut Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922)* as meaning no more than that a simple refusal to sell to customers who would not resell at prices suggested by the seller is permissible under the *Sherman Act. As United States v. Bausch & Lomb Co., supra*, pointed out in *Colgate, supra*, held insufficient on demurrer an indictment under the Sherman Act against a manufacturer for requiring its dealers to maintain prices. The indictment alleged only specification of resale prices by the manufacturer and refusal to deal with customers who did not maintain them. The Court held the indictment insufficient because no reference was made in it to a purpose to monopolize, and stated that the Sherman Act "does not restrict the long recognized rights of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." F.T.C. v. Beech-Nut Packing Co., supra, while recognizing that "a simple refusal to sell to others **[**12]** who do not maintain the first seller's fixed resale prices is lawful, * * * the seller may not, consistently with the Sherman Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, **[*147]** unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate commerce. * * * The Beech-Nut Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters." *United States v. Bausch & Lomb, supra at 722*.

The franchise agreement between the parties in the present case by its terms expressly restrains trade in favor of Head to the disadvantage of Wurzberg and the retail customers of the latter. The dealer may only acquire the right to sell Head Ski's products at retail provided the dealer executes and becomes bound by the terms of the franchise agreement. The franchise is limited in duration, i.e., to a year or season. The franchise may only be renewed from year to year provided the manufacturer and the dealer execute a new agreement. **[**13]** A further provision of the agreement renders it invalid upon any change of ownership or change of management of the dealer. The franchise may not be assigned or passed on to any other dealer or management without the written consent of Head, and it may be terminated without cause at any time on written notice by either of the parties. In the event of termination, Head shall have the prior right, but not the obligation, to repurchase from Wurzberg any of Head's products then in the dealer's possession at the original cost to the dealer. Despite these limits on the rights of the dealer, the manufacturer reserves the right to appoint additional dealers from time to time in locations of its choice where in its judgment, a valid reason for such appointment exists. A separate agreement, with the consent of Head, is required for each principal place of business and for each branch shop of the dealer where Head Ski products are to be displayed and sold. Finally, the dealer agrees not to sell or transfer any Head Ski products to any shop other than that of an Authorized Head Ski Dealer.

Any doubt that Head is not entitled to judgment as a matter of law is dissipated by *Simpson v. Union **[**14]** Oil Co. of California, 377 U.S. 13, 16, 84 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* in which Mr. Justice Douglas, speaking for the Court, stated:

> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant. See *Klor's v. Broadway-Hale Stores, 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705*; *Radiant Burners v. Peoples Gas Co., 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365*."

and further at p. 17:

> "We made clear in *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503*, that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is. *United States v. Colgate, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465*, as explained in *Parke, Davis, 362 U.S., at 37*, was a case where there was assumed to be no agreement to maintain retail prices. Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining * * * prices than were the Parke, Davis techniques in fixing **[**15]** monopoly prices on drugs."

I consider the foregoing language peculiarly apposite to the situation disclosed by the record in the case at bar. Because, therefore, the record fails to show that the defendant is entitled to judgment as a matter of law as required by *F.R.C.P. 56(c)*, the motion for summary judgment must be and is denied.

Plaintiff may present an appropriate draft of order.

Reimel v. Alcoholic Beverage Control Appeals Board

Court of Appeal of California, First Appellate District, Division One

November 21, 1967

Civ. No. 22905

Reporter

256 Cal. App. 2d 158 *; 64 Cal. Rptr. 26 **; 1967 Cal. App. LEXIS 1839 ***

JAMES O. REIMEL, as Director, etc., Plaintiff and Appellant, v. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Defendant and Respondent; CHARLES COHON et al., Real Parties in Interest and Respondents. [And 5 other cases.] *

Subsequent History: [*1]** Rehearing Denied 256 Cal. App. 2d 158 at 176.

Prior History: APPEALS from judgments of the Superior Court of the City and County of San Francisco. Joseph Karesh, Judge.

Proceeding in mandamus to review decisions of the Alcoholic Beverage Control Appeals Board revoking decisions of the Department of Alcoholic Beverage Control to suspend and revoke several liquor licenses for alleged violation of minimum price fair trade regulations.

Disposition: Reversed with directions. Judgments denying writs reversed with directions.

Core Terms

licensees, retailer, branded, minimum retail price, schedules, notice, distilled spirits, license, open competition, price schedule, trade journal, producer, actual notice, effective, appeals, package, words, fair trade contract, general circulation, legislative intent, minimum price, retail price, provisions, suspension, prices, mail, alcoholic beverage, make public, cases

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Governments > State & Territorial Governments > Licenses

* James O. Reimel v. Alcoholic Beverage Control Appeals Board (Jack Dorian et al.), Civ. No. 22906; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Catherine Carella et al.), Civ. No. 22994; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Michael Carella et al.), Civ. No. 22995; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Charles Cohon et al.), Civ. No. 23282; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Fred Lancelotti et al.), Civ. No. 23401.

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN1[] Conveyances, Licenses

Cal. Bus. & Prof. Code § 24755 provides that no package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this state for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section. A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof. Such schedule shall be filed by the owner of the brand (or any of certain other designated persons). No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package.

Governments > State & Territorial Governments > Licenses

HN2[] State & Territorial Governments, Licenses

Under the authority of Cal. Bus. & Prof. Code § 24757 the department adopted its Rule 99(k), Cal. Admin. Code, tit. IV, § 99k, which provides that the person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial Governments > Licenses

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

HN3[] Alcohol Related Offenses, Distribution & Sale

A state has particularly wide powers with respect to the traffic in alcoholic beverages and may provide for their prohibition or impose such conditions and regulations as it may deem proper.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > State & Territorial Governments > Licenses

HN4[] Fundamental Rights, Procedural Due Process

Unlike the rule with respect to the right to deal in ordinary commodities there is no inherent right in a citizen to sell intoxicants and a license to do so is not a proprietary right within the meaning of the due process clause of Cal. Const., art. I, § 13, nor is it a contract; it is but a permit to do what would otherwise be unlawful.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Governments > State & Territorial Governments > Licenses

HN5[] Separation of Powers, Legislative Controls

Cal. Bus. & Prof. Code § 24755 does not require as an element of its violation that a sale below the effective minimum retail price schedule be made knowingly. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. The duty to enforce and administer the act is vested in the Department of Alcoholic Beverage Control, and it has a broad range of power and discretion in carrying out this duty.

Governments > State & Territorial Governments > General Overview

Governments > Legislation > Effect & Operation > Operability

HN6[] Governments, State & Territorial Governments

To publish is defined as to disclose, reveal, proclaim, circulate or make public and to proclaim, to advertise.

Governments > Legislation > Effect & Operation > General Overview

HN7[] Legislation, Effect & Operation

Publish is not synonymous with communicate or to divulge or to make known. Inseparable from the term is the idea of publicity and circulation. The thought running through all the uses of the words is an advising of the public or the making known of something to the public for a purpose.

Governments > Legislation > Interpretation

HN8[] Legislation, Interpretation

If reasonably possible, conflicting provisions of a statute should be reconciled and brought into harmony with each other. In doing so, effect and meaning should be given to each word and phrase under consideration. A construction should be avoided which implies that the legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. The use of a word with settled legal meaning is some indication that such meaning was intended.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

HN9[] Standards of Review, Clearly Erroneous Standard of Review

The court is required to accord great respect to a statutory interpretation by the Department of Alcoholic Beverage Control. It must be followed unless it appears to be clearly erroneous.

Governments > State & Territorial Governments > Licenses

HN10[] State & Territorial Governments, Licenses

Cal. Bus. & Prof. Code § 24875 relates to minimum price schedules for wine. That section provides for publishing by the person filing the schedules in a trade journal of general circulation among affected licensees. It then recites: instead of publishing, such person may mail his price schedule or any changes therein to licensees affected.

Governments > Legislation > Interpretation

HN11[] Legislation, Interpretation

It is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law.

Governments > Legislation > Interpretation

HN12[] Legislation, Interpretation

When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction.

Governments > Legislation > Interpretation

HN13[] Legislation, Interpretation

The intention of the legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute.

Governments > Legislation > Effect & Operation > General Overview

HN14[] Legislation, Effect & Operation

All statute-directed publications of notice are made in privately owned newspapers or journals.

Governments > Legislation > Interpretation

HN15[] Legislation, Interpretation

While an intention to change the law is usually inferred from a material change in the language of the statute, the circumstances may indicate merely a legislative intent to clarify the law.

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

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

Fair and open competition is a positive requirement of the Cartwright ***Antitrust Law***, *Cal. Bus. & Prof. Code, §§16700-16758*. Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law.

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > State & Territorial Governments > Licenses

HN17[] **Administrative Law, Judicial Review**

Cal. Bus. & Prof. Code § 23095 provides, in part, as follows: whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Governments > State & Territorial Governments > Licenses

HN18[] **Formal Adjudicatory Procedure, Hearings**

In administrative matters, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws.

Headnotes/Summary

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Intoxicating Liquors—Alcoholic Beverage Control Act—Offenses.

--*Bus. & Prof. Code, § 24755*, relating to minimum price schedules for branded distilled spirits and providing sanctions for sales below such prices, does not require as an element of its violation that a sale below the effective minimum retail price schedule be made knowingly; and a strict liability is imposed on those exercising the privilege of selling alcoholic beverages.

CA(2)[] **(2)**

Id.—Alcoholic Beverage Control Act—Duty of Enforcement.

--The duty to enforce and administer the Alcoholic Beverage Control Act (*Bus. & Prof. Code, §§ 23000-25762*) is vested in the Department of Alcoholic Beverage Control, and it has a broad range of power and discretion in carrying out this duty.

CA(3)[] **(3)**

Words and Phrases—"Publish."

--In cases dealing with statutory requirements of publication in a newspaper, "publish," is defined as to disclose, reveal, proclaim, circulate, or make public, to proclaim, to advertise; the word is not synonymous with communicate, to divulge, or to make known, and inseparable from the term is the idea of publicity and circulation.

CA(4)[] **(4)**

Statutes—Construction—Giving Effect to Statute.

--In construing a statute, if reasonably possible, conflicting provisions should be reconciled and brought into harmony with each other, and in doing so, effect and meaning should be given to each word and phrase under consideration.

CA(5)[] **(5)**

Id.—Construction—Giving Effect to Statute.

--Statutory construction should be avoided which implies that the Legislature was ignorant of the language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose.

CA(6a)[] **(6a)** ***CA(6b)***[] **(6b)**

Intoxicating Liquors—Alcoholic Beverage Control Act—Suspension of License.

--The Legislature intended in *Bus. & Prof. Code, § 24755* (prior to amendment effective November 8, 1967), relating to minimum price schedules for branded distilled spirits and publication thereof, and providing sanctions for sales below such prices, the common accepted meaning of the word "publish"; and the Department of Alcoholic Beverage Control in its interpretation of the statute gave the word "publish" its accepted meaning in concluding that the Legislature intended that price schedules be published in a manner most likely to give notice to affected licensees, and thus required publication in a trade journal of general circulation.

CA(7)[] **(7)**

Statutes—Construction—Aids to Construction—Departmental Construction.

--A court is required to accord great respect to the interpretation of a statute by the Department of Alcoholic Beverage Control which must be followed unless it appears to be clearly erroneous.

CA(8)[] **(8)**

Id.—Construction—Reference to Other Laws.

--In construing a provision of any code, reference may properly be made to other codes or statutes for clarification; and when the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction.

CA(9)[] **(9)**

Id.—Construction—Departure From Literal Meaning.

--If necessary, in order to give meaning to words contained in a statute, a court can depart from a literal construction of the words employed; the intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute.

CA(10)[] **(10)**

Intoxicating Liquors—Alcoholic Beverage Control—Licensing Agency—Rules and Regulations.

--A determination of the Department of Alcoholic Beverage Control that the words requiring publication of minimum price schedules for branded distilled spirits "in a manner which will result in each retailer being advised of [its] contents" in the context of the Alcoholic Beverage Control Act and *Bus. & Prof. Code, § 24755*, indicated a legislative intent that the price schedules be published in a manner most likely to give notice to the affected licensees, was reasonable and correct, as was its requirement that such schedules be published in a trade journal of general circulation in the trading area affected.

CA(11)[] **(11)**

Id.—Alcoholic Beverage Control Act—Construction.

--The circumstances that the Legislature used the word "published" in the 1961 amendment to *Bus. & Prof. Code, § 24755*, did not indicate that publication of minimum price schedules for branded distilled spirits be discontinued in favor of actual notice to licensees where for many years prior to the amendment such schedules had been published in a trade journal of general circulation by rules of the Department of Alcoholic Beverage Control and its predecessor, but rather indicated an intent to confirm the practice of publication by placing express directions therefor in the act.

CA(12)[] **(12)**

Statutes—Construction—Change of Language.

--While an intention to change the law is usually inferred from a material change in the language of a statute, the circumstances may indicate merely a legislative intent to clarify the law.

CA(13)[] **(13)**

Intoxicating Liquors—Alcoholic Beverage Control Act—Revocation and Suspension of License—Sufficiency of Evidence.

--In proceedings against licensees for sanctions for violations of *Bus. & Prof. Code, § 24755*, relating to minimum price schedules for branded distilled spirits and publication thereof and providing sanctions for sales below such prices, in selling at less than minimum prices contained in the schedules, the Department of Alcoholic Beverage Control sustained its burden of proving publication of minimum price schedules as required by *Bus. & Prof. Code, § 24755*, by proof of publication in accordance with its reasonable and not erroneous interpretation of the publication provisions of the act.

CA(14)[] **(14)**

Id.—Alcoholic Beverage Control Act—Validity.

--To the extent that the retail price maintenance provisions of the Alcoholic Beverage Control Act enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices.

CA(15)[] **(15)**

Id.—Alcoholic Beverage Control Act—Validity.

--The former statutory requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least one retailer before it became binding on all retailers was not in substance or practical effect different from the requirement of *Bus. & Prof. Code, § 24755*, relating to minimum prices for branded distilled spirits, that the producer unilaterally fix such price, so as to constitute an unlawful delegation of legislative power without necessary guide lines and safeguards against excessive prices.

CA(16)[] **(16)**

Id.—Alcoholic Beverage Control Act—Validity.

--The absence from *Bus. & Prof. Code, § 24755*, relating to minimum price schedules for branded distilled spirits, of the specific requisite that brands be in fair and open competition with alcoholic beverages of the same general class produced by others, creates no constitutional infirmity in the act, such fair and open competition being a positive requirement of the Cartwright ***Antitrust Law*** (*Bus. & Prof. Code, §§ 16700-16758*), where minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against the latter law.

CA(17)[] **(17)**

Id.—Alcohol Beverage Control Act—Validity.

--*Bus. & Prof. Code, § 24755*, relating to minimum price schedules for branded distilled spirits, publication thereof, and providing sanctions for sale below such prices, and rule 99 of the Department of Alcoholic Beverage Control (Cal. Admin. Code, tit. 4, § 99 (adopted in furtherance thereof)) are not violative of the due process clauses of the federal and state Constitutions.

CA(18)[] **(18)**

Id.—Alcoholic Beverage Control Act—Revocation and Suspension of License—Evidence.

--In a proceeding before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of *Bus. & Prof. Code, § 24755*, relating to minimum prices for branded distilled spirits, the department did not err in considering four previous accusations against the licensee as final determinations and considering them in fixing penalties where in each of the previous cases it was decided that the license be suspended for 30 days; and where, as to each decision, administrative or judicial review was pending when the parties stipulated to a penalty compromise under Bus. & Prof. Code, § 23905, the compromise stipulation providing that one case would be permitted to become final, while suspensions in the other proceedings were merged.

CA(19)[] **(19)**

Id.—Alcoholic Beverage Control Act—Revocation and Suspension of License.

--In a proceeding before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of *Bus. & Prof. Code, § 24755*, relating to minimum prices for branded distilled spirits, consideration of prior disciplinary proceedings is entirely proper, and the prior record of the licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws.

CA(20)[] **(20)**

Id.—Alcoholic Beverage Control Act—Review.

--On appeal from proceedings before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of *Bus. & Prof. Code, § 24755*, providing for minimum prices for branded distilled spirits, points relating to questions of fact or mixed questions of law and fact not raised before the Department of Alcoholic Beverage Control, the Alcoholic Beverage Control Appeals Board, or the superior court, may not be urged for the first time on appeal from a decision of the superior court.

CA(21)[] **(21)**

Id.—Alcoholic Beverage Control Act—Grounds for Revocation and Suspension.

--*Bus. & Prof. Code, § 24755.1*, providing that the license of a Department of Alcoholic Beverage Control licensee shall not be suspended or revoked for a violation of *Bus. & Prof. Code, § 24755*, and establishing monetary penalties as sanction for such violations, does not apply to a license suspension or revocation preceding its effective date and cannot be given retroactive application to such proceedings.

CA(22)[] **(22)**

Id.—Alcoholic Beverage Control Act—Judicial Review.

--The rule that a party is not permitted to change his position and adopt a new and different theory on appeal is applicable to appeals from decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board. (Opinion on denial of rehearing.)

Counsel: Thomas C. Lynch, Attorney General, and L. Stephen Porter, Deputy Attorney General, for Plaintiff and Appellant.

Charles P. Just and Robert Martin for Defendant and Respondent.

J. Bruce Fratis, Saveri & Saveri, Richard Saveri, Barbagelata, Broderick, Carmazzi & Arnold and Rinaldo A. Carmazzi for Real Parties in Interest and Respondents.

Judges: Elkington, J. Sims, Acting P. J., and Christian, J., [*] concurred.

Opinion by: ELKINGTON

Opinion

[*163] [28]** These consolidated appeals primarily concern the interpretation of *Business and Professions Code* [1] *section 24755* as amended in 1961 which relates to minimum retail **[***2]** price schedules for branded distilled spirits. The section is part of the Alcoholic Beverage Control Act (§§ 23000-25762) which herein will be called the Act.

The individual respondents and real parties in interest were holders of off-sale general liquor licenses issued by the Department of Alcoholic Beverage Control (hereinafter called Department). Against each respondent licensee the Department filed an accusation alleging the sale of branded distilled spirits at prices less than the stipulated minimum retail schedules duly filed with the Department. After hearings the Department found the charges to be true. As to some of respondent licensees, license suspension was ordered; as to the others the sanction was license revocation.

Appeals in each case were taken to the Alcoholic Beverage Control Appeals Board (hereinafter called Appeals Board). The Appeals Board reversed the several decisions of the Department. It **[***3]** held in each case that the record did not establish publication as required by *section 24755*; therefore the evidence did not support the Department's findings that the licensees sold at prices "below the minimum retail price schedule duly filed."

The Department thereupon filed in the superior court applications for mandate (*Code Civ. Proc., § 1094.5*) seeking reversal of the decisions of the Appeals Board. The superior court, after hearings, entered judgment in each case denying the prayed for relief. Each of the judgments recited: "The **[*164]** foregoing judgment is rendered by this Court upon the grounds that, as determined by the Appeals Board in its decision, the record does not contain substantial evidence that the petitioner sustained its burden of proving publication of the price schedule in the manner required by *section 24755 of the Business and Professions Code*."

It is from these judgments that the instant appeals were taken.

As pertinent here ***HN1***[] *section 24755* provided:

"(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a **[***4]** minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. . . . *Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof*.

"(c) Such schedule shall be filed by (1) the owner of the brand [or any of certain other designated persons]. . . .

" **[**29]** (e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package. . . ." [2] (Italics added.)

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[*] Assigned by the Chairman of the Judicial Council.

[1] All statutory references unless otherwise noted are to Business and Professions Code.

[*5]** ***HN2***[] Under the authority of *section 24757* [3] the Department adopted its rule 99 (k) (tit. IV, Cal. Adm. Code) which as pertinent here states: "(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule *to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof*. . . ." (Italics added.)

[*165] It seems proper at this point before discussing the respective contentions of the parties to consider certain fundamental principles relating to the enforcement of the Act.

Our Supreme Court in *Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal.2d 141, 147 [346 P.2d 737]*, has said, ***HN3***[] "A state has **[***6]** particularly wide powers with respect to the . . . traffic in alcoholic beverages and may provide for their prohibition or impose such conditions and regulations as it may deem proper."

This court in *State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 377 [42 P.2d 1076]*, stated: ***HN4***[] "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants [citations]; and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution ([Cal.] *Const., art. I, § 13*), nor is it a contract [citation]; it is but a permit to do what would otherwise be unlawful. . . ." (See also *Kirchhubel v. Munro, 149 Cal.App.2d 243, 247-248 [308 P.2d 432]*; *Schaub's Inc. v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 858, 869-870 [315 P.2d 459]*.)

CA(1)[] **(1)** ***HN5***[] *Section 24755* does not require as an element of its violation that a sale below the effective minimum retail price schedule be made *knowingly*. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. (See *DeMartini v. Department of Alcoholic **[***7]** Beverage Control, 215 Cal.App.2d 787, 815 [30 Cal.Rptr. 668]*; *Morell v. Department of Alcoholic Beverage Control, 204 Cal.App.2d 504, 513 [22 Cal.Rptr. 405]*; *Munro v. Alcoholic Beverage Control Appeals Board, 154 Cal.App.2d 326, 329 [316 P.2d 401]*; *Mercurio v. Department of Alcoholic Beverage Control, 144 Cal.App.2d 626, 630-631 [301 P.2d 474]*.)

CA(2)[] **(2)** The duty to enforce and administer the Act is vested in the Department, and "it has been given a broad range of power and discretion in carrying out this duty, . . ." (*Harris v. Alcoholic Beverage Control Appeals Board, 238 Cal.App.2d 24, 30 [47 Cal.Rptr. 424]*.)

We shall state the several contentions on these appeals as they are outlined by respondents.

The first and principal contention of respondents [4] may be stated as: *The record discloses that the Department did not **[*166]** sustain its burden of proving publication of the minimum retail price schedules as required by section 24755*.

[*8]** The specific contention of respondents takes the following form. In order that *section 24755* be violated there must be a **[**30]** sale below the "effective" filed minimum retail price schedule (*§ 24755, subd. (e)*). For such a schedule to be "effective" there must have been a compliance with subdivision (b) of the section which provides that the "person filing such schedule shall cause [it] to be published in a manner which will result in each retailer affected by such schedule being advised of [its] contents." The schedule was not so published; it follows that there was no "effective" price schedule and accordingly no violation.

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[2] *Section 24755* also delineates "trading area" for which the minimum retail price schedules may be filed separately and differently. Here we are concerned with the northern California trading area.

Effective November 8, 1967, *section 24755* was again amended. Among the changes the requirement of publication was deleted.

[3] "The [Department] may adopt such rules as it determines to be necessary for the Administration of sections 24754 to 24756 inclusive. . . ." (*Bus. & Prof. Code, § 24757*.)

[4] This is the only contention urged by respondent Appeals Board.

Further it is contended: The specification that the schedules be published in a manner which will result in each retailer being advised of their contents is a requirement of some form of actual notice by personal service or by mail.

The records of the administrative hearings show the following: Publication of the minimum retail price schedules was made in the Beverage Industry News, a privately owned monthly publication in business since 1946. It was a trade journal of the liquor industry in general circulation in the area here concerned. Its **[***9]** subscription price was $ 7.50 per year. Since 1946, copies of the publication had been mailed monthly to a majority of the offsale retail licensees authorized to sell alcoholic beverages in the northern California trading area.

It is clear that publication here was not made in a manner designed to effect actual notice by personal service on, or mailing to, each retailer affected.

CA(3)[] **(3)** In cases dealing with a statutory requirement of publication in a newspaper, California's appellate courts have defined ***HN6***[] publish as to "disclose, reveal, proclaim, circulate or make public" (*Application of Monrovia Evening Post, 199 Cal. 263, 266 [248 P. 1017]*; *Western States Newspapers, Inc. v. Gehringer, 203 Cal.App.2d 793, 795 [22 Cal.Rptr. 144]*) and "'to proclaim, to advertise.'" (*Arthur v. City of Petaluma, 27 Cal.App. 782, 788 [151 P. 183]*.) [5]

[*10]** Black's Law Dictionary (4th ed. 1954) defines "publish" as "To make public; to circulate; to make known to people in general. . . . An advising of the public or making known of something to the public for a purpose." It defines "publication" **[*167]** as "To make public; to make known to people in general; . . . The act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny." Webster's New International Dictionary, Unabridged (2d ed. 1953), defines "publish" as "To make public announcement of; to make known to people in general; . . . To promulgate or proclaim, as a law or an edict. . . . To make public in a newspaper, book, circular or the like." (See also 73 C.J.S. 1250-1251.)

HN7[] "Publish" has been held not to be synonymous with "communicate" or "to divulge" or "to make known." (*United States v. Baltimore Post Co., 2 F.2d 761, 764*; 15A C.J.S. 84; 51 C.J.S. 463.) Inseparable from the term is the idea of publicity and circulation. (*United States v. Williams, 3 F. 484, 486*; *People v. Burns, 178 App. Div. 845 [166 N.Y.S. 323, 325]*; *Cox v. First Mortg. Loan Co., 173 Okla. 392, 394 [48 P.2d 1060, 1063]*.) **[***11]** "The thought running through all the uses of the words . . . is an advising of the public or the making known of something to the public for a purpose. . . ." (*Estill County v. Noland, 295 Ky. 753 [175 S.W. 2d 341, 346]*; *Marx v. United States, 96 F.2d 204, 206*; *Associated Press v. International News Service, 245 F. 244, 251* [157 C.C.A. 436, *2 A.L.R. 317]*.)

We have before us conflicting statutory provisions. If we accept respondents' interpretation we must ignore the phrase, "shall cause such schedule to be published." Conversely, if we give "published" its ordinary and accepted meaning we must hold that actual notice to each licensee is not required.

CA(4)[] **(4)** ***HN8***[] If reasonably possible, conflicting provisions of a statute should be reconciled **[**31]** and brought into harmony with each other (*Hough v. McCarthy, 54 Cal.2d 273, 279 [5 Cal.Rptr. 668, 353 P.2d 276]*; *County of Placer v. Aetna Cas. etc. Co., 50 Cal.2d 182, 188-189 [323 P.2d 753]*.) In doing so, effect and meaning should be given to each word and phrase under consideration. (*Select Base Materials v. Board of Equalization, 51 Cal.2d 640, 645 [335 P.2d 672]*; *Brown v. **[***12]** Cranston, 214 Cal.App.2d 660, 672 [29 Cal.Rptr. 725]*.) ***CA(5)***[] **(5)** A construction should be avoided which implies that the Legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. (*Prager v. Isreal, 15 Cal.2d 89, 93 [98 P.2d 729]*; *Siler v. Industrial Acc. Com., 150 Cal.App.2d 157, 161 [309 P.2d 910]*.) The use of a word with settled legal meaning is

[5] We consider "publish" and "publication" in the sense of transmitting information or knowledge. They have, of course, other connotations such as in the law of defamation, negotiable instruments, wills, etc.

some **[*168]** indication that such meaning was intended. (*Perry v. Jordan, 34 Cal.2d 87, 93 [207 P.2d 47]*; *City of Long Beach v. Payne, 3 Cal.2d 184, 191 [44 P.2d 305]*.)

CA(6a)[] **(6a)** In its interpretation of *section 24755* the Department has given to the word "published" its accepted meaning. It has concluded that the intent of the Legislature was that the price schedules be published in a manner *most likely* to give notice to the affected licensees. Rule 99(k) requiring publication "in a trade journal of general circulation" gives rational effect to this interpretation. Such a publication may reasonably be considered as most likely to give the desired notice.

CA(7)[] **(7)** ***HN9***[] *We* **[***13]** *are required to accord great respect to this interpretation by the Department. It must be followed unless it appears to be clearly erroneous*. (*Cohon v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 332, 339 [32 Cal.Rptr. 723]*; see also *Adoption of Parker, 31 Cal.2d 608, 615 [191 P.2d 420]*; *Bodinson Mfg. Co. v. California Employment Com., 17 Cal.2d 321, 325-326 [109 P.2d 935]*; *Neely v. California State Personnel Board, 237 Cal.App.2d 487, 491 [47 Cal.Rptr. 64]*; *Rich v. State Board of Optometry, 235 Cal.App.2d 591, 604 [45 Cal.Rptr. 512]*.) Accordingly, we now direct our inquiry into the reasonableness of the Department's interpretation.

The search for the Legislature's intent is aided by a consideration of ***HN10***[] *section 24875* of the Act relating to minimum price schedules for wine. That section provides for publishing (by the person filing the schedules) in *a trade journal of general circulation* among affected licensees. It then recites: "*Instead of publishing*, [*such person*] *may mail his price schedule or any changes therein to licensees affected*." (Italics added.) An intent to give the word "publishing" a meaning **[***14]** other than the giving of actual notice as insisted by respondents, is demonstrated. Elsewhere in the Act where actual notice is intended, appropriate words are used, i.e., sections 23328, 23329, 23987, prescribing "written notice," and section 25760 calling for notice "personally or by mail." ***HN11***[] "[It] is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar, 29 Cal.2d 119, 123 [173 P.2d 313]*.)

Throughout the statutes and codes of this state the Legislature has many times provided for publication of notices. So **[*169]** far as we can determine the term has never been construed to require actual notice. ***CA(8)***[] **(8)** In construing a provision of any code, reference may properly be made to other codes or statutes for clarification. (*In re Porterfield, 28 Cal.2d 91, 100 [168 P.2d 706, 167 A.L.R. 675]*; *People v. Vassar, 207 Cal.App.2d 318, 323 [24 Cal.Rptr. 481]*.) ***HN12***[] "When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there **[***15]** is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." (*Perry v. Jordan, supra, 34 Cal.2d 87, 93*.)

CA(6b)[] **(6b)** It seems reasonable to conclude that the Legislature intended in its amended *section* **[**32]** *24755* the common and accepted meaning of the word "published."

However, the Department was required, as are we on these appeals, to give meaning, if possible, to the words "*in a manner which will result in each retailer . . . being advised of [its] contents*." ***CA(9)***[] **(9)** If necessary, in order to reach such a result, we can depart from a literal construction of the words employed. (*County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639 [122 P.2d 526]*; *In re Kernan, 242 Cal.App.2d 488, 491 [51 Cal.Rptr. 515]*; *Brown v. Cranston, supra, 214 Cal.App.2d 660, 672-673*. ***HN13***[] "[The] intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute." (*Struckman v. Board of Trustees, 38 Cal.App.2d 373, 376 [101 P.2d 151]*.)

CA(10)[] **(10)** We conclude that the Department's determination that the words **[***16]** in question, in the context of the Act and its *section 24755*, indicated a legislative intent that the price schedules be published in a manner *most likely* to give notice to the affected licensees is reasonable and correct. This interpretation gives effect to each of the words and phrases under consideration. It brings them to a degree of harmony with each other not otherwise possible. And it is consistent with the usual meaning given the word "published" by the Legislature and by the courts.

The Department's interpretation is in accord with the general legislative practice of prescribing publication in such a manner as is best designed to give notice to persons concerned. [6] **[*170]** And it imposes no hardship upon the individual licensee who is under an affirmative duty to conduct his business in accordance with law. (See *Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal.App.2d 504, 514*; *Munro v. Alcoholic Beverage Control Appeals, Board, 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]*; *Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678 [290 P.2d 914]*.) If he cannot conveniently check the price schedules filed with the **[***17]** Department he may have the information delivered to him by subscribing to the Beverage Industry News.

Respondents urge that such a construction of *section 24755* makes it "incumbent on a retailer **[***18]** to assume the burden of subscribing to a private trade journal which has no official blessing, sponsorship or information at its disposal."

The Act simply provides that the retailer shall not sell at prices below the effective minimum price schedules under peril of administrative sanction. The publication provisions of *section 24755* and rule 99 (k) make these price schedules readily available to him. He may, however, obtain the retail price information from the Department where it is on file or in any manner he chooses. As to the claimed compulsion to subscribe to a private trade journal without official blessing or sponsorship, we see no illegality. ***HN14***[] All statute-directed publications of notice are made (so far as we can determine) in privately owned newspapers or journals. Indeed, as we have previously pointed out, *section 24875* of the Act expressly calls for publication in a trade journal or industry price book of general circulation among wine licensees.

Respondents point out that prior to the 1961 amendment of *section 24755*, publication **[**33]** as now directed by rule 99 (k) was then also directed by Department rule. Publication was not then expressly directed by the **[***19]** Act as it is now. They contend that by amending *section 24755* the Legislature is presumed to have intended a change in the method of giving notice to retailer licensees.

CA(11)[] **(11)** By rules of the Department, and of its predecessor agency, the State Board of Equalization, minimum retail price schedules for branded distilled spirits have been published **[*171]** (except for a few years during and after World War II) since 1939 [7] in a trade journal of general circulation. If the Legislature intended by its 1961 amendment of *section 24755* that such publication be discontinued in favor of actual notice it seems likely that it would not have used the word "published." Instead it would have called for "written notice" or notice "personally or by mail" as it has elsewhere in the Act. (See for instance, §§ 23328, 23329, 23987, 25760.) The circumstances seem more likely to indicate an intent to confirm the practice of publication by placing express direction therefor in the Act.

[*20]** ***CA(12)***[] **(12)** ***HN15***[] While an intention to change the law is usually inferred from a material change in the language of the statute (*Loew's Inc. v. Byram, 11 Cal.2d 746, 750 [82 P.2d 1]*; *People v. Weitzel, 201 Cal. 116, 118 [255 P. 792, 52 A.L.R. 811]*) "the circumstances may indicate merely a legislative intent to clarify the law." (*W. R. Grace & Co. v. California Employment Com., 24 Cal.2d 720, 729 [151 P.2d 215]*; see also *San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264 [125 P.2d 36]*; *Martin v. California Mut. Bldg. & Loan Assn., 18 Cal.2d 478, 484 [116 P.2d 71]*; *Union League Club v. Johnson, 18 Cal.2d 275, 279 [115 P.2d 425]*; *County of Alameda v. Clifford, 187 Cal.App.2d 714, 723 [10 Cal.Rptr. 144]*.)

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[6] I.e., *Code of Civil Procedure section 1277*, in a "newspaper of general circulation . . . printed in the county"; *Health and Safety Code section 4785*, in a "newspaper having a general circulation in the [sewer] district"; *Labor Code section 1181*, "by advertisement in at least one newspaper published in each of the cities of Los Angeles, Oakland, Sacramento, San Jose, Fresno, Eureka, San Diego, Long Beach, Alameda, Berkeley, Stockton, San Bernardino, and San Francisco"; *Business and Professions Code section 23986*, "in a newspaper of general circulation in the city in which the premises are situated"; *Revenue and Taxation Code section 3391*, publication "within the county as they [the board of supervisors] shall determine most likely to afford adequate notice to owners whose property is upon the delinquent lists."

[7] Rule 42 (1939, 1940) and rule 22 (1941-1944), State Board of Equalization, rule 99, title 4, California Administrative Code (1947).

CA(13)[] **(13)** We conclude that the Department's interpretation of the publication provisions of *section 24755* is reasonable and certainly not "clearly erroneous." It should be followed by us. (See *Cohon v. Department of Alcoholic Beverage Control, supra, 218 Cal.App.2d 332, 339*.) Accordingly, the record before us discloses that the Department did sustain its burden of proving publication of minimum retail price schedules as required **[***21]** by *section 24755*.

Respondent licensees' second contention is stated as " *Section 24755 of the Business and Professions Code and Rule* 99 *are unconstitutional*."

The argument here is that *section 24755* as amended, "is now nothing more than a naked 'price fixing' statute by which the Legislature has unlawfully delegated its power to producers and brand owners (who no longer are required to be in fair and open competition) and which permits them unilaterally to fix the price at which liquor must be retailed without any protective 'standards,' 'price guidelines,' 'ordinary play of competition' or 'bargaining processes' whatsoever." **[*172]** Such a grant of power, it is argued, is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process of law as guaranteed by the federal and state Constitutions.

The appellate courts of this state apparently have never considered the constitutionality of *section 24755* as amended in 1961. However, the general argument now made by respondent licensees has frequently been directed at distilled spirits minimum price statutes and regulations both in this state and elsewhere. While other states **[***22]** are not in agreement, the question in California appears to be resolved by the cases of *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal.2d 349 [55 Cal.Rptr. 23, 420 P.2d 735]*, and *Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141*. These cases concerned the mandatory fair trade minimum **[**34]** price fixing provisions of the Act as they existed prior to the 1961 amendment of *section 24755*.

The earlier law permitted (and still permits) fair trade contracts relating to the sale of any branded distilled spirits, "which is in [any] fair and open competition with alcoholic beverages of the same general class produced by others. . . ." (Section 24750.) *Section 24755* (before its 1961 amendment) provided that all "distilled spirits sold at retail shall be . . . sold pursuant to [such a fair trade] contract." As amended in 1961, *section 24755* provides that no branded distilled spirits shall be sold at retail at a price below the filed effective minimum price schedule, without regard to whether there is a related fair trade contract.

It will be seen that since 1961 under *section 24755* there is no longer **[***23]** a requirement that at least one fair trade contract be negotiated with a retailer, nor is there an express requirement that brands be in fair and open competition with other brands. These omissions, respondents urge, present new questions of constitutionality not decided by *Wilke & Holzheiser, Inc., supra*, and *Allied Properties, supra*, which should now be considered by this court.

Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, 365-369, considering the pre-1961 mandatory minimum price fixing provisions of the Act, rejected the contention that they *unlawfully delegated* legislative power by enabling a producer or wholesaler to fix retail prices. *CA(14)*[] **(14)** It held that (pp. 365-366): "To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the **[*173]** crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold." The court found no tendency in the Act to allow one to regulate the business of his competitors or to exclude potential **[***24]** competitors from the liquor industry. It concluded (p. 367): "To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices." The holding of *Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141*, generally was to the same effect.

CA(15)[] **(15)** Respondents contend that the earlier statutory requisite of a negotiated fair trade contract was a necessary guideline and safeguard now wholly missing from the Act. We cannot agree that the former requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least *one* retailer before it became binding on all retailers was in substance or practical effect any different from the present *section 24755* requirement that he unilaterally fix such a price. In each case the producer effectively sets the price for which his own product is to be sold. **[***25]** The competition between producers and their respective brands is not affected. This, coupled with the bargaining power of low overhead retailers who desire lower retail prices, could, as said by the *Wilke & Holzheiser* court, reasonably be assessed by the Legislature to be a safeguard against excessive prices.

CA(16)[] **(16)** Nor do we deem the absence from *section 24755* of the specific requisite that the brands be in "fair and open competition with alcoholic beverages of the same general class produced by others" to create a constitutional infirmity. Such *HN16*[] fair and open competition is a positive requirement of the Cartwright ***Antitrust Law*** (*Bus. & Prof. Code, §§ 16700- 16758*). Minimum retail price schedules resulting from any **[**35]** combination for the purpose of stifling fair and open competition would be an offense against that law. (*DeMartini* v. *Department of Alcoholic Beverage Control, surpa*, *215 Cal.App.2d 787, 808-809*.)

Respondents complain that the Department is no longer required under *section 24755* to produce affirmative evidentiary **[*174]** proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that **[***26]** there was such a requirement prior to 1961. *DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787, 808-809*, considering the pre-1961 Act, held that certain statutory presumptions [8] constituted evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (See also *Dave's Market, Inc. v. Department of Alcoholic Beverage Control, 222 Cal.App.2d 671, 677-678 [35 Cal.Rptr. 348]*; *United Liquors, Inc. v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 450, 453-454 [32 Cal.Rptr. 603]*.) *DeMartini v. Department of Alcoholic Beverage Control, supra* (pp. 813-814), also held that express findings that the products were in fair and open competition were not required.

[*27]** *CA(17)*[] **(17)** Applying the principles announced in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349*, and *Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141*, we hold *section 24755* and rule 99 not to be violative of the due process clauses of the federal and state Constitutions.

Respondents Carella and Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) further contend: "*The Department erred by considering four unproven prior accusations in determining the penalty imposed herein*.

HN17[] *Section 23095* provides, in part, as follows:

"Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, . . ."

CA(18)[] **(18)** Four previous accusations concerning the named licensee respondents were found to be true by the Department. In each case it was decided that the license be suspended for 30 days or less. As to each decision, administrative **[***28]** or judicial review was pending when the parties stipulated to a penalty compromise (§ 23905) under which respondents would make a payment of $ 2,000. The compromise stipulation further provided that one case would be "permitted to become final" **[*175]** while the suspensions in the other "proceedings mentioned were merged." The $ 2,000 payment was made and the respective reviews or appeals were dismissed.

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[8] *Code of Civil Procedure section 1963*, *subdivision 15*, "that official duty has been regularly performed"; *idem*, subdivision 19, that "private transactions have been fair and regular"; *idem*, subdivision 33, that "the law has been obeyed." (See *Evid. Code, § 12*.) They were repealed effective January 1, 1967, and reenacted in substance elsewhere.

In the instant cases the Department found each of the four prior decisions was a final determination and considered all of them in fixing the penalties. Respondents contend that such findings were not supported by the evidence and that such consideration was error.

CA(19)[] **(19)** *HN18*[] In administrative matters such as those before us, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws. (*Dave's Market, Inc. v. Department of Alcoholic Beverage Control, supra, 222 Cal.App.2d 671, 679-680*.)

[36]** We conclude that the evidence before the Department gave sufficient support to the questioned findings, and that the Department did not err in considering **[***29]** the four prior proceedings.

CA(20)[] **(20)** Certain respondent licensees have in their briefs urged several additional points which were not raised before the Department, the Appeals Board or the superior court. With the hereinafter discussed exception these points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. (See *Ward v. Taggart, 51 Cal.2d 736, 742 [336 P.2d 534]*; *Damiani v. Albert, 48 Cal.2d 15, 18 [306 P.2d 780]*; *Algeri v. Tonini, 159 Cal.App.2d 828, 832 [324 P.2d 724]*.)

We think it proper, however, to consider one matter which is now urged for the first time by the following contention: *The penalties of revocation and suspension ordered by the Department should be vacated and a monetary penalty as provided by section 24755.1 should be applied retroactively*.

In 1965, and following the Department's hearings and decisions in the matters before us, the Legislature enacted *section 24755.1*. This section provides among other things that the license of a Department licensee shall not be suspended **[***30]** or revoked for a violation of *section 24755*. It establishes monetary penalties as the sanction for such violations.

CA(21)[] **(21)** Respondent licensees ask us to give retroactive application of *section 24755.1* to their cases. We are precluded from doing so by *Wilke & Holzheiser, Inc. v. Department of Alcoholic* ***[*176]*** *Beverage Control, supra, 65 Cal.2d 349*, where a similar request was made. The court in *Wilke & Holzheiser, Inc*. (p. 373) held "*Section 24755.1* clearly does not apply to a license suspension or revocation proceeding its effective date." However, in view of the current legislative intent concerning license revocation and suspension demonstrated by *section 24755.1* the Department may elect to review respondent licensee's penalty assessments before they are placed in effect, as permitted by section 24211, added in 1963.

Each of the judgments appealed from is reversed. The superior court in each case will grant a writ of mandate commanding respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

End of Document

Southern Pacific Co. v. United States

United States District Court for the District of Nebraska

December 6, 1967

Civ. No. 02577

Reporter

277 F. Supp. 671 *; 1967 U.S. Dist. LEXIS 9251 **

SOUTHERN PACIFIC COMPANY and Union Pacific Railroad Company, Plaintiffs, v. The UNITED STATES of America and the Interstate Commerce Commission, Defendants

Core Terms

route, Railroad, solicitation, transportation, preferential, practices, conditions, lines, connections, carriers, transcontinental, freight, interstate commerce, traffic, River, roads, public interest, circumstances, consolidation, modification, modified, national transportation policy, district court, discriminatory, territory, purposes, shipper, stock, connecting line, discriminations

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David F. Turner, John H. D. Wigger, Larry Meyer, Dept. of Justice, Washington, District of Columbia, Theodore L. Richling, U.S. Atty., Omaha, Nebraska, for defendant the United States.

Robert W. Ginnane, Fritz Kahn, Betty Jo Christian, Washington, District of Columbia, for defendant Interstate Commerce Commission.

Dennis McCarthy, Salt Lake City, Utah, Ernest Porter, Denver, Colorado, Donald R. Ross, Omaha, Nebraska, for defendant intervener Denver & Rio Grande.

E. Barrett Prettyman, Washington, District of Columbia, Yale C. Holland, Omaha, Nebraska, for defendant intervener Western Pacific.

Judges: Lay, Circuit Judge, and Richard E. Robinson and Van Pelt, District Judges. Richard E. Robinson, District Judge (dissenting).

Opinion by: LAY

Opinion

[*672] LAY, Circuit Judge.

Plaintiffs, Southern Pacific and Union Pacific seek equitable relief to enjoin the Interstate Commerce Commission **[*673]** from enforcement of a supplemental order, dated January **[**2]** 6, 1966, modifying the Commission's order of February 6, 1923, entitled Control of Central Pacific by Southern Pacific, Finance Docket No. 2613.

While the one general issue before us is the legality of the preferential routing and solicitation by the Southern Pacific Company and the Union Pacific Railroad, [1] plaintiffs argue their case within the frame work of two basic questions. First, they challenge the propriety of modifying a condition originally imposed by the Interstate Commerce Commission upon the Southern Pacific when it acquired the Central Pacific Railway in 1923 (the Control case, 76 I.C.C. 508 (1923)). The second question concerns the legality of a 1924 agreement and the practices thereunder, providing for reciprocal solicitation and routing by Union Pacific and Southern Pacific in each other's behalf.

[3]** By its 1923 order the Commission approved and authorized, subject to nine conditions, the acquisition by the Southern Pacific of control of the Central Pacific Railway Company through lease and stock ownership. The fifth condition, hereinafter referred to as condition (e), read as follows:

> "*That the Southern Pacific Company shall cooperate with the Union Pacific Railroad Company to secure by active solicitation the routing of the maximum of freight traffic via the lines of the Union Pacific Railroad Company and the Central Pacific Railway Company through the Missouri River and Ogden, Utah, as parts of one connected continuous line*, between all points in California and Oregon north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Ore., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y."

At the time, **[**4]** the Denver and Rio Grande Western Railroad (hereinafter the Rio Grande) acquiesced in the 1923 condition. However, in 1957, the Rio Grande sought to reopen the control proceedings for modification of condition (e). In 1962, the Commission in a 6-5 decision refused to modify the original condition so as to eliminate all reference to the Union Pacific. The Rio Grande then sought relief from the District Court in Colorado. The Commission's order was set aside by the District Court and the proceeding remanded for the Commission to consider additional evidence. *Denver & R.G.W. R.R. v. I.C.C., D.C., 229 F. Supp. 249 (1964)*. Upon reconsideration, the Commission revised its prior holding and modified the condition omitting the Union Pacific's name as originally recommended by the Examiner. [2] **[*674]** The Commission likewise held the 1924 agreement and practices of the Southern Pacific and the Union Pacific contrary to the National Transportation Policy (49 U.S.C. prior to § 1), and their preferential routing in violation of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. § 3(4).

[5]** We sustain the action of the Commission and deny the injunctive relief requested.

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[1] This same case was heard by the District Court in Colorado in 1963, but was remanded to the Commission for consideration of additional evidence. The District Court in discussing the issues, observed:

> "This preferential solicitation was attacked as being improper or illegal under several sections of the Act as well as the ***antitrust law***. The origin and the authority for these practices were contained in both condition (e) and the 1924 agreement. These two items constituted the physical evidence of the authority for the practice, but *it was the practice, or the authority for the practice*, which was attacked by the plaintiff, and where this *authority might be physically found would seem to be of minor importance*. Thus in effect there was but one general issue before the Examiner and before the Commission, although in somewhat different context." *Denver & R. G. W. R.R. v. I.C.C., D.C., 229 F. Supp. 249, 253, 254 (1964)*.

[2] The modified condition reads:

"*That the Southern Pacific Company shall continue to secure by active solicitation the routing of the maximum of freight traffic through the Missouri River and Ogden, Utah*, between all points in California and Oregon, north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y. ".

It is helpful to understand the routes of the various carriers as demonstrated on the attached map, Appendix A. The Union Pacific operates the route east of Ogden via Cheyenne to Omaha, and also makes interchanges at Denver with the Rio Grande, via routes through northeastern Colorado and central Kansas east to Omaha and Kansas City. The southern route of the Southern Pacific is a transcontinental route from the west coast to Kansas City via El Paso. The Central Pacific, now the Southern Pacific, by complete merger in 1959 (Southern Pac. Co. Merger, 307 I.C.C. 806) connects at the Utah Gateway with both the Rio Grande and the Union Pacific and goes west to California.

Western Pacific, an intervening defendant, [3] competes with the Southern Pacific both on its north-south route through California and Oregon *and its east-west route from San Francisco to Ogden*. Western Pacific connects at Salt Lake City with both the Rio Grande and the Union Pacific. The Rio Grande operates two main lines between Denver and Ogden. One is via Pueblo, the other is through the Moffat Tunnel and the Dotsero cutoff. **[**6]** West of Dotsero the lines are identical to Ogden. The Dotsero cutoff and the Moffat Tunnel were opened in 1934, thereby reducing the distance between Denver and Ogden by 175 miles.

The Commission observed:

> "The differences in distance, whether in favor of the Southern Pacific-Rio Grande routes or the Southern Pacific-Union Pacific routes, are insignificant from the standpoint of length of hauls [and 'maintenance of schedules'], and therefore the two routes are **[**7]** substantially comparable. * * *" 317 I.C.C. 469, 475-76 (1962).

Under condition (e) and the 1924 agreement between Southern Pacific and Union Pacific, the plaintiffs have been routing and soliciting in favor of each other's lines at the Utah Gateway, in preference to any other interchanging lines.

Plaintiffs now urge that the Commission has no power to reopen the 1923 Control proceeding or to modify condition (e). We disagree. As the Commission said in its 1966 order:

> "[Future] changes of circumstances were undoubtedly one of the reasons which prompted inclusion of condition (i) reserving jurisdiction to reopen **[*675]** for supplemental orders as appropriate in the light of future events." [4]

[8]** The Commission "has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances * * *." *Baltimore & O.R.R. v. United States, 386 U.S. 372, 387, 87 S. Ct. 1100, 1108, 18 L. Ed. 2d 159 (1967)*. See also 49 U.S.C. § 5(9). Any rule to the contrary could illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today.

We turn to the substantive problems involved. A brief background is necessary. In 1862 and 1864 the Pacific Railroad Acts [5] were passed by Congress. These Acts authorized the building of the first transcontinental railroad

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[3] Western Pacific observes in its brief, p. 10, n. 7:

"In January 1966, Western Pacific filed with the Commission a complaint against Union Pacific and Southern Pacific, alleging that the Agreement of 1924, the Memorandum of 1947, and the preferential practices implemented there-under violate Section 1 of the Sherman Act, the National Transportation Policy, and Sections 3(4), 5(1) of the Interstate Commerce Act. By stipulation of the parties, a hearing on that complaint is being stayed pending the ultimate disposition of the instant case."

[4] Condition (i), also part of the 1923 I.C.C. order, provides:

> "That this proceeding may be reopened at any time by order of the Commission either upon the initiative of the Commission or, in the discretion of the Commission, upon the motion of any person claiming an interest in the matter, for the purpose of making such orders as the Commission may deem necessary or appropriate supplementary to the present order."

[5] Act of July 1, 1862, ch. 120, 12 Stat. 495; Act of July 2, 1864, ch. 216, 13 Stat. 362 (codified in *45 U.S.C. § 83*).

in this country which found completion in the historic joinder at Promontory, Utah, of the two roads, the Union Pacific and the Central Pacific, on May 10, 1869.

Thereafter, in 1887, **[**9]** the Interstate Commerce Act was passed, and at that time, as recently observed, the railroads, then "had a practical monopoly of freight transportation * * * and discriminations flourished." *American Trucking Assoc., Inc. v. Atchison, T. & S.F. Ry., 387 U.S. 397, 406, 87 S. Ct. 1608, 1613, 18 L. Ed. 2d 847 (1967)*. As other roads began to develop in this country, railroads began to view the competitive future. In 1912 the Supreme Court was confronted with the control of the Southern Pacific by the Union Pacific. This was disapproved in *United States v. Union Pac. R.R., 226 U.S. 61, 33 S. Ct. 53, 57 L. Ed. 124 (1912)*, as being a restraint of trade violative of the Sherman Antitrust Act of 1890.

Thereafter, because of the interlocking financial and physical relationships between Central Pacific and Southern Pacific's California lines, the Southern Pacific was forced to defend a lease and stock acquisition of the Central Pacific. This was similarly denied, with the Supreme Court making this relevant observation:

> "The proof is ample that the policy of the Southern Pacific system has been to favor transportation on its line by securing for itself, whenever practicable, the carriage **[**10]** of freight which would normally move eastward or westward over the shorter line of the Central Pacific Railroad and its connections [the central route], for its own much longer and wholly owned southern route. This course was limited by an arbitrary rule during the time the Union Pacific dominated the Southern Pacific from the stock purchase [of Southern Pacific's stock by Union Pacific] in 1901 until the so-called 'unmerger' in 1913, as the result of the decision of this court in the Union Pacific Case [*United States v. Union Pac. R.R., 226 U.S. 61 [, 33 S. Ct. 53, 57 L. Ed. 124]]*. The compelling motive of this course of conduct is obvious. The Southern Pacific owns and controls the southerly route, and receives 100 per cent. of the compensation for freight transported by its road and water lines. Over the Central Pacific route it receives but a fraction of the freight, because the Union Pacific with its Eastern connections take up the carrying from Ogden to the East. Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines." *United States v. Southern Pac. Co., 259 U.S. 214, 231, 42 S. Ct. 496, 499, 66 L. Ed. **[**11]** 907 (1922)*.

In 1920 the first Transportation Act was passed. 41 Stat. 456 (1920). It recognized **[*676]** that the "public welfare" would be better served by a national transportation system. Subject to the Interstate Commerce Commission's approval and direction, common carriers could otherwise merge or join together notwithstanding the prohibtion of antitrust or other laws. [6]

Immediately thereafter, the Southern Pacific sought authorization from the Commission to acquire control of Central Pacific under the Act, 41 Stat. 480-482, as amended, 49 U.S.C. § 5(2) (1964). This was opposed by the Union Pacific. After a long hearing the Union Pacific and others withdrew their objection [7] **[**13]** and the Commission attached to its approval of the merger nine specified conditions. Condition (e), supra reflected similar concern of the Commission over Southern Pacific's favoring its longer route to the jeopardy of the **[**12]** transcontinental route of Central Pacific and Union Pacific. The newly approved merger and conditions [8] were embodied in the decree of

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[6] The Interstate Commerce Act was further amended by the Transportation Act of 1940, 54 Stat. 899.

[7] In the recent order of the Commission denying control of the Western Pacific by either the Southern Pacific or the Santa Fe, the Commission observed:

> "We have considered the possibility of authorizing one or the other of the applicants herein to acquire control of Western Pacific subject to a solicitation condition to safeguard the central route of Western Pacific similar to the condition imposed in the Central Pacific case. However, the situation here does not contain the element of intermingled properties and operations necessitating the control authorization in the Central Pacific case, *and, moreover, Santa Fe has recorded its objection* to any condition which would require solicitation from its own territories for Western Pacific, either to the West or East of the Utah gateways." Southern Pacific Co. - Control - Western Pacific R.R., 327 I.C.C. 387, 400 (1965).

[8] The other relevant conditions generally required the Southern Pacific to cooperate or join the Union Pacific in maintaining service, schedules and rates via the Ogden Gateway and the line of the Central Pacific.

the District Court. *United States v. Southern Pac. Co., 290 F. 443 (D.Utah 1923)*. No appeal was taken from the order of the Commission or court.

THE PACIFIC RAILROAD ACTS

In the present proceeding the Union Pacific and the Southern Pacific urge that condition (e) is not only lawful but accords with a mandate of the Pacific Railroad Acts. They argue that all conditions attached to the 1923 order by the Commission were nothing more than the fulfillment of the Acts.

Subsequent to the Commission's approval of the acquisition of Central Pacific by the Southern Pacific, an agreement was entered into with the Union Pacific which was theoretically premised upon condition (e). The 1924 agreement (1) obligated Union Pacific and Central Pacific to preferentially solicit for each other, (2) obligated Union Pacific and Central Pacific to preferentially route freight unrouted by the shipper along the Union Pacific and Central Pacific line and (3) expanded the territory of the preferential solicitation and routing beyond condition **[**14]** (e). The failure of the Commission in the 1962 proceeding to consider this agreement and practices thereunder motivated the District Court to remand the case to avoid "splintered issues," under authority of *A. L. Mechling Barge Lines, Inc. v. United States, 376 U.S. 375, 84 S. Ct. 874, 11 L. Ed. 2d 788 (1964)*.

Plaintiffs similarly defend the 1924 agreement and the practices under the Pacific Railroad Acts, arguing that, like the conditions in the Interstate Commerce Commission order, they too simply embody the statutory benefits accorded them by the Acts, and therefore cannot be countermanded by order of the Commission. [9]

[15]** **[*677]** In 1962, in their first supplemental order, the Commission interpreted the Pacific Railroad Acts in accord with plaintiffs' contention. 317 I.C.C. 469 (1962). Upon reconsideration in its 1966 order, the Commission reversed itself. We feel the 1966 order and its interpretation is in accord with the correct construction of the Pacific Railroad Acts. These Acts provide in part as follows:

> "The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific coast; * * * the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line; * * *" Act of July 1, 1862, ch. 120, § 12, 12 Stat. 495.
>
> "* * * the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as **[**16]** one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others * * *." Act of July 2, 1864, ch. 216, § 15, 13 Stat. 362 (codified in *45 U.S.C. § 83*).

This language was interpreted by the Supreme Court in *United States v. Union Pac. R.R., 226 U.S. 61, 33 S. Ct. 53, 57 L. Ed. 124 (1912)*. Mr. Justice Day stated:

> "These acts, it is said, are only intended to secure the permanent physical connection of the roads, and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the interstate commerce acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable

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[9] Plaintiffs urge that in 1923 it was the mutual understanding of the parties, including the Rio Grande, that condition (e) was in furtherance of the Pacific Railroad Acts and therefore should not be set aside. Apropos here is Mr. Justice Brennan's statement that "the ICC is not prisoner of the parties' submissions." See *Baltimore & O. R.R. v. United States, 386 U.S. 372, 430, 87 S. Ct. 1100, 1129, 18 L. Ed. 2d 159 (1967)* (concurring opinion).

> treatment which might have been accorded to it in the matter of **[**17]** through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time and transportation shall be without any discrimination of any kind in favor of either of said companies, or adverse to the road or business of any or either of the others; and the purpose of Congress to secure a continuous line of road, operating from the Missouri river to the Pacific coast as one road, is further emphasized in the act of Congress of June 20, 1874, [c. 331, 18 Stat. 111,] making it an offense for any officer or agent of the companies authorized to construct the roads, or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in **[**18]** favor of or adverse to any or either of said companies." *226 U.S. at 91-92, 33 S. Ct. at 59*.

[*678] Plaintiffs construe the above language of the Court to mean that the Union Pacific and Central Pacific must *prefer* one another to the prejudice of a connecting line, but that no other carrier may discriminate against either of them. This contradicts not only the spirit of the acts, but the plain language as well.

Mr. Justice Day added:

> "Such practices of *systematic* and *preconcerted discrimination* as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific, and be equally violative of the letter and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts (*Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co., 163 U.S. 564, 603, 604 [16 S. Ct. 1173, 41 L. Ed. 265]*), and might possibly have resulted in a forfeiture of all rights under the acts of Congress." *226 U.S. at 92, 33 S. Ct. at 59*.

Section 15 of the Act prohibits "discrimination of any kind *in favor* **[**19]** *of* [10] the road or business of any or either of said companies, *or adverse* to the road or business of any or either *of the others* * * *."

The case of *Union Pac. Ry. v. Chicago, R.I. & P. Ry., 163 U.S. 564, 16 S. Ct. 1173, 41 L. Ed. 265 (1896)*, as cited by Mr. Justice Day, is contrary to plaintiffs' position. Under the authority of the Pacific Railroad **[**20]** Acts, the Supreme Court enjoined the *Union Pacific* from discriminatory practices to other connecting lines. The Union Pacific reasoned it would fail in its public duty by fulfilling a trackage and bridge agreement with connecting roads across the Missouri River. The Court enforced the contracts between the carriers and said:

> "For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha * * *." *163 U.S. at 586, 16 S. Ct. at 1181*.

> "It is impossible for us to ignore the great policy in favor of continuous *lines* thus declared by congress, and that it is in *effectuation of that policy* that such business arrangements as will make such connections effective are made." *163 U.S. at 589, 16 S. Ct. at 1183*.

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[10] The Union Pacific openly acknowledges this construction in a footnote on page 67 of Union Pacific's brief, when it argues:

> "The 1864 Pacific Railroad Act prohibits 'any discrimination of any kind *in favor of* the road or business of any or either of said companies and adverse to the road or business of any or either of the others.' Yet to compel Southern Pacific only to solicit the Central Pacific portion of the Central Pacific-Union Pacific route is discrimination *in favor of* the Central Pacific portion. This is quite apart from the fact that Southern Pacific solicitation via Rio Grande is discrimination against Union Pacific."

The original Section 15 of the Act of 1862, and its amendatory provisions, are clear indication that the vision of Congress was not confined to the Union Pacific and the Central Pacific or just their branch lines, nor were **[**21]** their privileges to be forever exclusive:

> "* * * *any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches* provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had **[*679]** been properly added thereto." [11]

[22]** Mr. Justice Strong said in review of the Pacific Railroad Acts in *Union Pac. R.R. v. Hall, 91 U.S. 343, 345-346, 23 L. Ed. 428 (1875)*:

> "The scheme of the act of Congress, then, is very apparent. *It was to secure the connection of the main line, by at least three branches, with the Missouri and Iowa Railroads, and with a railroad running eastwardly from Sioux City in Iowa*, either through that State or through Minnesota. An observance of this scheme, we think will aid in considering the inquiry at what place the act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was *to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory*, and to provide *for those connections within those States, at points at or near their western boundaries*."

The purpose of Congress by the passage of the Pacific Railroad Acts was to create a strong link between the East and the West, sufficient to ensure military protection for the isolated areas if **[**23]** needed, as well as a dependable and speedy means of commercial and social access. But it is clear that Congress envisioned not only a single, unbroken cross-nation line, but a network of railroads feeding and complementing the transcontinental route. [12]

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[11] This section is now codified as *45 U.S.C. § 82*. Congress recognized that the Act might be further amended when it said:

"*And be it further enacted*, That congress may, at any time, alter, amend, or repeal this act." 13 Stat. 356 § 22. And as observed in *Union Pac. Ry. v. Chicago, R.I. & P. Ry. supra*, *163 U.S. at 589, 16 S. Ct. at 1183*:

> "On June 15, 1866, an act was approved, [c. 124, 14 Stat. 66,] 'to facilitate commercial, postal and military communication among the several states,' carried forward as section 5258 of the Revised Statutes, which provided that '*every railroad company in the United States*, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states *so as to form continuous lines* for the transportation of the same to the place of destination.'"

[12] Despite numerous attempts during the Congressional debates to cut off the proposed branch lines, the majority consistently voted to retain them for such reasons as Senator Wade of Ohio expressed in his speech of June 19, 1862:

> "I believe the branches are as essential as the main trunk; that they will assist in building it; that they will furnish a motive for the embarking of money in the main line. It will be a mighty lonesome business to commence the main line in a mere wilderness, where it has nothing to attach itself to. You have got to begin it where it will seem to the world of no use whatever. Why, sir, it is like building a bridge across a magnificent river and never framing your abutments, by which you can get on to it. I do not think it is best that this should be done." Cong. Globe, 37th Cong., 2d Sess. 2807 (1862).

In Section 9 of the 1862 Act, the Leavenworth, Pawnee, and Western Railroad Company of Kansas was granted authority to build a line from a point on the Missouri River in Kansas to the Union Pacific line to the north, "*upon the same terms and conditions in all respects* as are provided in this act for the construction of the railroad and telegraph line first mentioned * * *." In Section 13, the Hannibal and St. Joseph Railroad Company of Missouri was specifically authorized to connect itself to the new transcontinental route. In the amendatory act passed in 1864, which is to be construed together with the 1862 Act (14 Opinions of Atty. Gen. 233 (1873)), Congress further authorized the Kansas railroad companies to make connection with the proposed Union Pacific line where practicable or desirable; in addition, if the Union Pacific company by the time of such connection was

[24]** **[*680]** Plaintiffs insist that to afford *equal* solicitation to the Rio Grande at Ogden would constitute discrimination against the Union Pacific under the Pacific Railroad Acts. We cannot agree. Preferences and discrimination are among the prohibitions of the Acts and are in no sense sanctioned by them. [13]

We conclude that plaintiffs' reliance on the Pacific Railroad Acts is unavailing.

MODIFICATION OF CONDITION (e) UNDER § 5(2)(a).

Plaintiffs argue alternatively that the Commission did not have sufficient grounds to find that condition (e) was no longer "just and reasonable" **[**25]** under Section 5(2)(a) of the Interstate Commerce Act.

The Commission considered evidence which clearly demonstrated the change since 1923 in the circumstances of Rio Grande as a competing line using the Ogden Gateway. The Commission points out that the "primary objective" of the conditions in the 1923 Control proceeding, wherein stock acquisition by Southern Pacific of Central Pacific was approved, was "the protection of the competitive position of the transcontinental route of the Central Pacific via Ogden against the Southern Pacific's possible preference for its long-haul southern route via El Paso." 328 I.C.C. 345, 354 (1966). The Commission states:

> "The Rio Grande in no way seeks to disturb such a method of operation. But the Rio Grande now also maintains through routes and joint rates with the Southern Pacific at Ogden, and by means of its several eastern connections also operates as one connected, continuous central or Overland transcontinental line through Ogden and the Missouri River to points beyond, and we now see no valid reason for a continuance of a requirement by this Commission under which Rio Grande is precluded from *equality of treatment* by the Southern **[**26]** Pacific so far as traffic solicitation is concerned. The Rio Grande does not seek to have the Southern Pacific prefer it at the Ogden interchange to the prejudice of the Union Pacific or any other railroad. It only seeks an equal competitive position.
> * * *
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> "Had the petitioner's competitive situation at Ogden been more than that of a minor connecting line in 1923, we have no doubt that the requirements of condition (e) would have been different from those actually imposed in the *Control* case.
>
> "After consideration of the full record, without the procedural limitations before imposed, we now find that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results *in a stifling of competition* between the Union Pacific and the Rio Grande on Transcontinental traffic. *It tends to relegate the Rio Grande to a secondary status as a transcontinental carrier*. The concern of Congress in 1862 and 1864 that there be a strong transcontinental rail **[*681]** line operated as one connected, continuous line, is not thwarted by the existence of several such transcontinental lines operating today.
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> "Upon **[**27]** reconsideration, we now find that in view of changed circumstances and developments since its imposition, condition (e) is no longer just and reasonable. Under present day circumstances it is contrary to the public interest and the national transportation policy. The Congressional desire reflected in the Pacific Railroad Acts has been fulfilled by the existence of several central transcontinental routes. The Rio Grande is an

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not "proceeding in good faith to build the said railroad through the territories," the Kansas company was authorized to take over the project and build to the junction with the Central Pacific. Sections 9, 12. *In Section 18, the Burlington and Missouri Railroad Company was given specific authority to join its line to the Union Pacific*. For discussion of the decision to include branches and connecting lines within the scope of the Acts, see Russell, Improvement of Communication with the Pacific Coast as an Issue in American Politics 1783-1864 at pp. 296-320 (1948). See also Trottman, History of the Union Pacific 10-22 (1923).

[13] As the district court stated in *United States v. Southern Pac. Co., 239 F. 998, 1006-1007 (D. Utah 1917)*, rev'd on other grounds, *259 U.S. 214, 42 S. Ct. 496, 66 L. Ed. 907 (1922)*:

> "Those statutes require physical connection with the Union Pacific to make a through line and the furnishing of *equal advantages* and facilities as to rates, time and transportation *without discrimination of any kind*."

important segment of one of these routes. *The national defense and the public welfare of the country will not now be served by favoring one of these central transcontinental routes at the expense of another* under present day circumstances."

Plaintiffs place much significance upon the Commission's original denial of modification in 1962 and subsequent reversal in 1966 after remand "without additional facts before it." However, it is apparent to us, at least, that in 1962 the Commission was guided more by an erroneous interpretation of the Pacific Railroad Acts than it was by considerations of "public interest." Furthermore, at the time of the remand from the district court, nothing had been finally decided. Cf. *United States v. United States Smelting, **[**28]** Refining & Min. Co., 339 U.S. 186, 198, 70 S. Ct. 537, 94 L. Ed. 750 (1950)*. Under these circumstances it is "consistent with a concept of administrative power which emphasizes a broad and continuing administrative initiative. * * *" to gauge the Commission's action by the public interest, rather than by its previous statements. See Jaffe, Judicial Control of Administrative Action 714 (1965). And, when the Commission reheard the case in 1966, it did consider as new evidence the 1924 Agreement and the implications and practices thereunder, in accordance with the direction of the remanding district court.

The Commission found that pursuant to said agreement:

> "In December 1946, representatives of the parties adopted a map on which areas are marked 'as the areas described in the [1924] agreement although the said representatives recognize that the areas so marked are not precisely those described in the language of the agreement and that they are not authorized to modify or supplement the said agreement.' The eastern territory outlined includes western trunkline territory west of the Missouri River in Colorado, Wyoming, Kansas, Nebraska, South Dakota, and North Dakota. Southern **[**29]** Pacific also solicits and routes traffic via Union Pacific from and to Nevada and Utah, and in Oregon, North of Kirk, to but not including Portland.
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> "Southern Pacific has also agreed to preferentially solicit and route via Ogden and the Union Pacific (1) export and import traffic moving through California ports in the western preferred territory; (2) traffic from or to points on lines constructed or acquired subsequent to the Commission's 1923 order; and (3) traffic requiring stop to complete loading or to partially unload within the preferred western territory where the western origin or destination is located outside of such territory."

The testimony of traffic managers for the plaintiffs indicated that all freight agents were frequently and fully instructed to carry out the solicitation and routing practices outlined by the agreement.

Our National Transportation Policy is said to be "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co. v. United States, 355 U.S. 83, 87-88, 78 S. Ct. 173, 176, 2 L. Ed. 2d 117 (1957)*, as recently cited with approval in *American Trucking Assoc., Inc. v. Atchison, T. & S.F. Ry., 387 U.S. 397, **[**30]** 421, 87 S. Ct. 1608, 18 L. Ed. 2d 847 (1967)*. Mr. Justice Clark stated in **[*682]** *Baltimore & O.R.R. v. United States, 386 U.S. 372, 386, 87 S. Ct. 1100, 1107, 18 L. Ed. 2d 159 (1967)*:

> "This Court has often pointed out that the national transportation policy 'is the product of a long history of trial and error by Congress. * * *.' *McLean Trucking Co. v. United States, 321 U.S. 67, 80, 64 S. Ct. 370, 88 L. Ed. 544 (1944)*. In that case it found that the Transportation Act of 1920 'marked a sharp change in the policies and objectives embodied in those efforts.' [Ibid.] In that Act the Congress directed the Commission to adopt a plan for consolidation of the railroads of the United States into 'a limited number of systems.' 41 Stat. 481 (1920). Consolidation would be approved by the Commission upon a finding that the transaction was in harmony with and in furtherance of the complete plan of consolidation and that the public interest would be promoted. *But the Commission was warned that 'competition shall be preserved as fully as possible*.' [Ibid.] The initiation of this unification, however, the Congress left wholly with the carriers. The Commission was given no power **[**31]** to compel mergers. *This pattern was carried forward in the Transportation Act of 1940, 54 Stat. 898; however, § 5 of the former Act was amended to authorize the Commission to approve carrier-initiated proposals which it found to be consistent with the public interest and upon just and reasonable conditions*."

And Mr. Justice Brennan in a concurring opinion, *386 U.S. at 402, 87 S. Ct. at 1116*, observed:

> "The ICC has recognized that inquiry into a proposed transaction does not end with the possibilities for increased economies, but extends to 'the effect of the transaction upon adequate transportation service to all parts of the public which would be so affected, * * *." [14]

Here, the Commission determined that the routes of the Southern Pacific formed at Ogden with **[**32]** the Union Pacific and the Rio Grande are now "substantially similar." Although the 1962 and the 1966 Commission orders lend appearance, as Mr. Justice Douglas says in *Baltimore & O.R.R. v. United States, supra, 386 U.S. at 449, 87 S. Ct. at 1141* (dissenting in part), of having been "decided by different regulatory bodies rather than the same commission," nevertheless we feel there exist sufficient findings to support modification of condition (e) as being no longer "just and reasonable" nor in accord with the "public interest."

In this regard, it should be recalled that it is only "our task to scrutinize the Commission's authority, not the substance of its exercise." *American Trucking Assoc., Inc. v. Atchison, T. & S.F. Ry., supra, 387 U.S. at 412, 87 S. Ct. at 1617*. As Mr. Justice Frankfurter said in *Rochester Telephone Corp. v. United States, 307 U.S. 125, 145-146, 59 S. Ct. 754, 764, 83 L. Ed. 1147 (1939)*:

> "So long as there is warrant in the record for the judgment of the expert body it must stand. * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original **[**33]** question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

PRACTICES UNDER 1924 AGREEMENT.

Despite the admonition of the District Court of Colorado that the agreements and practices arising from condition (e) must be considered together with the condition itself, plaintiffs nevertheless urge that their practices were not specifically passed upon, and that the 1924 agreement can survive with or without the modification of condition **[*683]** (e) in the *Control* proceedings. There are many reasons why this position must fail.

First, we defer to the approach of the Colorado District Court in construing the condition, agreement and practices as one issue. Notwithstanding plaintiffs' protestations of their own use of awkward language in their 1924 agreement, we join in the observation of the Commission that the agreement was devised for "the stated purpose of arriving at a common understanding of the meaning of the conditions and for making them reciprocally obligatory. * * *" With condition (e) modified, any authority for preferential routing or solicitation between the Union Pacific **[**34]** and Central Pacific must cease. See note 1, supra.

Secondly, these practices between the parties, as we have observed, are not required by the Pacific Railroad Acts, but in fact are in direct contravention of them. The only possible sanction for the practices and the agreement was the original 1923 version of condition (e), which embodied a Commission-approved exemption pursuant to a provision of the Transportation Act of 1920, now codified as 49 U.S.C. § 5(11). However, it is seriously in doubt whether within the *Control* proceedings the Commission could authorize the Union Pacific to preferentially solicit and route for the Southern Pacific (Central Pacific) in contravention of the Pacific Railroad Acts.

It is true that the Commission under Section 5(11) of the Act could grant immunity from the "antitrust laws" as well as from "all other restraints, limitations and prohibitions of law." But it is important to consider that immunity can only be given under Section 5(11) to those "carriers * * * participating in a transaction approved or authorized under * * * this section * * *." The Union Pacific was not a "carrier * * * participating" in the merger or lease and stock acquisition **[**35]** of the Central Pacific by Southern Pacific. It is true they intervened to file objections, but it is agreed that the Commission had no jurisdiction over the Union Pacific to impose obligations on it. As the Commission acknowledges, the Union Pacific only acquiesced in the proceedings and conditions set forth. [15] Under

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[14] Citing Chicago, B. & Q.R. Co. - Control, 271 I.C.C. 63, 146. See also Detroit, T. & I.R. Co. - Control, 275 I.C.C. 455, 489, sustained sub nom. *New York, C. & St. L. R.R. v. United States, 95 F. Supp. 811 (N.D.Ohio 1951)*.

these circumstanstances, the Commission had no authority to relieve the Union Pacific from any "restraints * * * or prohibitions of law" under Section 5(11). In any event it should be clear, as we have observed, that by modification of condition (e) the Commission has removed any ostensible approval for discrimination by the parties.

[36]** Third, the Commission observed that both practices are contrary to the national transportation policy, as declared by the Transportation Act of 1940. [16] As **[*684]** the Commission has observed, the preferential solicitation and routing by the plaintiffs "tends to relegate the Rio Grande to a secondary status as a transcontinental carrier." The Commission found that the preferential soliciting and routing "stifle competition"; that the "public welfare" and "national defense" are better served by the maintenance of several strong, central transcontinental routes; and that "equality of treatment" must be a dominant consideration when dealing with competing lines that are "substantially similar," such as the Union Pacific and the Rio Grande.

[37]** The Commission's discretionary appraisal of the facts with regard to the national transportation policy must stand if there is evidence to warrant the decision. *McLean Trucking Co. v. United States, 321 U.S. 67, 64 S. Ct. 370, 88 L. Ed. 544 (1944)*. Mr. Justice Rutledge commented in *McLean:*

> "The national transportation policy requires the Commission to 'promote * * * economical * * * service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, [or] undue preferences or advantages * * *."
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> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress **[**38]** left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong.Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' Cf. *Interstate Commerce Commission v. Illinois Central R. Co., 215 U.S. 452, [30 S. Ct. 155, 54 L. Ed. 280;]* *Pennsylvania Co. v. United States, 236 U.S. 351, [35 S. Ct. 370, 59 L. Ed. 616;]* *United States v. Chicago Heights Trucking Co., 310 U.S. 344, [60 S. Ct. 931, 84 L. Ed. 1243]*; *Purcell v. United States, 315 U.S. 381, [62 S. Ct. 709, 86 L. Ed. 910]*. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." *321 U.S. at 86-88, 64 S. Ct. at 380*.

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[15] "Conditions (a) through (d) generally require the Southern Pacific to cooperate or join with the Union Pacific in maintaining service, schedules, and rates via the Ogden gateway and the line of the Central Pacific.

"It was observed in the *Control* case that there was no jurisdiction therein to enforce an order against the Union Pacific or carriers other than the Southern Pacific and Central Pacific. However, the Union Pacific accepted and approved the conditions made, as they apply to the Southern Pacific and its constituent lines, and evinced its intention to comply therewith so far as its cooperation was necessary or required." 317 I.C.C. at 472.

[16] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U.S.C. (prior to § 1).

Public interest germane to this case includes (1) adequacy of service, (2) economy and (3) the efficient use of transportation facilities. See *New York Central Securities Corp. v. United States, 287 U.S.* ***[**39]*** *12, 24-25, 53 S. Ct. 45, 77 L. Ed. 138 (1932)*. But also, until we totally evolve a new approach toward railroad consolidation, [17] Congress requires the Commission, as well as the courts, to give "consideration of all important consequences including anticompetitive effects." *Denver & R.G.W.R.R. v. United States, 387 U.S. 485, 492, 87 S. Ct. 1754, 1759, 18 L. Ed. 2d 905 (1967)*.

Finally, the Commission determined that the preferential *routing* of **[*685]** traffic not routed by the shipper was a direct violation of Section 3(4) of the Interstate Commerce Act. Section 3(4) reads in part as follows: "All carriers * * * shall not * * * unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

Plaintiffs urge that this holding is erroneous since there exists no proof (other than evidence received in 1922 that at that time from 2 to 4 per cent of the freight was **[**40]** unrouted) that sufficient shipping was affected to create "undue prejudice" at the present time by reason of the preferential routing. However, this overlooks the fact that the agreement attacked involves preferential solicitation as well as preferential routing, and that between the two practices 100 per cent of the freight originated by the plaintiffs and *not routed before the railroad is contacted*, is either solicited or directly routed for the plaintiffs. [18]

[41]** The prohibition of Section 3(4) is against discriminatory conduct of the carrier against connecting lines. The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier. In other words, the legislation is not to be so weakly construed that it permits the carrier to accomplish indirectly what he cannot do by direct preferential routing. In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted.

The statute must be interpreted broadly to effectuate its purposes in the public interest. *B & C Truck Leasing, Inc. v. I.C.C., 283 F.2d 163, 164-165* (10 Cir. 1960). As is stated in the *Shreveport* case, *Houston, East & West Texas R. Co. v. United States, 234 U.S. 342, 356, 34 S. Ct. 833, 838, 58 L. Ed. 1341 (1914)*, "there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." In *Western Pac. R.R. Co. v. United States, 382 U.S. 237, 244, 86* ***[**42]*** *S. Ct. 338, 343, 15 L. Ed. 2d 294 (1965)*, the Supreme Court said:

> "In the absence of any settled construction of § 3(4), then, its manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange must be the basic guide to decision."

Thus, we feel that preferential solicitation when done on a "preconcerted" and "systematic" discriminatory basis, as conducted by the parties herein, falls within the statutory prohibition of Section 3(4) as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an apportionment of "economic advantage" as direct routing itself. As plaintiffs argue, preferential solicitation has been referred to without disapproval by the Commission occasionally under *special circumstances*. See, e.g., Chicago, I. & L. Ry. Co. Reorganization, 254 I.C.C. 539, 557, 559 (1943), 254 I.C.C. 673, 689 (1944); Minneapolis, St. P. & S.S.M. Ry. Co. Reorganization, 252 I.C.C. 525, 574-75, 252 I.C.C. 615, 653 (1942). Of course the present case where Southern **[**43]** Pacific was

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[17] See National Transportation Policy, S.Rep.No. 445, 87th Cong., 1st Sess. 260-61 (1961).

[18] The agreement states, "the parties * * * shall cooperate to secure by active solicitation the *routing of the maximum* of freight traffic via Union Pacific and Central Pacific lines * * *.

> "It is understood that such traffic as has origin or destination east of the Missouri River will be *solicited and routed* via the Union Pacific between the Missouri River and Ogden, and via the Southern Pacific west of Ogden; such traffic as has origin or destination west of the Missouri River will be *solicited and routed* via Ogden so as to afford Union Pacific and Southern Pacific respectively the longest practicable haul."

obliged to solicit for the Central Pacific route rather than its own El Paso route is another example. But special circumstances **[*686]** were involved, such as the reorganization and merger of two formerly separate lines. Discrimination on a purely arbitrary anticompetitive basis, where the connecting lines prejudiced offer equal facilities and service, is far outside the scope of permissible activity and must be disapproved. [19]

[44]** Since *all* freight that is not independently routed by the shipper is solicited or routed discriminatorily to the prejudice of the Rio Grande, Section 3(4) prohibits both such practices as being "unduly prejudicial," without further facts before us.

The Commission applied Section 3(4) only to the preferential routing. We are cognizant that we are "powerless" to affirm discretionary agency action other than on the grounds invoked by the agency. *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)*. However, in the construction of Section 3(4), we are not reviewing agency discretion. And although fully relying upon the expertise of the Commission in review of this entire matter, apropos is Professor Jaffe's statement:

> "The judgment of the expert may, as we have seen, be relevant to the decision, but it cannot by reason of its 'pure' quality, its specifically expert character, transform a question of law into a question of fact and so insulate the decision from legal judgment." Jaffe, Judicial Control of Administrative Action, p. 580 (1965).

Other arguments are made by the defendants and intervenors concerning violation **[**45]** of Section 15(1) and of the antitrust laws. Since the Commission has not relied upon these grounds, they require no discussion.

In conclusion, we find no authority under (1) the Pacific Railroad Acts, (2) the National Transportation Policy or (3) Section 3(4) of the Interstate Commerce Act for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition. We find the Commission made adequate findings to support the modification of its 1923 order under Section 5(2) of the Interstate Commerce Act.

We deny plaintiffs' request to enjoin, set aside, annul and suspend the supplemental order of the Commission dated January 6, 1966, entered in Finance Docket No. 2613, Control of Central Pacific by Southern Pacific, and accordingly dismiss the complaint and enter judgment for the defendants herein

It is so ordered.

[*687] [SEE APPENDIX A IN ORIGINAL]

Dissent by: ROBINSON

Dissent

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[19] As the parties, including the Interstate Commerce Commission, have observed in their briefs and arguments, solicitation on a reciprocal basis, as well as routing, are to some degree found in industry practices. We note the discussion in Conant, Railroad Mergers and Abandonments 34-35 (1964):

> "If the shipper does not control the entire routing of shipment, the initial carrier will be free to choose which connecting carriers will transport the shipment to its final destination. At major connecting points, such as Chicago, St. Louis, Kansas City, and Omaha, an initiating carrier must choose which of a number of connecting lines should receive shipments bound for major cities on two or more routes. In the absence of price competition, the choice is usually made on the principle of reciprocity. A railroad transfers to connecting carriers as many cars as it receives from them, or, if traffic is not balanced in both directions, a railroad transfers cars to connecting carriers in some proportion to cars received.
>
> "But the reciprocity of interchange of connecting railroads is not short-term. A railroad will develop long-run interchange preference patterns to protect its own longest hauls by favoring connecting carriers that are not its rivals for any segment of traffic. Thus, the Chicago and North Western, which has a main line from Chicago to Omaha, has established wide interchange with the complementary Union Pacific which extends from Omaha west to Denver, Ogden, and Portland. Neither the North Western nor the Union Pacific has substantial interchange at Omaha with the Rock Island or the Burlington, both of whose lines run from Chicago to Denver and thus rival the North Western and part of the Union Pacific."

RICHARD E. ROBINSON, District Judge (dissenting).

I would respectfully submit that the construction of the Pacific Railroad Acts offered by the majority relies too heavily upon a 1967 interpretation of the language chosen. "Discrimination" has become **[**46]** colored by its present use in the Interstate Commerce Act; "branch lines" have assumed proportions far beyond those obviously contemplated by the Acts. One could hardly expect to find language in the Pacific Railroad Acts which would specifically guard against the application of an Interstate Commerce Act not yet envisioned; and any argument based on its absence could not survive its own statement.

The Congress designed the system so that "branch lines" would connect with the "main trunk"; [1] the question remains whether they could foresee competing systems. A word used indicates that they did not.

> "* * * the several companies * * * are hereby required to operate * * * as *one* continuous line."

I am constrained to find the "branches" to which discrimination was forbidden were **[**47]** feeder lines, not competitors. The "discrimination" referred to **[*688]** appears to have been directed, in addition to the two segments of the "main trunk", to the branches who were to compete between themselves, not with the "one continuous line". [2] I believe that Congress intended to create one railroad; the two organizations were formed to accomplish this end and were not intended to diminish their right to operate as such. I would agree that the obligations of the parties under the Acts were fulfilled by mere physical connection and the absence of discrimination between themselves and their branches, but I would not equate fulfillment of duty with exhaustion of rights. The duty of preferential solicitation and routing arises from the control of Central Pacific by Southern Pacific and the arrangements which resulted. In other words, if my interpretation is correct, the Pacific Railroad Act gives the parties the right to agree to exert in concert any lawful competitive force available to them; the control of Central Pacific by Southern Pacific demands that such an agreement be made. It is also worth noting that the separate companies were given the express right to consolidate **[**48]** their corporate structures. Act of July 2, 1864, ch. 216, § 16, 13 Stat. 363.

[49]** I do not agree that the cases cited in the majority opinion add weight to the position therein taken. In particular, I cannot agree that in the case of Union Pac. Ry. Co. v. Chicago, R.I. & P. Ry. [supra] [3] **[**50]** the

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[1] "Branch lines" and "main trunk" were the descriptions often given of the system in the Congressional debates; in particular the quotation offered by the majority. Cong. Globe 37th Cong.2nd Session, 2807 [1862].

[2] Senator Sherman offered the following argument for private ownership of the branch lines: "I hope that this proposition, which will add another prong to this many-pronged railroad, will be voted down, and that the proposition of the Senator from New Hampshire will be adopted, and that we may agree upon the construction of one main Pacific railroad, which may be promptly constructed, and give such reasonable aid as we can to diverging routes, all pointing to the main line, and I think that all these diverging lines ought to be under different corporations. There is one part of this bill that I do not like. I do not wish to criticise it, but I do not think the Pacific Railroad Company ought to build any of these diverging lines. They ought to be built by different companies so that all the diverging lines will compete with each other, and compete with each other fairly, while they all pour their streams of commerce into one great line, which is aided by the Government. But under the operation of the bill as you have it now framed, the Pacific Railroad Company will own one of these branch lines, and may to the sacrifice of other interests involved in these roads divert the whole travel and transportation to one line, thus destroying the property in which you yourself invest to the tune of $16,000 a mile. I think it would be much wiser to leave these various branches to be built by the local interests concerned." Cong.Globe, 37th Cong., 2nd Sess., 2784 [1862].

[3] That case was an action for specific performance of certain contracts entered into by the Union Pacific and the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company in which the Union Pacific had leased the use of their bridge across the Missouri to the two latter named companies. The Union Pacific claimed that it had no authority to lease the use of its lines and that the contract was therefore ultra vires. The Court found that the contract did not disable the Union Pacific from fulfilling its obligations to the public. The Court then cited the Pacific Railroad Acts as authority for the proposition that the Congressional policy favored "continuous lines". "It is impossible for us to ignore the great public policy

Supreme Court enjoined "discriminatory practices" under the authority of the Pacific Railroad Acts. Reference to the Acts gave support to the Court's finding of Congressional policy; neither the questions involved nor the answers given shed light here. The other authorities might well be cited in favor of the position taken by the Union Pacific as well as those conclusions for which they were cited. Each of the cases refer to the "main line" and "connecting branches." I would not agree that the language can be transplanted to apply equally to competing **[*689]** systems. Each of the cases recognize that the Acts demand something more than mere physical connection. [4]

[51]** The position I have taken is not novel. It was stated by the Interstate Commerce Commission when it originally adopted the five conditions now under review, and cited as the correct interpretation when the Commission first ruled on the petition for reopening and modification. The following is taken from Control of Central Pacific by Southern Pacific, 317 I.C.C. 469, at 484:

> "The existing conditions are consistent with the stated purposes of the Pacific Railroad Acts, and one of the purposes of those conditions is to protect the rights of the Union Pacific and the public under those acts, which are still in force and effect. In imposing the conditions, we stated:
>
> > 'By virtue of the Pacific Railroad acts the Union Pacific and Central Pacific have certain reciprocal rights, including the right to cooperation in the establishment and maintenance via the Central Pacific-Union Pacific route of through train service and joint rates reasonably necessary to meet competition by other routes, and to cooperation in other respects, to the end that the lines of said companies shall be operated and used as one connected, continuous line. We think that the rights of the Union Pacific **[**52]** and all interests of the public under the Pacific Railroad acts may be protected by imposing upon the acquisition and exercise of control by the Southern Pacific the five conditions set out above. * * *'
>
> The proposed modified condition is directed solely to the protection of the Central Pacific line and, thus, would favor it over the Union Pacific line. Although the proposed modified condition is directed toward continued protection of the Central Pacific line, it would fall short of its purpose as the Union Pacific could not be expected to preferentially solicit for that line in the absence of a reciprocal obligation upon the Southern Pacific. It is clear that mere physical connection does not satisfy the purposes of the Pacific Railroad acts; and it is noteworthy that both the 1862 act and the 1864 act authorized the roads concerned 'to form themselves into one consolidated company.'"

Even counsel for the Government expressed a similar view of the proper construction of the acts in his argument of *United States v. Southern Pac. Co., 259 U.S. 214, at p. 217, 42 S. Ct. 496, 66 L. Ed. 907* [1922]:

> "The Pacific Railroad laws imposed on the franchise of the Central **[**53]** Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, *but to exert together* ***[*690]*** *in normal voluntary cooperation all of the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad* * * *."

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in favor of continuous lines thus declared by congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made." *Union Pacific Ry. Co. v. Chicago, R.I. and P. Ry. Co., 163 U.S. 564, at 589, 16 S. Ct. 1173, at 1183, 41 L. Ed. 265*.

[4] I refer particularly to *United States v. Union Pac. R.R., 226 U.S. 61, 33 S. Ct. 53, 57 L. Ed. 124* [1912]. As I read that case the Court made two observations which are important here. First, they found that the Pacific Railroad Acts require more than mere physical connection. The Court then listed reasons why they believe that physical connection was not the only requirement; but they did not proceed to define the obligations which did exist. Some light is shed on the question, however, by another comment contained in that opinion. While the Court was not disturbed about discrimination by Southern Pacific against the Rio Grande, they stated definitely that such discrimination against the Union Pacific would be contrary to the Act.

> "Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress. * * *" *226 U.S. at 92, 33 S. Ct. at 59*.

I believe that the opinion clearly indicates that the Union Pacific and Central Pacific were to be given special treatment because of the Acts that created them. While the extent of their rights is not defined, their existence is nevertheless acknowledged.

Most persuasive, in my opinion, is the fact that the Interstate Commerce Commission has recognized and the Pacific railroads themselves have operated under this interpretation for a long period of time. This "long-continued reliance", was made an express finding in the Commission's 1962 decision. Control of Central Pacific by Southern Pacific [supra at p. 483]. It is undisputed that the Rio Grande had aspirations at the time the nine conditions were imposed of becoming competitive with the Union Pacific. The Rio Grande participated in the *Control* case; the conditions affected the operation of that route to a certain extent when imposed; the interpretation of the Pacific Railroad Acts was clearly stated; and the conditions were accepted as reflecting the law up until 1957. The rights which are reflected in "condition **[**54]** e" were granted by the Congress; they cannot be deleted by the Commission. I must therefore, respectfully dissent.

American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.

United States Court of Appeals for the Second Circuit

December 15, 1967, Decided

No. 31528

Reporter

388 F.2d 272 *; 1967 U.S. App. LEXIS 4149 **; 1967 Trade Cas. (CCH) P72,315; 11 Fed. R. Serv. 2d (Callaghan) 1220; 11 Rad. Reg. 2d (P & F) 2079

American Manufacturers Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co. and Lumbermens Mutual Casualty Co. v. American Broadcasting-Paramount Theatres, Inc.

Core Terms

stations, lineup, network, package, summary judgment, negotiate, advertisers, sponsor, card, Evening, cleared, film, antitrust, broadcast, license, tie-in, segments, issue of fact, differential, offering, summary judgment motion, television, products, markets, prices, sheet, terms, television station, discount, disputed

LexisNexis® Headnotes

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

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 > Trials > Judgment as Matter of Law > General Overview

HN1[] **Summary Judgment, Opposing Materials**

It is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. And, on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. Thus, the standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. Of course, the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment.

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

The well settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[] **Appeals, Standards of Review**

The function of an appellate court is not to determine whether there is sufficient evidence in the record to substantiate findings of fact that were never made. On the contrary, the district court must at a trial resolve contested factual issues and draw the appropriate inferences in the first instance with full recognition that the issues are disputed, and only after sufficient evidence has been introduced to permit an informed judgment.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN4[] **Regulated Practices, Private Actions**

The use of summary judgment in complex antitrust litigation must be closely scrutinized. And, this admonition is apt where too little is known of the practical impact of the challenged transactions. But, this is not to say that summary judgment never has a place in the antitrust field.

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

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where there is no quality or distinguishing desideratum between a product offered singly or in a package, the seller cannot charge substantially higher for the individual product if the price differential has the effect of conditioning the sale of the single product to the sale of the entire package and if the difference in price cannot be legitimately justified by cost considerations.

Judges: [1]** Friendly, Kaufman and Anderson, Circuit Judges.

Opinion by: KAUFMAN

Opinion

[*274] KAUFMAN, Circuit Judge:

Several insurance companies generally known as the Kemper Insurance Companies group, the appellants here, instituted this action on May 23, 1963 against American Broadcasting-Paramount Theatres, Inc. seeking a declaratory judgment that a television sponsoring agreement between Kemper and ABC constituted a tie-in which violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The complaint, *inter alia*, sought treble damages in addition to a decree that the agreement was illegal and unenforceable. On May 31, 1967 -- almost 2 years after the parties had moved for summary judgment -- the District Court granted ABC's motion and denied Kemper's. This appeal followed from the judgment against Kemper. We believe that summary judgment, as intended to be utilized pursuant to *Rule 56 of the Federal Rules of Civil Procedure*, was inappropriately and imprudently employed in this case to resolve the important and exceedingly complex factual and legal dispute presented to the trial judge. We are of the view that the antitrust questions cannot be resolved for there **[**2]** remain material issues of fact that are not brought into sharp focus or clarified by the record before us. We therefore reverse and remand for further proceedings consistent with this opinion.

I.

A substantial portion of the District Court's careful and elaborate opinion (reported at *270 F. Supp. 619*) is devoted to a detailed presentation of the factual background of the dispute. While we shall make an effort to avoid repetition, the complexities of the litigation will be sketched in order to clarify the reasons for our belief that summary judgment was inappropriate in this case.

ABC is one of 3 major television networks in the United States and during 1962-1963 approximately 260 television stations were affiliated with that network. [1] The greater part of network income **[*275]** is derived from selling programs to sponsors (advertisers). All the networks arrange financial terms and details with their advertisers, such as providing network programs, technical facilities and scheduling programs for clearance. The programs and "commercials" are ultimately broadcast to the public over the facilities of local stations which are licensed by the Federal Communications **[**3]** Commission. [2] The networks and local stations share the sponsor's payments on a percentage basis under the terms of an affiliation agreement.

In April 1961, ABC announced it would produce a nightly news program -- the "Evening Report" -- which **[**4]** it offered to its network stations on a 5-nights-per-week basis and by August, 95 stations had "cleared" (accepted) the program. These cleared stations are known in industry parlance as the "going lineup."

Under the typical affiliation agreement then employed by ABC, when a station cleared a program it was compelled to accept the sponsor provided by the network as well as those portions of the program for which the network could not find a sponsor. The local station did not receive any payment from ABC for broadcasting the unsponsored parts, but the apparent harshness of this arrangement was mitigated by the network's practice of "releasing" the unsold time to its affiliates for direct sale by them. [3] Another facet of these complex arrangements was that the local stations were required to "option" certain time periods and to accept programs (and sponsors) provided by ABC for those hours. "Evening Report," however, was not broadcast during an option period and the local stations were therefore free to accept or reject the program as they saw fit.

[5]** From time to time, it was the practice of ABC to issue "offering sheets" concerning "Evening Report." In essence, these are notices advising potential advertisers of the number of clearing stations, the prospective cost of the program, the names of other advertisers, if any, already sponsoring the program, and other relevant details. The gross price mentioned in the offering sheets was in large measure dependent on the hourly station rates of the individual local stations which had cleared the program. ABC published these rates in a so-called "rate card" which was designed to reflect such factors as the number of homes with television sets reached by the particular station,

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[1] For interesting discussions of the structure of the television industry and television advertising rate practices see Blake & Blum, Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination, 74 Yale L.J. 1339 (1965); Note, Antitrust Implications of Network Television Quantity Advertising Discounts, 65 Colum. L. Rev. 1213 (1965).

[2] Each of the networks, however, is owner and licensee of 5 local stations -- the maximum permitted by FCC regulations. See Amendment of Multiple Ownership Rules, ***18 Fed. Reg. 7796***, 9 P. & F.R.R. 1563 (FCC 1953).

Where the program is not a network program, the station is free to sell the broadcast time on that program directly to advertisers.

[3] Such sales are known as sales on the "local market." The time released for local sales was, however, subject to recapture on 3 weeks' notice. In this connection, it should be noted that ABC had two types of affiliation agreements -- "primary" and "secondary" -- which contained different terms. The vast majority of clearing stations were primary affiliates and the description in the text is of their relation with ABC. (For example, of the 95 stations that had cleared "Evening Report" in August 1961, approximately 90 per cent were primary affiliates which had their major network association with ABC.)

the quality of its signal and the number of competing stations. In addition to the rate card time charge, the gross price contained in the offering sheet included a program charge and a "networking" charge. The offering sheet of April 27, 1961 is typical and its essential terms are set out in the margin. [4] We have been told that the offering **[*276]** sheet gross price was only a starting point for negotiations; a variety of "special discounts" were offered potential advertisers. [5] And, the ultimate price **[**6]** charged was the product of detailed negotiations between advertiser and network. [6] In fact, Kemper alleges and ABC does not deny that "Evening Report" was not sold by ABC to a single sponsor at full rate card.

[7]** The Kemper-ABC contract, dated August 15, 1962 (and resulting from extended negotiations), provided *inter alia*, that Kemper would sponsor "Evening Report" one evening per week for 26 weeks over 130 local television stations. But Kemper insists that it did not want to advertise over 32 of these stations and that it had agreed to take them only because ABC refused to make available the 95 stations it did want -- except at an unreasonable cost -- unless Kemper agreed to take the entire lineup. [7] According to Kemper, a detailed analysis convinced it that it did not do a sufficient amount of business in the markets served by the 32 stations to justify advertising over them. Moreover, it claims that it did not seek business from these areas because it could not adequately service customers located there. ABC admits that Kemper sought to eliminate the 32 stations but contends that the lineup question was of minor importance in Kemper's advertising policies. It also states that Kemper ultimately took the entire package offered by ABC because it best served Kemper's needs. On its surface, it would appear that the contract does not reflect an illegal tie-in; it merely recites an agreement **[**8]** to sponsor a program over 130 different stations. But, we are urged not to overlook that ABC's alleged coercion is said to have taken place during the extensive period of negotiations which culminated in the contract.

Since the history of the negotiations is fully set forth in Judge Tenney's opinion, we will repeat only so much of it as will aid in comprehending our ultimate conclusion. It is not disputed that at a meeting in ABC's New York offices on January 25, 1962, Edgar Sherick, then ABC's vice president in charge of network sales, offered Buckingham W. Gunn, a senior official of Kemper's advertising agency, Clinton E. Frank, Inc., the right to sponsor "Evening Report" at a package price of $22,000 per one quarter-hour segment for 2 segments per week over a 26 week period. The talks were preliminary, and **[**9]** detailed negotiations continued between officials of Kemper and the Frank agency and members of ABC's Chicago office. These talks culminated in a meeting that was held in the Chicago offices of the Frank agency on April 27, 1962 -- by which time the going lineup consisted of approximately 99 stations. The subject matter under considerable discussion was that Kemper would order 39 segments of "Evening Report" over a 26 week period but would have the right to reduce its order to one segment per week if within 30 days of signing the contract not all the stations in Kemper's key markets cleared the program. The price was to be $22,000 per segment for 39 segments and $24,000 if only 26 segments were ordered. In addition, Kemper expressed an interest in 28 stations which had not yet cleared the program. ABC was willing to agree to furnish 15 of these stations at a maximum charge of $3,000 (assuming **[*277]** all cleared) and the remaining 13 at "no charge."

On or about May 4, 1962 Kemper submitted its first "order letter" for "Evening Report" in which it asked for 39 segments over a 26 week period. The lineup requested consisted of 95 stations -- 67 of the 99 already cleared as **[**10]** well as the 28 requested at the April 27th meeting. For this package Kemper offered a total price of

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4 The program was offered for periods of 13 or 26 weeks for each weekday in one-quarter hour segments. The estimated lineup was 110 stations and the approximate gross was $34,500. This was based on rate card time charges for the clearing stations to which was added a program charge of $5,000, a 15 per cent commission of $750, and a networking charge of $500. A "Special Discount" of 35 per cent off rate card was offered for the purchase of 2 quarter-hour segments over 26 weeks (or $28,675, including all charges) and a 30 per cent discount (or $30,400 *in toto*) was offered if 1 quarter-hour was taken.

5 For a detailed description of ABC's pricing practices see Blake & Blum, supra, 1351-53.

6 Id. at 1347. The legality of these practices under the principles of the Robinson-Patman Act, *15 U.S.C. § 13*, has received much attention but is not now before us. See generally articles cited in note 1.

7 In the record, the precise number of unwanted stations is sometimes said to be 32 and at other times 35. Apparently 3 unwanted stations were added to the lineup after Kemper accepted ABC's terms.

$24,250 which its order letter broke down into a time charge which was not to exceed $18,750, a program charge of $5,000 and a $500 networking charge. The time charges were to be reduced by the "package rate" of any of the ordered stations that did not clear the program. Kemper conditioned its order on all the stations in its 41 "key markets" clearing.

According to ABC, Kemper's May 4th order improperly substituted the 28 stations it had requested at the April 27th meeting for 32 of the stations that were part of the going lineup which ABC had offered. And, Kemper attempted to get these stations at the package rates discussed at the April 27th meeting even though the time charges for the 28 stations totaled more than twice those for the 32 stations. Accordingly, ABC rejected Kemper's order and on May 10, 1967 counter-offered Kemper the full 99 station lineup (which included the 67 stations ordered on May 4th) at a time charge of $15,750 and the 28 stations at a total cost of $3,000. With the program and network charges included, the cost was $24,250 -- the same as in Kemper's **[**11]** May 4th order. Although it was thus offered extra stations at no extra cost, Kemper maintains that it wanted and preferred the package as it ordered it on May 4th. It alleges that ABC consistently refused to sell it the lineup it sought except at full rate card -- that is, without the 47 1/2 per cent discount reflected in the April 27th discussions. ABC admits that it refused to sell Kemper its limited lineup at the April 27th package rate although Kemper was asking for fewer stations at the same price; but, it responds (and Kemper denies) that it would be expensive to black out Kemper's commercials on the unwanted stations. Also, ABC tells us that it never insisted on Kemper paying full rate card for the smaller lineup but rather offered to negotiate further. In any event, Kemper ultimately accepted the entire lineup of 130 stations and a contract was signed.

II.

The life of the Kemper-ABC agreement (dated August 15, 1962) proved to be less than the period consumed by the negotiations already discussed. After only 4 of the 26 ordered broadcasts, Kemper notified ABC that it considered its obligations under the contract at an end. It declared that on November 11, 1962, ABC **[**12]** had broadcast a program titled "The Political Obituary of Richard M. Nixon" during which Alger Hiss was permitted to evaluate Mr. Nixon's role in the Hiss perjury case. The program was promoted on broadcast time sponsored and paid for by Kemper and in substance it contended that ABC violated the contract by associating Kemper with a program that was in poor taste. Two days later Kemper advised ABC that it was cancelling its sponsorship. Efforts at reconciliation proved fruitless and on January 9, 1963 ABC filed suit in the New York Supreme Court for breach of contract. A final judgment was ultimately entered for $265,047.21. *48 Misc. 2d 397, 265 N.Y.S. 2d 76*, aff'd, *24 App. Div. 2d 851, 265 N.Y.S. 2d 577 (1st Dept. 1965)*, aff'd, *17 N.Y. 2d 849, 218 N.E. 2d 324, 271 N.Y.S. 2d 284 (1966)*. Kemper asserted for the first time its claim that the agreement with ABC violated the Sherman Act in its answer in the state court suit and in the complaint it filed in federal court. [8]

[13]** **[*278]** On May 31, 1963, ABC moved in the federal court to dismiss Kemper's complaint on the ground that it failed to state a claim upon which relief could be granted. Judge Cooper denied this motion, *221 F. Supp. 848 (S.D.N.Y. 1963)*, noted, 39 Notre Dame Law. 719 (1964), holding that the allegation that ABC refused to make available a limited lineup of 95 stations except at a disproportionately high price stated a cause of action under the Sherman Act. The case was then assigned to Judge Tenney as a Rule 2 Judge (Rule 2, General Rules for the Southern and Eastern Districts of New York) and the motions for summary judgment were then argued to him. After examining voluminous affidavits, exhibits and depositions, he granted ABC's motion for summary judgment in a painstaking opinion which consumes almost 70 pages in the appendix on this appeal.

Judge Tenney advanced 4 grounds for his decision. First, he ruled that ABC sold Kemper a single "product" -- the privilege of being identified as the sponsor of "Evening Report." Since only a single product had been sold, a tie-in could not have occurred. Second, assuming *arguendo* that the transaction **[**14]** was properly characterized as

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[8] The state court chose not to adjudicate the validity of the contract under the antitrust laws although it indicated that on its face the contract was enforceable. *42 Misc. 2d 939, 249 N.Y.S. 2d 481 (1963)*, aff'd, ***20 App. Div. 2d 890, 251 N.Y.S. 2d 906 (1st Dept. 1964)***, aff'd, *17 N.Y. 2d 849, 218 N.E. 2d 324, 271 N.Y.S. 2d 284*, cert. denied, ***385 U.S. 931, 87 S. Ct. 291, 17 L. Ed. 2d 213 (1966)***. ABC does not contend that the state court judgment bars Kemper from pressing the instant litigation.

the sale of different television stations, for purposes of tie-in analysis the different stations were components of a single product because it was "a reasonable and economically justified requirement of the industry" to sell them all as one package. Third, assuming *arguendo* that more than one product was involved in the sale, ABC was legally justified in rejecting Kemper's May 4th order and reverting to its higher rate card prices "even though said prices are substantially higher than the average price per unit for all the components of the package." Finally, he ruled that Kemper was not coerced by ABC because it never attempted to negotiate a lower price after ABC rejected its May 4th order. Although we understand the reasons which would motivate a district judge in seeking to avoid a complex and grating trial, we believe that material questions of fact were presented with respect to each of these alternative grounds for decision and that summary judgment was improper.

III.

The importance of summary judgment in the structure of modern federal practice as a procedural weapon to pierce sham claims and resolve actions where the facts are undisputed **[**15]** has been frequently noted by this court. See, e.g., *Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964)*. Although some of the older decisions of this court had put in question the wisdom of granting summary judgment, we interpreted the 1963 amendments to *Rule 56* as suggesting that the courts thereafter were to approach the Rule with less reticence and more resoluteness. *Dressler v. MV Sandpiper, supra* (discussing cases); 6 Moore's Federal Practice para. 56.15 [1], 1966 supp. at 102.

The functions and purposes of summary judgment have been stated thus:

> "It is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials where no genuine issues of fact are raised. The procedure enables a party to pierce the allegations of fact in the pleadings and obtain relief by showing that there are no issues to be tried. Its purpose is to separate the formal from the substantial issues, eliminate improper issues, determine what, if any, issues of fact are present for the jury to determine, and enable the court to give judgment on the issues of law where no disputed **[**16]** issues of fact are found." 3 Barron & Holtzoff, Federal Practice and Procedure, **[*279]** § 1231, at 97-100 (Wright ed. 1958).

But ***HN1***[] it is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. And, "on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)* (per curiam). [9] Thus, the standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. *Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962)*. See 6 Moore, supra, para. 56.02 [10]; 3 Barron & Holtzoff, supra, § 1234, at 133. Of course, the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a **[**17]** matter of informed and properly reasoned judgment.

The instant litigation is somewhat atypical because both parties clamor for summary judgment urging that the record presents no disputed material issue of fact -- as if a trial is to be avoided like the plague. But, rather typical of such "agreements" to end the case by summary judgment, this admirable harmony does not carry over to agreement on what the "undisputed" facts are or the permissible inferences to be drawn from **[**18]** them. While a substantial part (but not all) of the evidence is documentary, the parties sharply dispute the inferences to be drawn, see United States v. *Diebold, Empire Electronics v. United States, supra*, and, as we shall see below, the depositions present conflicting testimony. In any event, "***HN2***[] the well settled rule is that cross-motions for

[9] In light of the history of the Kemper-ABC agreement one may suspect that the claim of Sherman Act illegality was an afterthought to justify having broken a contract that had turned sour. And, it is understandable that the District Court looked with a jaundiced eye on Kemper's allegations that it was coerced into accepting all 130 stations. But, "that it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him." 3 Barron & Holtzoff, supra, § 1234, at 132.

summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." 6 Moore, supra, para. 56.13, at 2247. See also Barron & Holtzoff, supra, § 1239, at 176. Nor, have we lost sight of the fact that neither ABC nor Kemper requested a jury trial and that ultimately the unresolved questions will be decided by the District Judge. But ***HN3***[] the function of an appellate court is not to determine whether there is sufficient evidence in the record to substantiate "findings" of fact that were never made. Compare *Bollenbach v. United States, 326 U.S. 607, 614, 90 L. Ed. 350, 66 S. Ct. 402 (1946)*. **[**19]** On the contrary, the District Court must at a trial resolve contested factual issues and draw the appropriate inferences in the first instance with full recognition that the issues are disputed, and only after sufficient evidence has been introduced to permit an informed judgment. As we said in *Empire Electronics Co. v. United States, supra, 311 F.2d at 180-1*: "If reasonable inferences could be drawn . . . such that the issue would be submitted to the trier of fact, then *Rule 56(c)* leaves us no latitude and *we must return that issue to the trier of fact in this case the judge*." See 6 Moore, supra, para. 56.15 [1-02], at 2291-92; Asbill & Snell, "Summary Judgment Under the Federal Rules -- When an Issue of Fact is Presented," 51 Mich. L. Rev. 1143, 1146 n. 15 (1953). Cf. *Colby v. Klune, 178 F.2d 872, 874 (2d Cir. 1949)*.

Moreover, we have been forewarned that ***HN4***[] the use of summary judgment in complex antitrust litigation must be closely scrutinized. *Poller v. Columbia **[*280]** Broadcasting System, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. **[**20]** And, this admonition is apt where too little is known of the practical impact of the challenged transactions, *White Motor Co. v. United States, 372 U.S. 253, 263-4, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*. But, this is not to say that summary judgment never has a place in the antitrust field. See *White Motor Co. v. United States, supra, 372 U.S. at 259*; 6 Moore, supra, para. 56.17 [5]; 3 Barron & Holtzoff, supra, § 1232 (1967 supp.).

The question before us is not the availability of the rule in any specific category of cases, but whether the record in this particular case adequately clarifies the complex and convoluted issues that are so common in antitrust litigation. Thus, our holding here does not weaken the force of *Rule 56*, but "simply recognizes that there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case." *Miller v. General Outdoor Advertising Co., 337 F.2d 944, 948 (2d Cir. 1964)*. Cf. *Allied Mutual Insurance Co. v. Lysne, 324 F.2d 290 (8th Cir. 1963)*; **[**21]** *S.J. Groves & Sons Co. v. Ohio Turnpike Commission, 315 F.2d 235 (6th Cir. 1963)*. In the context of this case, Judge Weinfeld stated the precept well:

> "I am persuaded that a decision after trial will be the more desirable procedure in the matter. It will serve to bring into sharper focus certain issues of importance which have been obscured by the voluminous affidavits with their statements, counter-statements and alternative positions, and the conflicting conclusions which the parties contend are to be drawn from the multitude of facts and statistics presented.
>
> Under all the circumstances the application of the summary judgment rule is questionable and the Court deems it sound judicial administration to permit a trial for such additional evidence and clarification as may be relevant." *United States v. Bethlehem Steel Corp., 157 F. Supp. 877, 879 (S.D.N.Y. 1958)* (Bethlehem was ultimately tried to the court, *168 F. Supp. 576*).

See also *Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7, 92 L. Ed. 1347, 68 S. Ct. 1031 (1948)*; H.J. *Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F. Supp. 452 (S.D.N.Y. 1960)*.

[22]** IV.

With these principles in mind, we turn to the grounds for decision advanced by the District Court. Judge Tenney reasoned that ABC had not tied the sale of the 95 stations Kemper wanted to the sale of 32 stations it did not want because, conceptually, only a single "product" was involved in the transaction. Indeed, it is axiomatic that a tie-in analysis begins with the question of separability -- the requirement that the tying and tied products be different, or, stated simply, that the forced purchase be of a second distinct commodity. As Professor Turner (now Assistant Attorney General in charge of the Anti-Trust Division) stated:

> "The requirement that they [the tying and tied products] be 'different' obviously cannot be dropped out. Every manufactured item is a combination of various materials and components. There are obvious cases in which we would say either that there is no tie-in because the object of the sale is a single product, or that if there is a tie-in, it should not be deemed illegal per se or even illegal at all." Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 67-68 (1958).

See *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; **[**23]** *Susser v. Carvel Corp., 332 F.2d 505, 512 (2d Cir. 1964)*, cert. dismissed, *381 U.S. 125, 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965)*; Pearson, Tying Arrangements and Anti-trust Policy, 60 Nw. U.L. Rev. 626, 627 (1965).

[*281] *Times-Picayune, supra*, has been cited to us as a case where the Court was presented with a question for determination not too dissimilar from the one before us. The government contended that the defendant had unlawfully tied the sale of advertisements in its morning newspaper to the sale of advertisements in an afternoon paper it also published. The Court stated that:

> "two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the markets the same." *345 U.S. at 614*.

But the issue of separability here is not quite the same **[**24]** as in *Times-Picayune*; it is manifest that whether one or more products is involved in a given transaction must be dependent upon the nature of that transaction. One factor that may distinguish this case from *Times-Picayune*, for example, is that commercials over different local television stations reach what are clearly different markets. [10] Moreover, as Judge Tenney recognized, the influence of the Court's analysis of the tying issue in *Times-Picayune* has been relatively restricted in later cases. See, e.g., *Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 760-61* (6th Cir.), cert. denied, *382 U.S. 820, 15 L. Ed. 2d 66, 86 S. Ct. 47 (1965)*.

[25]** The District Judge, in determining that a single product was involved in the Kemper-ABC transaction, placed major reliance on *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961)* cert. denied, *369 U.S. 812, 7 L. Ed. 2d 612, 82 S. Ct. 689 (1962)*. [11] In *Amana*, CBS sued to recover monies due under a television sponsorship agreement and Amana counter-claimed that CBS's rate structure violated sections of the Clayton Act, *15 U.S.C. §§ 13(a)*, *14* and *15*. The court held that "a purchase by Amana of the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products" was not the purchase of a "commodity" within the meaning of the Act. *Id. at 378*. [12]

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[10] Compare Blake & Blum, supra, at 1385-86: "Characterizing the network's discount practices as tying arrangements does not present the difficulties encountered by the Court in *Times-Picayune*. Even assuming the Court there had sound basis for treating readership of the morning and evening papers as homogenous, which seems doubtful, network tie-ins are of much more distinct products. Evening and afternoon viewers of television, for example, constitute a substantially different market, as do viewers in New York and Dubuque. Furthermore, the morning and evening papers effected critical economies by leaving ad materials intact in page layouts from morning to evening editions. Network time tie-ins have no comparable claim to achieving economic efficiency."

[11] *Amana* has not received a welcome reception from the commentators. See, e.g., Blake & Blum, supra at 1379-80; Columbia Note, supra at 1232-34.

[12] The Sherman Act, of course, is not limited to "commodities."

Whether or not *Amana* correctly characterizes the nature of the sale in this case, a point we do not decide, we see nothing in the rationale of that opinion which compels a holding that in analyzing the tying issue "the privilege of being identified as the sponsor of a program" should not or may not be considered a different "product" for each **[**26]** station sold. We have already noted that each local station is licensed independently by the F.C.C. and serves different markets. To absolutely preclude applicability of the Sherman Act -- a broad remedial statute -- merely by characterizing a transaction by some *ipse dixit* formulation would be to frustrate the Congressional intent in a most mechanical fashion. In any event, this is merely to recognize the problem, not to solve it; there may yet be ample justification for **[*282]** treating a sale of advertising time over different stations as a single "product" for purposes of the antitrust laws. Compare *Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 655* (1st Cir.), cert. denied, *368 U.S. 931, 7 L. Ed. 2d 194, 82 S. Ct. 368 (1961)*.

Recognizing **[**27]** these considerations, Judge Tenney held that it "is a reasonable and economically justified requirement of the industry" to sell many-station lineups as a single package. [13] **[**29]** The trial judge applied the four criteria of separability laid down in *United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 559 (E.D. Pa. 1960)*, aff'd per curiam, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961)*, and for present purposes we accept his summary of *Jerrold*. The first test is: "Did competitors of the seller offer all the components of the alleged 'product' separately and not exclusively as a single package?" Kemper alleges, and ABC does not deny, that when it advertised over the NBC network it was allowed to select its own lineup. And, there is some indication in the record that this practice was not uncommon in the industry. The second test is: "Was the number of components of the product variable 'so that hardly any two versions of the alleged product were the same?'" It is not disputed that ABC *offered* a going lineup to all prospective purchasers. But an uncontroverted affidavit submitted by Kemper alleges that on a number of occasions ABC sold **[**28]** "Evening Report" on a selective partial lineup basis. [14] Moreover, ABC admits that it was willing to sell Kemper the lineup it desired; ABC merely demanded that Kemper pay more. Third, "Was the purchaser charged for each component and not a lump sum for the total product?" It is undisputed that ABC's offering sheets set a total price per broadcast but it is also true that ABC published a rate card time charge for each individual station. Finally, "Did the seller offer similar components for sale separately?" As noted above, there was evidence suggesting that ABC did this on occasion.

Thus, applying the criteria suggested by *Jerrold* to the case before us, and drawing all inferences in favor of Kemper as we are required to do, *United States v. Diebold, supra*, we are unable to determine on the record before us whether the Kemper-ABC transaction concerned a single product for purposes of a tie-in analysis. [15] The evidence submitted on this motion for summary judgment was simply insufficient to make a determination that the practices just described were typical or economically necessary in the television industry. ABC urges that it is in the public interest for it to build a "strong network." But it is not at all clear from the facts what added burden would have been imposed upon ABC had Kemper sponsored the program over only some of the stations which had **[*283]** cleared it for broadcast. [16] **[**31]** For example, would the network **[**30]** or local stations have incurred substantial

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[13] A number of commentators have argued that the sales of commercial time over different television stations constitute different products for purpose of tie-in analysis. See, e.g., Schwartz, Antitrust and the FCC: The Problem of Network Dominance, 107 U. Pa. L. Rev. 753, 779-80 (1959). ABC seeks to explain away such authorities by pointing out that they deal with "must buy" practices by the networks and it asserts it does not have a "must buy policy." That may well be true but it misses the point. An analysis that "must buy" constitutes an illegal tie-in necessarily presupposes that the sale of time over different stations constitutes more than one product.

[14] For example, Kemper claims that in May 1963 General Mills purchased 69 stations from a master lineup of 106 stations; that in February 1964 Armour & Co. bought 37 stations out of a lineup of 109 and Sun Oil bought 44 of 104 stations.

[15] We note in this connection that the actual holding of *Jerrold* was that the defendant was justified in treating the "components" it sold as one "product" only for a short period following its introduction as a new "product," *187 F. Supp. at 559-61*. And, we have stated that "tying arrangements have been given short shrift under the antitrust laws." *Susser v. Carvel Corp., supra, 332 F.2d at 512*.

[16] Neither party has cited, and we have not found, any recent study of the FCC dealing with these problems. And generally, the FCC appears not to have been overly concerned with antitrust considerations. See Schwartz, Antitrust and the FCC: The Problem of Network Dominance, supra note 13, 781-86.

costs by blacking out the undesired stations? Was there a ready national market where ABC could have sold the remaining stations? Would local stations refuse to clear the program if they knew that they might not be sponsored by particular advertisers? On the record presented, we find it impossible to answer these and similar relevant questions. In order that our decision not be misconstrued, it should be emphasized that we do not now hold that more than one "product" is involved in the sale of commercial time over many stations; we merely hold that additional evidence and clarification is required. [17]

V.

Finally, the District Court decided that Kemper failed to demonstrate that ABC had employed an illegal tie-in (assuming, *arguendo*, that more than one "product" was involved) because "the necessary element of coercion, economic or otherwise, has not been proven." See *Osborn v. Sinclair Refining Co., 286 F.2d 832, 836 (4th Cir. 1960)*, cert. denied, *366 U.S. 963, 6 L. Ed. 2d 1255, 81 S. Ct. 1924 (1961)*. Two independent reasons were given: (a) ABC was legally justified in rejecting Kemper's May 4th letter order and reverting to its rate card time charges for Kemper's selected lineup; and (b) Kemper never attempted to negotiate a discount price after ABC rejected its May 4th order. This argument, we assume, is based on the premise that if Kemper never attempted to open the door, **[**32]** it cannot claim it was slammed in its face.

Here too, we find it impossible on the record before us to determine whether ABC was justified in reverting to its higher rate card prices. As we view the law, ***HN5***[] where there is no quality or distinguishing desideratum between a product offered singly or in a package, the seller cannot charge substantially higher for the individual product if the price differential has the effect of conditioning the sale of the single product to the sale of the entire package and if the difference in price cannot be legitimately justified by cost considerations.

The leading case in this area is *United States v. Loew's Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*, in which the government challenged the "block booking" of feature motion picture films for sale to television exhibitors. The lower court decree had enjoined the defendants from:

> "(C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold **[**33]** or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." *Id. at 43, 83 S. Ct. at 101*.

The government contended that this provision was too vague for effective enforcement and the court responded:

> "The final judgments as entered only prohibit a price differential between a film offered individually and as part of a package which 'has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films.' . . . Differentials unjustified by cost savings may already be prohibited under the decree as it now appears. Nevertheless, the addition of a specific provision to prevent such differentials will prevent uncertainty in the operation **[*284]** of the decree . . . . to ensure that all proper bases of quantity discount may be used, the modification [of the decree] should be worded in terms of allowing all legitimate cost justifications." *Id. at 54-5*.

We do not read this to mean, of course, that a purchaser can **[**34]** select the most expensive individual item from a package and demand it at the average price for all the items in the package -- a price which necessarily reflects the charges for the less costly components of the package. But Kemper was not selecting a limited number of stations and demanding them at the average package price; it insists it was willing to pay for its limited 95 station lineup what ABC was demanding for all 130 stations. The trial judge seemed more certain than we are that in its May 4th order Kemper substituted the 28 more expensive for the 32 cheaper stations. [18] In any event, regardless of

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[17] Similarly, we voice no opinion on the rule of law that would apply if a sponsor demanded a lineup of two or three stations. See Pearson, Tying Arrangements and Antitrust Policy, supra at 628-29, commenting on Judge Cooper's opinion below. We will cross that bridge when we come to it.

how Kemper arrived at the figures it used in its May 4th order, we are still faced with Kemper's claim that it was requesting fewer stations than ABC was offering at the price ABC was demanding. And, under the circumstances of this case, we do not think it is an answer to say that the rate card prices to which ABC reverted were pre-established. Apparently, full rate card prices were never charged by ABC. Moreover, to hold that a seller can avoid the impact of the *Loew's* rationale merely by setting a pre-established price for each individual item -- even if that price is **[**35]** rarely if ever charged and is, in relation to the package price, fanciful and unjustified by cost -- would mean that the antitrust laws could be flouted at will.

[36]** On the incomplete record before us, we find it impossible to determine whether there were justified cost differentials between ABC's individual and package prices. The extent of the extra administrative burden, if any, that ABC would incur if it had to negotiate on a less than full lineup basis is unclear. And, Kemper maintains steadfastly that ABC would incur no cost by having to black out the unwanted stations. While there are suggestions in the record that would seem to lend some support to this contention, it is possible that although blacking out involves no cost to the *network*, it would impose a substantial burden on the individual stations -- a burden which might ultimately have to be borne by the network. In any event, additional evidence is needed before a determination can be made that ABC's price differentials were cost justified.

As we have already noted, the District Judge found that Kemper never attempted to negotiate with ABC after it rejected its May 4th letter order. Judge Tenney seems to suggest that Kemper **[*285]** had a duty to approach the hierarchy of officialdom at ABC's New York office with respect to a discount on its selected lineup, and should **[**37]** not have been content to accept the rejection it received from the lower echelon in the network's Chicago sales office. But the law does not demand that Kemper joust with windmills; it would have been reasonable to require it to negotiate only if there was a chance of success. If all the inferences are resolved in favor of Kemper -- as we are required to do on ABC's motion for summary judgment, *United States v. Diebold, supra* -- we believe that on the record before us it is a disputed issue of fact whether, under all the circumstances of this case, it was reasonable to have required Kemper to attempt to negotiate further after ABC rejected its order.

Kemper has insisted in these summary proceedings that ABC adamantly refused to sell the desired lineup at other than rate card. And, an ABC official asserted that he had been told by his superior that "if they insist on a specific lineup, they must pay rate card." Of course, if this ABC policy was never communicated to Kemper, it could not have been a factor in the decision not to negotiate; but, this is not clear. It is also true that there was some evidence that at a meeting held on May 18th, Kemper was told that "we **[**38]** would be willing to renegotiate the deal." However, the record also discloses that at another point in the meeting Kemper was told that the selected lineup would cost "rate card and then some." Moreover, an official of the Frank agency stated that after the May 18th meeting he was informed that "ABC New York" wanted Kemper to take the full lineup and the price seemingly was to be rate card. Following all these meetings and conversations, Kemper alleges that it concluded that any further efforts to get ABC to modify its position would be doomed to failure. Consequently, it capitulated and agreed to ABC's terms. [19] **[**39]** It is apparent to us that the facts underlying the negotiations are in serious conflict and

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[18] As we understand the parties' contentions, there are two different equations submitted for arriving at the figures in Kemper's May 4th order. Kemper claims it was willing to pay for 67 of 99 stations the $15,750 ABC was asking for the full lineup of 99. It asserts that it added to this figure the $3,000 charge for the 28 additional stations it wanted, to arrive at the $18,750 station time charge found in its May 4th order. ABC claims that Kemper treated all 99 stations as fungible and deducted a proportional amount ($2,871.23) for the 32 unwanted stations from the time charge used at the April 27th meeting. It then added $5,588.88 -- the discounted rate for the 28 stations it wanted -- to arrive at a figure of $18,467.65, which was rounded to $18,750 in the May 4th letter.

It is apparent that either theory would account for the figure Kemper used. While it is relatively clear that Kemper, in an intra-office memo sometime previous to the April 27th meeting, employed the method of computation suggested by ABC, an official of the Frank agency swore in an affidavit submitted on the motion that these earlier computations were not reflected in Kemper's orders. We have already indicated in part II that on a motion for summary judgment, with no opportunity to evaluate the demeanor of the witnesses, it is not the function of the court to determine whether the affiant is telling the truth or that he seems "persuasive." We note in this connection that it is not obvious to us why Kemper should have used a figure of $5,588.88 for the 28 extra stations when ABC had previously stated at the April 27th meeting that it would agree to charge only $3,000.

thus it is impossible to resolve them on this motion or to draw inferences adverse to Kemper, as would be necessary for a holding that Kemper's refusal to negotiate was unreasonable. [20]

[40]** VI.

In sum, we are of the opinion that this case was not ripe for summary judgment. While this matter has already been pending for an inordinate amount of time, we cannot grant or withhold summary judgment merely because it would save time or expense. Cf. 3 Barron & Holtzoff, supra, § 1231 (1967 supp.). We suggest in the interest of judicial economy, however, that the District Court first determine at trial whether it was reasonable for Kemper not to have attempted to negotiate further. A negative answer based **[*286]** on adequate evidence and findings would obviate the need for further proceedings with respect to the issues discussed in part IV of this opinion. [21]

[41]** Summary judgment in favor of ABC is reversed.

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[19] The District Court placed great emphasis on a number of Kemper memoranda that did not indicate the lineup problem was of importance to the company. The significance of many of these documents without further evidence must be discounted, however, since they were written after Kemper alleges it capitulated to ABC's demands.

[20] We frankly find the positions advanced by both parties in this summary proceeding somewhat puzzling and incongruous. Kemper claims it refused extra stations although they would cost nothing additional because it could not adequately service potential customers. ABC, on the other hand, apparently insisted that Kemper take something for nothing, allegedly because it would be expensive to cut out the unwanted stations. But when Kemper ordered its limited lineup, ABC did not respond "you can have your lineup at the package rate but you will, of course, have to pay any expenses we will incur by cutting out stations." Instead, it spoke of "rate card and then some" -- to an important customer -- although it is clear that it apparently never charged anyone rate card. The only fact of possible monetary significance that we can detect between Kemper's offer and ABC's counteroffer is that Kemper stipulated that the charge "shall be reduced by the package rate of any station not clearing." But the maximum price effect appears to be relatively insignificant and it does not rationalize for us the positions of the parties.

[21] Another issue, not raised by ABC, which could well be explored before confronting the important and difficult problem of application of the "tie-in" principle to network broadcasting, is the possible bearing of *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)*. The principal, indeed almost the sole, item of damage which plaintiffs seek to recover is the state court judgment for their breach of contract committed for a reason wholly unrelated to the antitrust laws; if, under *Kelly*, the antitrust laws did not give Kemper a valid antitrust defense to that suit, they can hardly permit it to recover three times the amount of the judgment. The case arguably differs from *Kelly* in that here the contract included the sale of something alleged to constitute an illegal tie-in; however, it is also unlike *Associated Press v. Taft-Ingalls Corp., 340 F.2d 753* (6th Cir.), cert. denied, ***382 U.S. 820, 86 S. Ct. 47, 15 L. Ed. 2d 66 (1965)*** in that, although the record is not completely clear on this point, the price for the entire package of 130 stations appears to have been no greater than Kemper was willing to pay for the 95 stations they wanted. We note also that the discussion in *Kelly* assumed that there was a "lawful sale *for a fair consideration*," *358 U.S. at 521*, a fact upon which the District Court made no findings.

Otto Milk Co. v. United Dairy Farmers Cooperative Asso.

United States Court of Appeals for the Third Circuit

September 25, 1967, Argued ; December 26, 1967, Decided

No. 16386

Reporter

388 F.2d 789 *; 1967 U.S. App. LEXIS 4027 **; 1967 Trade Cas. (CCH) P72,318

OTTO MILK COMPANY, Plaintiff-Appellee, v. UNITED DAIRY FARMERS COOPERATIVE ASSOCIATION, United Dairy Farmers, Ernest Hayes, J. D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, United Dairy Farmers Cooperative Association, Ernest Hayes, J. D. Smouse, Joseph M. Piper, Stanley Yagla and Adam Babiarz, Appellants

Disposition: **[**1]** Affirmed.

Core Terms

milk, pickets, Farmers, Dairy, customers, sales, products, buy, defendants', signs, Co-Operative, storekeepers, conspiracy, handle, Farms, front, interstate commerce, trial judge, Sherman Act, injunction, answered, supplied, entity, induce, district court, milk product, retail store, cross-examination, discontinue, purchases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Defenses**

The Sherman Act, *15 U.S.C.S. § 1* and *§2*, does not require actual monopoly of the territory sought.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN2[] **Fundamental Freedoms, Freedom of Speech**

The constitutional freedom for speech and press does not extend its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.

Judges: McLaughlin, Hastie and Forman, Circuit Judges.

Opinion by: McLAUGHLIN

Opinion

[*790] OPINION OF THE COURT

McLAUGHLIN, Circuit Judge.

Appellee sued defendants under *sections 1* and *2* of the Sherman Act (*15 U.S.C. Sections 1* and *2*) for engaging in an unlawful conspiracy in restraint of trade and for endeavoring to monopolize the marketing of milk in the particular southwestern area of Pennsylvania involved. The third count of the complaint, urged under the pendent jurisdiction of the district court, was for unlawfully interfering with plaintiff's relations with its customers. The case was heard on the merits of all three of plaintiff's charges on June 14 and 22, 1966. The three counts were sustained by the trial judge. A decree was issued which permanently enjoined the defendants.

> "* * * from inducing, or attempting to induce, directly or indirectly, any present or potential customer of plaintiff to refuse to purchase products from plaintiff and, in connection therewith, from picketing or demonstrating, or threatening to picket or demonstrate, before or about any retail store in and around Western Pennsylvania, or in any other place **[**2]** which is, or may become, a purchaser of the bottled milk or dairy products of plaintiff."

Appellee buys raw milk, then processes, bottles and sells it to retail stores. The milk comes from Western Pennsylvania farms, is handled at appellee's receiving plants in Pennsylvania and Ohio and sold as bottled milk and other dairy products in Pennsylvania, Ohio and West Virginia. Plaintiff's milk supplier during the critical period was Dairymen's Co-Operative Sales Association (DCSA). Plaintiff's **[*791]** president, Thomas P. Otto, as a witness, testified that there are in the neighborhood of 4,000 members of the DCSA with approximately 700 of these having furnished milk to plaintiff. Defendant-appellant United Dairy Farmers Cooperative Association (Association) is an incorporated association under the laws of Pennsylvania. Defendant United Dairy Farmers (UDF) admittedly was an unincorporated association. Defendant-appellant Hayes was sued individually and is designated in the complaint as currently president of the Association and of UDF. He admits being president of the Association. Defendants-appellants Smouse, Piper, Yagla and Babiarz were all sued as individuals and were **[**3]** stated to be currently respectively Vice President, Treasurer, Secretary and Assistant Secretary of the Association and UDF. An answer was filed on behalf of all defendants. The individual defendants admitted they were officers of the Association. They denied they were then officers of UDF. The trial court found as a fact that the individual defendants are officers of said organization.

Plaintiff Otto Milk Company sought a permanent injunction against the defendants from inducing or attempting to induce customers of plaintiff to refuse to purchase products from plaintiff and in connection therewith, from picketing or demonstrating before any retail store which was a purchaser of plaintiff's products. Defendants agreed voluntarily to stop the complained of conduct pending the outcome of this case.

So that the entire situation appears in its true perspective it is necessary to set out at some length highlights of the hearing testimony. As stated the president of plaintiff company was a witness. He said that on April 29, 1966 at the last contact he had with defendant Hayes the latter "asked that we discontinue the purchase of our milk supplies from the Dairymen's Cooperative Sales **[**4]** Association and buy the Class I needs from the United Dairy Farmers. He also at that time indicated that he couldn't be responsible for what might happen if we did not do so." Otto said that by May 26, 1966 "in various areas, pickets appeared before the stores of our very good customers." With reference to an article in the Pittsburgh Post Gazette titled "Dairymen to picket Otto outlets" in which defendant Hayes was purportedly quoted (Pltf's Ex. 2) the latter was called to the witness stand by the plaintiff. He was asked how many members the UDFCA had. He said that the last tally made probably two months previously, showed in the neighborhood of 600 members. He stated they were taking in new members all the time. After some back and forth he was asked "All right now, I will get back to you later, sir, but are we agreed that you did tell the reporter from the Pittsburgh Post Gazette that you were going to tell your story and 'this', meaning walking around with cards or signs was the only way to do it? A. I didn't say the only way, I said this was a way that we would inform the public." Hayes, shown a sign by his lawyer, identified it as "a sign that our members was carrying, * * *. **[**5]** " He agreed with his attorney that it was the typical sign that was carried by the persons who were telling their story. A little later plaintiff's attorney referring to the same sign asked Hayes "Incidentally on the back, it says 'UDF and DSCA'. What's that?" Hayes answered saying "This is an old sign." and went on to explain that they "just turned it over and used the side that there was nothing printed on it."

Otto, returning to the stand, stated that his company since that May had been obtaining all their dairy products from Western Pennsylvania farms. A letter from the Pennsylvania Milk Control Commission to plaintiff company advised "that the audit recently completed by our auditors reveals that your company purchased its entire milk supply for the month of May, 1966 from 740 Pennsylvania producers." The witness testified that because of the pickets the numbers of stores that discontinued the Otto product totaled a weekly purchase from Otto of some $3,670. In addition leaflets or pamphlets **[*792]** which the defense attorney said were printed by UDFCA were distributed by persons wearing the alluded to signs and walking up and down in front of stores belonging to Otto customers. **[**6]** Hayes, as a witness, said United Dairy Farmers paid for the printing and that "*it was written back when we negotiated the contract with Beverly Farms*." (Emphasis supplied). The leaflet or pamphlet was marked in evidence as plaintiff's exhibit 5. It was read into the record as follows:

> "A. The heading in bold type, 'Help your local farmer help you. When you buy milk today, please buy Beverly Farms *United Dairy Farmers milk*. When you do this you are actually helping your local farmers stay in business and you are getting better milk. The only carton of milk guaranteed to have local farmers' milk in it, is the one which has the black "United Dairy Farmers" handle. We local farmers need your help and support. When you buy Beverly Farms United Dairy Farmers milk you help us help you keep the price down. If your dealer does not have the milk with the United Dairy Farmers label from Beverly Farms -- ask him for it. Thanks and God bless you for helping us stay in business to better serve you and your children. *United Dairy Farmers Cooperative Association*.'" (Emphasis supplied).

Otto denied that Beverly milk was better than his. He was asked one other way customers **[**7]** could be sure of obtaining local milk and answered. "They can buy it from Otto Milk and they can buy from other dairies." Otto went on to say that their customers had been reporting to them that they had been asked and in some cases demanding that they take Otto milk off sale. "In addition to this," he said, "the good will of the Otto Milk Company is definitely in jeopardy when our customers feel that when they handle our product, which is all from Pennsylvania and all from Western Pennsylvania and all paid for at the Pennsylvania Milk Control prices, they are incurring the wrath of a group of producers, farmers." Plaintiff's ex. 6 in evidence was a statement over Radio Station KQV, June 10, 1966 by Mr. MacIlvane one of the two attorneys who tried this suit on behalf of defendants. It was read into the record by the witness. It appears in Footnote. [1] It flatly accused the Pennsylvania Milk Control Commission of "approving the conniving and carrying-ons between Otto and the DCSA to water down the price the farmer actually receives for his milk."

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[1] " THE STATEMENT OF JOHN MACILVANE FOR *U.D.F.*

KQV -- June 10, 1966

The fact that the Pennsylvania Milk Control Commission approves of the audit (ah) of the Otto books means nothing. It only means that they are (ah) approving the conniving and carrying-ons between Otto and the DCSA to water down the (ah) price the farmers actually receives for his milk. Now the facts are that the farmer himself he gets his milk checked at at end of the month only receives eight (8) cents a quart on the average. Now, (ah) we can produce literally hundreds of farmers -- and, aw I would say, farmers that are also shipping to Otto itself -- where their checks will show that they only get eight (8) cents when they put, when they put it in their pockets. Now what happens to the, to the 12.47 cents that Otto says they pay to the DCSA we don't know." (Emphasis supplied).

[8]** Mr. DiGuglielmo, a storekeeper, testified he had handled Otto products over two years, since he had owned the store. On June 1st a man and a woman came to his store, told him they were from United Farmers Dairy Association and that if he wouldn't quit handling the Otto product, they would put a picket line at his doors. They told him they would allow him to get rid of his stock and would be back to check. He answered "O.K. I would not,". He then talked to the Otto company and, as he testified, "I told them what happened so I told them I didn't want their drivers to stop until this thing was settled." He has not had any Otto products since that time.

Otto, recalled, testified that twenty-three stores had turned out their Otto **[*793]** milk in the last three weeks and he named them all.

Mr. Marcinek, another storekeeper, told of being visited on May 31, 1966 by four ladies who said they represented United Dairies and United Dairy Farmers. They told him if he didn't take Otto milk out of the case, they would demonstrate in front of his store. They admitted Otto milk was paying the full price but said they were not getting it. Marcinek refused and stated that they picketed in **[**9]** front of the store with a card that had the name "United Dairy Farmers" printed on top of it. The pickets were later increased from the four ladies to around twenty-two people. This was a store in an industrial section, a strong union labor center. Marcinek said he lost business because of the picketing. In addition, an attempt was made by one of the pickets to persuade a person delivering non related merchandise to the store, not to make the delivery, as unfair to union labor.

Hayes, recalled, under cross-examination for the plaintiff, admitted that possibly all Ott's milk in the immediately preceding month of May came from Pennsylvania. Later he said that he never told the newspaper reporter above referred to "that Otto was buying milk out of the state." He also said "At the present time, I would say that this is correct, that they are buying all their milk in Pennsylvania." He agreed that the Otto Milk Company pays the applicable Pennsylvania prices.

Louis E. Milks, Jr., a driver salesman for Otto, on May 25, 1966 in calling on a Sligo Market customer found eight to ten pickets walking in a tight little circle in front of the store. They carried signs saying Otto was unfair **[**10]** to the farmers. The signs at least had the letters "UDF". Shortly after that the market owner left a note for the witness' relief driver that due to circumstances beyond his control he was going to discontinue Otto milk at the present time. That market had been a customer of Otto for at least three years. After leaving the above noted market, Milks visited another Sligo store right up the street from the first one. Coming out of the second store he saw that his gas cap was missing from his car. The pickets from the first store had followed him to the second place. Going on to the town of Clarion to the A & P store there, he found men pickets in front of the premises with the same sort of signs having UDF on them. He left less than half his normal delivery at that store. The pickets told him that when they got Otto signed up they would go after another dairy. On his next trip to that store he found that all Otto milk had been removed from the service store and that there was nothing in the dairy case. At the supermarket in Clarion, the witness "had to take all the milk out * * *." His ordinary sales to that store ran $400 to $450 a week. He made no sales at all there that day. His sales **[**11]** during the picketing declined around a thousand dollars a week.

Hayes again on the stand for cross-examination was questioned as to the United Dairy Farmers. He was asked "Well, did it exist in *April* (Mr. Simmons, attorney for defense) Which year, sir? (Plaintiff's attorney) Of *1966* I think this is. A. (Hayes) I couldn't be correct about this, *but I think it had*." (Emphasis supplied). Asked "And you were president of United Dairy Farmers also, weren't you? A. I was." Confronted with his testimony of March 18, 1966 before the Milk Control Commission he admitted that he had stated to the Commission "We have 2,000 people that have signed membership cards to be members of United Dairy Farmers. I would say they are United Dairy Farmers, yes, sir." Answering here he stated "Well, these are cards that were signed as United Dairy Farmers, yes. Q. Not the co-op? A. We didn't have the co-op yet." Asked "All right, in March you had 2,000. Today how many members do you have? A. I said the last count I had was something over 600." Asked, "I am trying to find out where are those 2,000 people today, in what organization? A. *Well, I would say there's some of them that's in United* **[**12]** *Dairy Farmers. Some of them* ***[*794]*** *that has not yet joined United Dairy Farmers* co-op." (Emphasis supplied).

With regard to the use of the word "pickets" and Hayes' knowledge of the persons who walked in front of the various stores he was asked and answered as follows:

"Q. Who is your picket captain?
A. There's picket captains in different areas.
Q. Tell me who they are.
A. I don't know them.
Q. Tell me the areas.
A. The county officers of each county can probably know the picket captains. As far as myself, I don't pick them.
Q. Who picks the picket captains?
A. Membership theirself.
Q. Who picks them?
A. Membership.
Q. Well, do you know any picket captains?
A. Offhand no. I don't keep tab on any of them.
Q. You don't know the names of a single picket captain?
A. No, I have enough to do without worrying about them.
Q. Do you know the name of any person who has picketed?
A. I would know quite a few, yes."

Rudolph Svrcek, an Otto driver salesman, was the next witness. He has had eighteen years experience as such salesman. He serves several Western Pennsylvania towns. On May 31, 1966 he saw pickets outside an **[**13]** Otto delivery store in Browneville. The next day the store authority made him buy back his Otto milk with the store refusing any more deliveries of it. He was shown the sign in evidence about Otto milk with the UDF initials on the back thereof. He said it was similar in all respects to signs the pickets had except that the language on the latter about not boycotting or picketing Otto was in smaller letters. At another store the next day a woman whom he had seen picketing came in and told the owner "You could sell any milk except Otto." Svrcek had to take his milk out of the store. He specifically stated that he saw that woman the same afternoon carrying a sign similar to the one introduced into evidence by the defendants. In the first talk he had with the woman she "made the statement that they would upset the Otto trucks." She favored this "to hurry up the situation." The witness added that the woman told the above mentioned storekeeper, "We don't want you to handle Otto milk." He said that because of the pickets he was unable to serve four of his stops and named them. This meant his route was down close to a $1,000 a week.

John Martin, secretary and controller of the plaintiff, **[**14]** was a witness. He said that for the last several years plaintiff had averaged $644,000 paid for plastic milk containers to out of state manufacturers; that plaintiff is starting to make them itself in Pittsburgh; that its projected out of state purchase of plastic for these during the next year is a quarter of a million dollars. Containers for its other milk products are supplied from named sources in New Jersey, Ohio and Michigan. Otto's average purchases of these amounted to $135,000. The milk cases come from Massachusetts. These average per year, $18,000. Other products, fruit flavoring and sugar, are obtained from stated companies in Michigan, Illinois, New York and Ohio. These total to $258,000 worth a year. Replacements for vehicle parts, etc., are obtained from Detroit, Michigan. The witness said that during the picketing, thirty of the Otto customer stores completely discontinued Otto products; that the weekly company loss of sales from this was $3,677; that the total reduction in route sales per week amounted to $6,700. Since the activities complained of stopped, the sales came back up. He affirmatively stated that if the conduct continued and sales declined they would have **[**15]** to reduce their purchases from out of state.

Jackson Dixon was the concluding witness for the plaintiff. He is supervisor for the Great Atlantic & Pacific Tea **[*795]** Company of fourteen A & P stores in Western Pennsylvania. He had personal knowledge of the picketing of his stores in the latter part of May or early June, 1966. He said 85 per cent of his store items come from outside Pennsylvania. The annual A & P purchases for his stores run into millions of dollars. The picketing of those stores did have some effect on their sales. The A & P continued to sell Otto milk and that action had a decreasing effect on their overall sales.

Hayes and Harry W. Wolfgang comprised the defense witnesses. The former said that they used the name United Dairy Farmers "until we got the co-op." He attempted no explanation of his earlier statement that some of his group were still using the name United Dairy Farmers. Hayes indicated very strongly that he did not want Otto to buy milk through the Dairymen's Co-Operative Sales Association but to buy direct from these farmers. He was asked on cross-examination "why don't you have your people go around in front of the stores that handle the milk **[**16]** that comes from Ohio, with these signs on it instead of Mr. Otto's customers." He answered "Well, we can only go to certain stores right now. We only have so many people." He was asked on cross-examination "Wouldn't it be helpful, most helpful, if everybody only purchased Pennsylvania milk at Pennsylvania prices, all dairies? A. I would say this would be helpful also. Q. It would be very helpful wouldn't it? And Mr. Otto now does that? A. That's correct. Q. That's all."

Mr. Wolfgang said he was a milk producer, a member of both DCSA and UDFCA. He was asked on cross-examination "Now you are a shipper to Otto, which has a high class I utilization. If Otto dealt directly with you, what would happen to the member farmer producer of the DCSA who ships to somebody, dairy that has only a 35 per cent Class I utilization as opposed to Otto's about 60 per cent? A. I don't think that would happen in Western Pennsylvania. The Ohio milk blends us down. Q. *So the answer is buy Pennsylvania milk? A. Yes, definitely*." (Emphasis supplied).

Plaintiff had four affidavits of other storekeepers marked in evidence. These had been for use on its motion for preliminary injunction. After that **[**17]** proceeding was telescoped into a final hearing on the merits under the stipulation of the parties, plaintiff introduced the said affidavits on the theory that they were properly a part of the full proceedings before the court. The court accepted them over the objection of defendants. Plaintiff argues forcibly that but for the stipulation converting the initial proceeding for preliminary injunction into final hearing, it would have produced the affiants in court as witnesses at the final hearing. The affidavits are cumulative of the testimony presented on behalf of the plaintiff. We see no need of adding the question of their validity to the issues before us in this appeal. We therefore have not considered them and express no opinion on that problem at this time.

No pretension is made that the above testimony has been tightly catalogued. However, it does present a cohesive, clear picture of the purposes and actions of the defendants which brought about the situation in which plaintiff found itself in June of 1966. None of plaintiff's evidence was validly contradicted, indeed little if any attempt was so made on the part of the defense. In large part on appellants' side the hearing **[**18]** was devoted to the shotgun argument efforts for the defense to the effect that assuming what was said and offered in evidence by the plaintiff was true, the latter had no right to be in court on any of its grievances.

The defendants-appellants put forward as a primary contention that there was not sufficient evidence of them having violated the Sherman Act by engaging in an unlawful conspiracy in restraint of trade. They seem to be quite content to base their position that there was no conspiracy at all, on the testimony of the defendant Hayes. They say Hayes denied there was such an unincorporated association as United Dairy Farmers and that he said it ceased to exist legally on **[*796]** November 5, 1965. They fail to mention that United Dairy Farmers, sued as a defendant, has been and still is represented in this litigation by counsel; that there was never any motion to strike UDF as a defendant; that according to Hayes, the 2,000 farmers, signed up in March 1966, were so signed as members of the UDF and not the co-op. Hayes himself under oath then said as to March 1966 "We didn't have the co-op yet." The above quoted record shows he thought the UDF was in existence in April **[**19]** 1966. He concluded that sequence of his testimony by answering in response to counsel's query as to where the 2,000 UDF people are today, "Well I would say there's some of them that's in United Dairy Farmers. Some of them that has not yet joined United Dairy Farmers co-op." This evidence from the president of UDF and actually most of the other testimony bearing on UDF in the record make it plain that UDF down to and including trial time was an existing organization sharing in the concerted activity against Otto. And it is plain that the pickets or marchers carrying UDF signs do indicate the participation in that movement by that group. Cf. *William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738, 743-744* (3 Cir. 1945), cert. den. *334 U.S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742 (1945)*. The evidence of record concerning UDF being a live group during the critical period which, with the Association, Hayes and the other individuals who were officers of both, marched in front of the various Otto West Pennsylvania customer stores carrying signs bearing the insignia of the two organizations and statements that "Otto Milk

Company refuses to pay fair prices for **[**20]** milk", "* * * refuses to pay fair prices to farmers", "* * * unfair to the farmer", was believed by the trial judge who so found as a fact. Among other items fully justified by the evidence included in the Findings of Fact were that the pickets of the defendants UDF and the Association advised the store people they would leave if the latter stopped selling Otto milk and that they tried to have the stores substitute Beverly Farms' products for Otto's. It will be remembered that Beverly Farms, a competitor of Otto, was the company that had a contract with UDF which Hayes definitely implied at least also related to the Association. It will be remembered too that the pickets distributed the leaflets put out by UDF urging the purchase of Beverly milk.

Appellant Association contends vigorously that it is an agricultural cooperative association within the Capper-Volstead Act, *Section 1*, *7 U.S.C. Section 291*. There is no dispute on this point. In that genuine status it of course is not in violation of *Section 1* of the Sherman Act. However, based on sufficient evidence which the trial court accepted as credible, the Association was found to have conspired with UDF (which **[**21]** was not protected by the Capper-Volstead Act) and Hayes and the other officers of UDF in express violation of *Section 1* of the Sherman Act. Under the evidence, the trial judge rightly refused to go along with the defendants' assertion that their conceded movement against Otto was simply that of one business entity. Defendants' fundamental theory, all of its argument, all of its cited decisional law is founded on the false premise that the UDF and its president Hayes in that capacity were not involved in palpably wrongful acts and conduct against plaintiff and therefore there was no conspiracy. Appellants finally suggest on this conspiracy proposition that if this Court finds that UDF exists and assuming all plaintiff's evidence to be true, the defendants are in law a single entity and there is no proof of conspiracy with another person or entity to substantially restrain trade. They propose in support of this, *Isaly Dairy Co. of Pittsburgh v. United Dairy Farmers, 250 F. Supp. 99 (W.D.Pa.1966)*. As the trial judge here found, "the facts in the Isaly case are entirely different from the facts in this case." There in what was originally a state litigation, the defendants **[**22]** were the UDF and Hayes, Yagla and Elkin individually and as officers of UDF. In Isaly, it was the plaintiff's plant which was picketed as **[*797]** agreed to by the defense attorney before us who represented the defendants in Isaly. There was no picketing of innocent third parties in that suit or any of the intimidation and pressure we have in this litigation. The citation of the latter by appellants is of some passing interest only because it sharply shows the there confessedly independent entity of UDF, Hayes and its other officers. See also Case-*Swayne Company, Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621*, opinion filed December 18, 1967.

The trial judge found as facts that the pickets were associated with and that what they did was authorized by the defendants, that as a result plaintiff suffered business losses of some $3600. a week, that those losses will continue if defendants are not prohibited from those practices. Appellee strongly stresses that the agreements forced upon the Otto storekeepers by the defendants were illegal under the Sherman Act, that by them the storekeepers became coerced coconspirators against appellee. **[**23]** Under the facts before us we think this argument sound. The whole integrated course of unlawful conduct directly brought about substantial loss of trade to Otto. The storekeepers by means of defendants' threats and pressures participated in the illegal scheme against Otto. Of itself this was a conspiracy under the *Sherman Act. Flintkote Co. v. Lysfjord, 246 F.2d 368, 374-375* (9 Cir. 1957), cert. den. *355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1957)*. The picketing in this appeal was not, as defendant Hayes continually proclaimed at the hearing, to tell defendants' story. The testimony reveals that it was affirmatively an attempt to stop Otto sales in the Western Pennsylvania milk products market. It was a raw endeavor on the part of defendants to monopolize that market by forcing Otto out of its retail connections because it would not bow to the defendants' demands, leave its distributor Dairymen's Co-Operative Sales Association and function under the defendants' groups. That tactic illustrated defendants' ultimate goal. As announced callously by defendants and above quoted, after they harassed plaintiff into submission they intended moving along to the **[**24]** next processor, with the unmistakable objective, found by the trial judge, of destroying their major competitor, Dairymen's Co-Operative Sales Association and taking over the Western Pennsylvania milk products field. *United States v. Addyston Pipe & Steel Co., 85 F. 271, 46 L.R.A. 122* (6 Cir. 1898), affd. *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)*; *Northern Pacific Ry. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Even the boycott against Otto standing alone was wrong as could be. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *Evening News Publishing Co. v. Allied Newspaper Carriers, 263 F.2d 715* (3 Cir. 1959), cert. den. *360 U.S. 929, 79 S. Ct. 1449, 3 L. Ed. 2d 1544 (1959)*; *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners, 93 F.2d 714* (3 Cir. 1937).

Appellants dispose of the serious question of their acts substantially affecting interstate commerce by saying "at no place has the Plaintiff shown that Defendants' acts affect interstate commerce in any substantial manner." The District Court **[**25]** found that "Defendants' activities if continued would have an effect on interstate commerce which would not be insubstantial." It further held that in the picketing retail grocery dealers and asking them to remove Otto's products from their stores, defendants have engaged in an operation amounting to a boycott of Otto and DCSA, designed to restrain and monopolize interstate commerce. There was sufficient proof to support this in the above quoted testimony of the Great Atlantic and Pacific Tea Company executive, Mr. Dixon and in the concise evidence of the Otto controller, Mr. Martin, above outlined.

We think that defendants interfered directly with the flow of interstate commerce which need not be in substantial degree. *United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*; *Apex Hosiery Co. v.* ***[*798]*** *Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*, and indirectly by intrastate restraint affecting interstate commerce to a degree not "insignificant or insubstantial". *International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*. In this connection it should **[**26]** be additionally noted that the defendants drive against DCSA could not help but affect interstate commerce as that Association serviced Ohio milk farmers according to defense witnesses Hayes and Wolfgang. See also the very late United States Supreme Court decision, *Burke et al. v. Ford et al., 389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554* (December 11, 1967).

Taking up the important element of pendent jurisdiction, it is uncontroverted that if the federal questions in this litigation are not plainly wanting in substance, the District Court had jurisdiction of the cause of action set out in the third count of the complaint. That alleged that "The deliberate, malicious and wanton acts of the defendants were intended to and in fact did tortiously and without privilege, induce retail stores in the Western Pennsylvania area to discontinue their long standing relationships with Otto, the existence of which was well known to the defendants." Defendants would eliminate this cause by their blanket statement that there is no substance at all to the Sherman Act claims. Under Count 1, the conspiracy count, defendants simply protest that they were a single entity. Under *Section* ***[**27]*** *2* of the Act, the second count, defendants repeat they were all a legal entity and say there is no evidence that they monopolized the milk market in the southwestern Pennsylvania area. As to this latter defense, it might be well to point out that ***HN1***[] the Act does not require actual monopoly of the territory sought and that what happened with respect to this third count claim was a deliberate, organized, determined maneuver to obtain a milk products monopoly in the particular territory. That was directly in violation of *Section 2* of the *Sherman Act. Maryland and Virginia Milk Producers Assn v. United States, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960)*; *North Texas Producers Assn. v. Metzger Dairies, 348 F.2d 189* (5 Cir. 1965, rehearing denied 1965).

The trial judge found as a fact that "The purpose of defendants' activities was to induce the retail store operators to agree to stop handling Otto's products and, in many instances it was successful. The pickets not only wanted to tell their story, but they also wanted to stop customers from shopping at the stores **[**28]** and, in turn, stop the stores from dealing with Otto. The activities of defendants interfered with, and if not enjoined would continue to interfere with, the advantageous business relationship between Otto and its customers." He held that "The activities of defendants constitute a tortious interference with plaintiff's advantageous business relationship between Otto and its customers." He correctly concluded that conduct to be contrary to the pertinent Pennsylvania law. *Glazer v. Chandler, 414 Pa. 304, 200 A.2d 416 (1964)*; *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 325 F.2d 2, 13-14* (3 Cir. 1963). See also *Hurn v. Oursler, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933)*; *United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*; *Taussig v. Wellington Fund, Inc., 313 F.2d 472* (3 Cir. 1963). We must agree completely with the said factual findings and the conclusion of the District Judge.

Finally, appellants assert that their actions can be justified "as an exercise of freedom of speech." The district court found on substantial evidence that the defendants **[**29]** had violated the Sherman ***antitrust law*** by forcing the innocent storekeepers to boycott Otto's milk products and by intending as they did, after finishing with Otto, to continue in like fashion with the other processors and thus force its competitor distributor (DCSA) out of the Western Pennsylvania market. *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949)* gives us a totally comparable guide on this. There dealing with a violation **[*799]** of Missouri law for just such threats to retailers as confront us in the defendants' offenses against the Federal ***Antitrust Law*** the Court said, pp. 497-498, *69 S. Ct. p. 688*:

> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See Thornhill v. [State of] *Alabama, 310 U.S. 88, 102 [60 S. Ct. 736, 744, 84 L. Ed. 1093,]* and Allen Bradley Co. v. [Local] *Union, 325 U.S. 797, 807, 89 L. Ed. 1939, 65 S. Ct. 1533*, note 12, [*325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939]*. **[**30]** But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities -- their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing -- constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.
>
> "It rarely has been suggested that ***HN2***[] the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases **[**31]** relied on by appellants calls for a different holding."

Appellants under the guise of peaceful picketing have been found to have been transgressing *Sections 1* and *2* of the Federal ***Antitrust law***. The Court below determined that constitutional protection does not reach Sherman Act offenders. The contrary is not here urged. We find no merit in the last point of appellants.

At the time the plaintiff's motion for preliminary injunction was heard, the plaintiff agreed to waive its claim for damages and counsel fees in consideration of the defendants agreeing that the hearing and the record thereof be considered as the final hearing and record on the permanent injunction sought.

The judgment of the District Court will be affirmed.

End of Document

Vornado, Inc. v. Corning Glass Works

United States Court of Appeals for the Third Circuit

January 19, 1968, Filed

No. 16282

Reporter
388 F.2d 117 *; 1968 U.S. App. LEXIS 8342 **; 1968 Trade Cas. (CCH) P72,344

Vornado, Inc. v. Corning Glass Works, Isaac Lehrhoff t/a I. Lehrhoff & Co., and H. Schultz & Sons

Core Terms

fair trade, stamp, exemption, trading stamp, retailers, consumer, redemption, merchandise, prices, retail store, fair trader, centers, dealers, abandoned, antitrust, products, sales

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

The policy of the New Jersey Fair Trade Act, like that of other fair trade acts, is to prevent a destruction of the producer's good will, which is often established at great cost, it appearing that this good will and integrity of the product is best preserved in the eyes of the public by regulating the price at which the public can buy the product. The act introduced into the law the concept that the owner of a trade-marked article retained an interest in his commodity after he parted with ownership and that he was therefore entitled to protect his good will by preventing the resale of his product below a fixed minimum price.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

The New Jersey courts have held that a company maintaining a fair trade program may establish exemptions to those programs, provided that such exemptions are reasonable and have a certain or well-defined meaning. There must be an accommodation of the interests of the public, those of the businessmen subject to the fair trade enforcement, and the interests of the fair trader himself.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

HN3[] **Public Enforcement, State Civil Actions**

A fair trader who uses his own fair traded products either alone or with non-fair traded items in promotional combination packages, abandons his right to fix prices . The New Jersey courts have held that under such circumstances the fair trader has indicated abandonment of his claim to protect the integrity of such fair trade items because of potential injury to retailers.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

New Jersey courts have held it to be no defense in a fair trade enforcement suit that the fair trader does not sell to all persons in the same class.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

New Jersey permits a fair trader to exempt some dealers from a price maintenance program if such exemption is consistent with the policy of the fair trade statute and not inequitable to those who become subject to the program.

Judges: [1]** Biggs, Freedman and Seitz, Circuit Judges.

Opinion by: BIGGS

Opinion

[*119] Opinion of the Court

BIGGS, Circuit Judge:

The plaintiff-appellant, Vornado, Inc., has appealed from a judgment dismissing a complaint which alleged in substance that a resale price maintenance agreement entered into by the defendant-appellee, Corning Glass Works, with the defendant-appellees, the Lehroffs and with H. Schultz & Sons to enforce Corning's fair trade program constitutes a violation of the antitrust laws of the United States. An appeal also has been taken by Vornado from a judgment entered upon Corning's counterclaim restraining Vornado from violating the fair trade agreement referred to, made, as we have said, by Corning with Vornado. Jurisdiction is based on *15 U.S.C. § 15*.

The prime issues presented are whether Corning forfeited its right to enforce its fair trade program against Vornado because of exemptions Corning has given to trading stamp companies, and further if Corning's exemptions to trading stamp companies be permitted, whether Vornado's own trading stamp program, referred to more particularly hereinafter, must also be deemed to be exempt.

The facts **[**2]** were stipulated and are disclosed by Judge Wortendyke in his exhaustive opinion, *255 F. Supp. 216 (D.N.J. 1966)*. We state here only the facts which we deem necessary to decide the issues referred to. Corning is the manufacturer of a prestige line of ovenware and cookware. These items bear Corning's trademark and, as indicated, are subject to fair trade contracts that have been entered into by Corning in every State where such contracts are permitted by law. Corning has over 3,000 such contracts in New Jersey. Corning publishes its fair trade prices and employs personnel whose duty it is to enforce Corning's fair trade policies through shopping excursions and the warning of price cutters. During the period November 1957 to June 1965, Corning obtained 18 permanent injunctions in (New Jersey against violators of its fair trade prices.

Corning sells its products to wholesale-distributors such as Schultz and Lehroff who have agreed to resell those products at the fair trade prices established in wholesale fair trade contracts and to sell only to retailers who are franchised Corning dealers; *i.e.*, to those retailers who have signed fair trade agreements with Corning. **[**3]** Such agreements are lawful in New Jersey. N.J.S.A. 56:4-5. Vornado signed such an agreement with Corning and proceeded to purchase Corning Ware from Schultz and Lehroff.

Corning Ware is also sold by Corning to trading stamp companies. Corning's total sales to New Jersey dealers in 1964 were $1,874,000. Of these the sales to trading stamp companies totalled $185,000. These trading stamp companies have redemption centers throughout New Jersey, some in the vicinity of Vornado's retail stores known as "Two Guys from Harrison". The trading stamp companies sell their stamps to retail merchants who customarily give one stamp for each 10 cents of the price of the article purchased. Between $120 and $150's worth of merchandise is required to fill one stamp book, the difference being dependent on which trading company's stamps are employed. At times the retail stores will offer bonus stamps with the purchase of a particular item. Merchandise at a redemption center may only be obtained by presenting completed books for the desired item. Aside from monies used for the collection of taxes, the redemption centers will not accept cash to supplement a deficiency in the number of books **[**4]** **[*120]** needed. A Corning Ware percolator for example requires 2 4/5 books of one stamp company or over $400 worth of purchases from the retail store issuing the stamps of that stamp company. Corning does not require the trading stamp companies to sign fair trade agreements, albeit Corning suggests values to be put on the stamps used to acquire Corning Ware but the trading stamp companies have not been required to, nor do they, abide by Corning's suggested valuations.

Vornado operates a program whereby its trading stamps are issued on food sales and also are redeemable in merchandise on sale at its retail stores. Unlike other trading stamp companies, Vornado advertises that a completed book containing its stamps is worth $2.25. [1]

[5]** In respect to its own trading stamp books, in October of 1962, Vornado commenced a merchandising program for the sale of Corning products which resulted in sales at less than the fair trade prices of the merchandise. Vornado's advertisements stated, to employ an example, that "Your books [are] worth up to $14.50 on these Corning Ware One Book Specials." Below this legend there would be shown a "Corning Ware Homemaker Set", list price $29.95 available at "Two Guys" for $15.75 plus one book. [2] On such sales Vornado often made little or no profit and even took losses, the articles sold being used as "loss leaders". It is stipulated that trading stamp companies never assign such fluctuating values to their stamp books. As noted, the trading stamp companies never permit a combination cash-stamp book purchase.

Corning, upon learning of Vornado's merchandising campaign, sent a telegram to Vornado demanding that it stop such merchandising **[**6]** campaigns. There were some negotiations but no agreement was reached. Corning then terminated Vornado's franchise and so informed its wholesalers-distributors who in turn ceased deliveries to Vornado. Vornado brought the suit at bar alleging, as we have said, violations of the antitrust laws, claiming treble damages and seeking injunctive relief. Corning and the other named defendants answered denying any ***antitrust law*** violations. Corning pleaded its fair trade agreement with Vornado and sought damages for breach of contract and injunctive relief.

The trial judge stated: "The provisions of the Fair Trade Agreements, between Corning and Vornado on the one hand, and Corning and each of its distributors on the other, were in all respects in conformity with the provisions of N.J.S.A. 56:4-5(1) and, therefore, within the exemptive proviso set forth in *15 U.S.C. § 1*." *255 F. Supp. at 224*. This

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[1] The value assigned to books issued by the trading stamp companies is considered a trade secret. Because of this it is unlikely that one could determine a valuation for the stamps consistent with fair trade prices set by Corning. Such difficulty seems to be inherent in the nature of trading stamp operations.

[2] See Exhibit J 12, Appendix of Respondent Corning Glass Works reproduced.

finding by the court below is clearly correct. Thus, as hereinbefore stated the only issues before us are, first, whether Corning Glass, by exempting trading stamp dealers from its fair trade program, forfeited its right to maintain that program and thereby **[**7]** abandoned its right to resort to judicial process to enforce its fair trade agreements; and, second, if that exemption be permitted, whether Corning must apply that exemption to Vornado's own stamp program. [3]

Because we do not find the exemption of the trading stamp companies **[*121]** by Corning to be outside the policy of the exception to the antitrust laws granted for State Fair Trade Acts provided by the Miller-Tydings Amendment to the Sherman Anti-Trust Act, *15 U.S.C. § 1*, we need address ourselves only to the scope of permissible exemption under New Jersey law.

HN1[] The policy of the New Jersey Fair Trade Act, like that of other fair trade acts, **[**8]** is "to prevent a destruction of the producer's good will, which is often established at great cost. . .", it appearing that this good will and "integrity of the product is best preserved in the eyes of the public by regulating the price at which the public can buy the product." *Menley & James Labs., Ltd. v. Vornado, Inc., 90 N.J. Super. 404, 411, 217 A. 2d 889, 893 (1966)*. "The act introduced into the law the concept that the owner of a trade-marked article retained an interest in his commodity after he parted with ownership and that he was therefore entitled to protect his good will be preventing the resale of his product below a fixed minimum price." *Frank Fischer Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 107, 19 A. 2d 454, 456 (1941)*.

HN2[] The New Jersey courts have held that a company maintaining a fair trade program may establish exemptions to those programs, *Burroughs Wellcome & Co. v. Weissbard, 129 N.J. Eq. 563, 20 A. 2d 445 (Chan. 1941)*, aff'd, *130 N.J. Eq. 605, 23 A. 2d 396* (E. & A. 1942), provided that such exemptions are reasonable and have a "certain or well-defined meaning". *Texas Co. v. DiGaetano, 39 N.J. 120, 131, 187 A. 2d 721, 727 (1963)*. **[**9]** There must be an accommodation of the interests of the public, those of the businessmen subject to the fair trade enforcement and the interests of the fair trader himself. For example in the Texas Co. case, supra, the Supreme Court of New Jersey refused to enforce a fair trade program where the exemption granted was too ambiguous for retailers to know who was included in the exemption thereby leaving retailers to sell below fair trade prices at their peril, nearly complete discretion seemingly resting in the fair trader as to the selling prices. The Court considered that under such circumstances "Upholding the fair trade agreement with its stated exemption would not serve to advance the protection of the good will symbolized by the producer's brand or trademark, nor would it afford an appropriate measure of protection to the retailers and the public." *39 N.J. at 132, 187 A. 2d at 727*. See also *Champion Spark Plug Co. v. T.G. Stores, Inc., 356 F.2d 462* (4 Cir. 1966).

The New Jersey courts also have concluded that ***HN3***[] the fair trader has abandoned his right to fix prices by using his own fair traded products either alone or with non-fair traded items in promotional **[**10]** combination packages. The New Jersey courts have held that under such circumstances the fair trader has indicated abandonment of his claim to protect the integrity of such fair trade items because of potential injury to retailers. Gillette Co. v. Two Guys from *Harrison, Inc., 36 N.J. 342, 177 A. 2d 555 (1962)*.

In another line of decisions ***HN4***[] New Jersey courts have held it to be no defense in a fair trade enforcement suit that the fair trader does not sell to all persons in the same class. For example, in *Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 Atl. 661 (1938)*, the Court held that a fair trader could sell his items only to beauty shops and retail department stores and nontheless compel a drug store which had obtained such items in an undisclosed fashion not to sell below fair trade prices. The New Jersey Court held it to be no defense to an enforcement action that the fair trader refused to sell to drug retailers while selling to department stores.

We think that the essence of a fair trade program rests in large part on a somewhat elusive factor, viz., the status and integrity of the product in the mind of the consumer. In **[**11]** order to determine the validity of Corning's

[3] Because we hold that Corning could properly exempt trading stamp companies from enforcement of its fair trade program and enforce its program against Vornado, we do not reach and voice no opinion on the question of whether Corning would be liable to Vornado under the Sherman Act if the trading stamp companies could not properly be exempted.

exemption of trading stamp companies and its failure **[*122]** to exempt Vornado's program we must attempt to divine the effect of the exemption. We therefore turn again to the peculiar circumstances presented by the case at bar.

It seems clear that ***HN5***[] New Jersey permits a fair trader to exempt some dealers from a price maintenance program if such exemption be consistent with the policy of the fair trade statute and not inequitable to those who become subject to the program.

We conclude that it cannot be fairly said that Corning's exemption to trading stamp companies is inconsistent with the policy of fair trade. A consumer obtaining a Corning Ware item at a stamp redemption center is unlikely to consider such an acquisition a denigration of the product acquired. As stated above such a consumer has to purchase between $120 and $150 worth of merchandise at the retail store to obtain one book of stamps. It is likely that a family will have to wait three to six months before being able to obtain, for example, a Corning Ware percolator. Moreover, the consumer has little means of comparing the value of the stamps redeemed with the established **[**12]** fair trade value of Corning Ware. As we have said actual valuations are considered to be a trade secret by the stamp companies. Also, if the retailer offers bonus stamps with the purchase of a particular item the consumer may well attribute his good fortune to the item purchased at the retail store and not to the Corning Ware acquired by him perhaps some six months later. [4] We conclude that Corning's exemption of trading stamp companies is a reasonable classification and within the spirit of the New Jersey Fair Trade Act.

Since we have found that Corning has not abandoned the integrity of its items by the trading stamp company exemptions, we now must decide **[**13]** whether such an exemption is inequitable to other persons subject to the program. Vornado contends that consumers who are able to obtain Corning products at stamp redemption centers will not buy the same product at retail dealers subject to Corning's fair trade program. We think Vornado's reliance on this argument is misplaced. Vornado surely may not complain that Corning supplies retail dealers other than "Two Guys" with Corning Ware for distribution to ultimate customers. It is not enough to show that some consumers will go to stamp redemption centers and not to "Two Guys". Vornado must also demonstrate that potential customers of "Two Guys" think they can obtain Corning Ware below fair trade prices by going to stamp redemption centers. As we have stated we think that the consumer does not draw such a conclusion simply because he has saved stamps issued by the traditional trading stamp companies and employs them to purchase Corning Ware. The consumer collects his stamps and must make a choice as to what product he desires and where he will acquire it. The consumer has great difficulty in accurately judging whether he achieves a better bargain by obtaining Corning Ware rather **[**14]** than some other article at a stamp redemption center in comparison with purchasing those articles at a retail store. We must conclude that Vornado suffers no inequity by the exemption granted trading stamp companies by Corning and thus cannot succeed in claiming that Corning has forfeited its fair trade program.

Finally, Vornado contends that it is discriminatory for Corning to distinguish between stamps issued by "Two Guys" and stamps issued, for example, by Sperry & Hutchinson, a trading stamp company. In essence Vornado's contention is that although trading **[*123]** stamp exemptions may be proper and equitable they are applied discriminatorily since its own trading stamps do not receive the benefit of the exemption. There is no merit in this argument. Clearly, Vornado's stamp redemption program is unlike those developed by conventional trading stamp companies exempted by Corning. In fact, it is likely that an exemption to trading stamp programs such as Vornado's would result in an abandonment by Corning of its fair trade protection. Cf. Gillette Co. v. Two Guys from *Harrison, supra.* [5] Vornado allows mixed cash and stamp purchases. Consequently the separation **[**15]** of the

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[4] Corning includes as part of its fair trade agreements with retailers the requirement that stamps issued in connection with a sale of a Corning product shall not exceed 3% of the fair trade price of the product. This protects Corning items from being demeaned by the retailer offering large stamp bonuses in connection with a purchase of Corning Ware.

[5] We think that the result suggested, i.e., abandonment by Corning of its fair trade policy would almost necessarily result. Corning could not make an exception to Vornado's failure to preserve Corning's fair trade program and not give similar concessions to all retailers selling its products. Vornado's trading stamp program as operated by it seems to us obviously a price cutting ploy.

retail product by which one obtains the stamps and the redemption of the stamps for the fair traded item which normally preserves the integrity of that item is largely nullified. Moreover, the merchandising campaign developed by Vornado emphasizes the fair trade product whereas the bonus stamp system of the other retail stores emphasizes the retail product with which the consumer obtains the stamps and seems unconnected with the integrity of the fair trade item. It can hardly be doubted that a consumer replying to one of Vornado's advertisements is of the opinion that he is getting a lower price on Corning Ware. This goes to the heart of the fair trade protection granted manufacturers by the State of New Jersey. On the other hand, as stated before, a consumer obtaining an item at a conventional stamp redemption center is not likely to be so affected. Moreover, it is likely that in the minds of the consumers the availability of Corning Ware at the stamp redemption centers increases the value of the stamps, rather than decreases the value of Corning Ware.

[16]** From the evidence presented on the present record we must conclude that Corning has a valid fair trade program, has given a valid exemption to trading stamp companies and may enforce that program against Vornado.

Accordingly, the judgment of the court below will be affirmed in all respects.

United States v. Provident Nat'l Bank

United States District Court for the Eastern District of Pennsylvania

February 12, 1968

Civil Action No. 40032

Reporter

280 F. Supp. 1 *; 1968 U.S. Dist. LEXIS 12599 **; 1968 Trade Cas. (CCH) P72,366

United States, Plaintiff v. Provident National Bank and Central-Penn National Bank of Philadelphia, Defendants and William B. Camp, Comptroller of the Currency (Intervenor)

Core Terms

banks, merger, four-county, convenience, anticompetitive, savings, commercial bank, concentration, deposits, effects, merge, wholesale, loans, retail, largest, proposed merger, customer, compete, ratio, financial institution, national bank, dollar, loan association, total deposit, commerce, geographic, mutual, competitors, realistic, resultant

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] **Financial Institutions, Bank Mergers**

Under the Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(5)(B)*, if the anticompetitive effects of a proposed merger are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the merger is saved.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] Regulated Practices, Market Definition

There is no requirement that courts, or the Department of Justice, has to decide upon an appropriate geographic market as a preliminary step in discovering whether a merger is anticompetitive. The government need prove only that there has been a merger between two corporations engaged in commerce, and that the merger may have a substantial anticompetitive effect somewhere in the United States. It (the Department of Justice) is no longer forced to prove what constitutes the relevant economic or geographic market.

Banking Law > Bank Activities > General Overview

HN3[] Banking Law, Bank Activities

Wholesale banking is that which deals with a number of large accounts, primarily with large corporations, governmental bodies, financial institutions, and wealthy individuals, while retail banking caters to the mass needs of the general public and small business.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

HN4[] Regulated Practices, Market Definition

For antitrust purposes, determination of the local market shares of constituent banks is not a simple matter of subtracting what has been determined to be the percentage of their deposits and loans which are allocable to the national market from their total deposits and loans. Manifestly, the true local market is the total deposits and loans of all the banks located in the metropolitan area, less the aggregate of their deposits and loans which originate in the national market.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN5[] **Commercial Banks, Mergers & Consolidations**

For antitrust purposes in banking that the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Bank Creations & Reorganizations

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

HN6[] **Regulated Industries, Financial Institutions**

For purposes of antitrust analysis for a proposed bank merger, the deposit base examined must be expanded to take into account saving and loan associations and mutual savings banks. Unlike the competition for wholesale accounts, all commercial banks, plus saving and loan associations and mutual savings banks, compete for the savings dollar, and residential mortgages.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > Bank Creations & Reorganizations

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN7[] **Standards of Review, De Novo Review**

One purpose of the Clayton Act, *15 U.S.C.S. § 18*, is to arrest the trends toward concentration or monopoly, before the consumer's alternatives disappear by mergers. Potential competition must also be preserved. Therefore, it is not sufficient to prove only that the banks involved in a proposed merger do not actually compete. It must also be proven that they probably will never compete or have the potential to compete.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Bank Creations & Reorganizations

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

HN8[] **Antitrust & Trade Law, Clayton Act**

In regard to antitrust analysis involving a proposed bank merger, the purpose of the Clayton Act, *15 U.S.C.S. § 18*, and the courts in enforcing the statute, is to preserve competition between the successful and unsuccessful providers of these banking services. The choice to bank where the customer pleases must be preserved and the gradual elimination of potential or actual competitors takes away competitive options which the customer should have.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN9[] **Antitrust & Trade Law, Clayton Act**

Taken as a whole, the legislative history of the Clayton Act, *15 U.S.C.S. § 18*, illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN10[] **Antitrust Statutes, Clayton Act**

Under the Clayton Act, *15 U.S.C.S. § 18*, if a market can be characterized as oligopolistic, any merger that strengthens the oligopolistic structure must be struck down.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN11[] **Antitrust Statutes, Clayton Act**

Any merger producing a firm controlling twenty-five percent of the relevant market is presumptively bad.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN12[] Antitrust Statutes, Clayton Act

One purpose of the Clayton Act, *15 U.S.C.S. § 18*, is to arrest a trend toward concentration or a tendency toward monopoly, before the consumers' alternatives disappear through mergers. Thus, the court must not focus only on the effect of a proposed merger in the present, but must scan the horizon to see what lies ahead.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

HN13[] Antitrust & Trade Law, Clayton Act

The basic purpose of federal ***antitrust law***, including the Clayton Act, *15 U.S.C.S. § 18*, is to prevent economic concentration in the American economy by keeping a large number of small competitors in business. The only exceptions to this rule are where one of the companies is about to fail, or where two companies have to merge to save themselves from destruction by some larger and more powerful competitors.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN14[] Financial Institutions, Bank Mergers

The Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(7)(B)*, carves out a new exception or defense to anticompetitive mergers in the form of the convenience and needs test. This defense or justification is available to merging banks once it has been determined that the proposed merger would be anticompetitive as judged by normal antitrust standards.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN15[] **Financial Institutions, Bank Mergers**

Under the convenience and needs test of the Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(7)(B)*, anticompetitive mergers should be approved only in those few instances where the anticompetitive effects are overwhelmed by the more compelling needs of the community.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

HN16[] **Financial Institutions, Bank Mergers**

The most common application of the convenience and needs test under the Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(7)(B)*, and the one primarily intended by Congress, is the floundering or stagnating bank.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

HN17[] Financial Institutions, Bank Mergers

The convenience and needs test under the Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(7)(B)*, must be read restrictively. It is not a mandate for mergers between banks across the board. It merely allows bank mergers in those cases where the needs and convenience of the community are so compelling that competition will be enhanced rather than decreased by the merger. This will occur in only a very few instances.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Banking Law > Commercial Banks > Bank Expansions > General Overview

HN18[] Financial Institutions, Bank Mergers

The Bank Merger Act of 1966, *12 U.S.C.S. § 1828(c)(5)(B)*, requires that the anticompetitive effects of the proposed transaction must be clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Judges: [1]** Clary, Chief Judge

Opinion by: CLARY

Opinion

[*3] CLARY, Chief Judge:

This case involves a proposed merger between the Provident National Bank and the Central-Penn National Bank, both of the City of Philadelphia, Commonwealth of Pennsylvania. It is being challenged by the Department of Justice as being in violation of the antitrust laws of the United States. The case was tried to the Court without a jury. In making a decision in this case, the Court is faced with the dilemma so ably stated by that noted legal scholar, John H. Wigmore, the late Professor and Dean of Northwestern University School of Law, and author of "Wigmore on Evidence", that "law and justice are from time to time inevitably in conflict." [1]

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[1] This quotation is taken from an article by Professor Wigmore in the April, 1929, issue of The Journal of The American Judicature Society, reading in part as follows: "Law and justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case

[2] [*4]** The dilemma confronting the Court is that the Court firmly believes that a jury would have no difficulty in finding qualitatively that the proposed merger would be a good merger; good for the banks in that they would complement each other in both location and services; good for the community in that it would create another billion dollar bank in Philadelphia with its attendant advantages, particularly in the field of international finance; put real depth into the management of the surviving bank; generate more intense competition in the oligopolistic banking structure of Philadelphia, and might well make some improvement in the economic status of business in the Philadelphia area generally, and specifically its port facilities and operation. However, because of the quantitative (mechanical rules) approach to the question of antitrust violations declared as a policy [2] by the Supreme Court and its decisions supporting that policy, this Court is constrained, albeit reluctantly, to declare that this merger may not be consummated.

[3]** The Facts

On December 6, 1965, Provident National Bank (hereinafter Provident) and Central-Penn National Bank (hereinafter Central-Penn) filed with the Comptroller of the Currency an application to merge. Pursuant to Title *12 U.S.C. § 1828(c)(4)*, the Comptroller requested advisory reports from the other Government agencies, Federal Deposit Insurance Corporation (hereinafter F.D.I.C.) and Federal Reserve Board (hereinafter F.R.B.), and the Department of Justice (hereinafter Justice). The F.D.I.C. filed no report, but both F.R.B. and Justice reported that the merger's effect on competition would be significantly adverse and therefore should not be approved.

Prior to the Comptroller's decision on this merger, the Bank Merger Act of 1960 (hereinafter B.M.A. 1960) was amended by Congress on February 21, 1966. ***HN1***[] The amended Act (hereinafter B.M.A. 1966) created a new defense for anticompetitive mergers in that if the anticompetitive effects of the proposed merger are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the merger is saved. Title *12 U.S.C. § 1828(c)(5)(B)*. The amended **[**4]** Act also deleted the words "line of commerce" which were present in B.M.A. 1960, thus leaving open the question whether commercial banking is still to be considered as the area of effective competition. See *United States v. First City National Bank of Houston, 386 U.S. 361, 369*, f.n. 1, *18 L. Ed. 2d 151, 87 S. Ct. 1088 (1967)*.

On March 4, 1966, soon after B.M.A. 1966 was enacted into law, the Comptroller approved the proposed merger between Provident and Central-Penn. A formal decision containing the reasons for such approval followed on March 31, 1966.

Justice, on April 1, 1966, then instituted suit under Section 7 of the Clayton Act (*15 U.S.C. § 18*), alleging that the proposed merger was anticompetitive under traditional Section 7 standards and therefore should be proscribed. The Comptroller was allowed to intervene in this suit by virtue of Title *12 U.S.C. § 1828(c)(7)(D)*.

The suit was dismissed by this Court on December 29, 1966 on the basis that Justice chose to rely solely on Section 7 of the Clayton Act without regard to the new standards enunciated by B.M.A. 1966. *United States v. Provident National Bank, et al., 262 F. Supp. 397 (E.D. Pa. 1966)*.

[*5] The Supreme **[**5]** Court reversed this decision in *United States v. First City National Bank of Houston, supra.* The Court ruled that the Government's failure to rely on B.M.A. 1966 was not a fatal defect in its pleadings since anticompetitive effects of such mergers were still to be assessed by traditional antitrust criteria. The only

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under all its circumstances. . . . Law-the rule-MUST be enforced-the exact terms of the rule, justice or no justice. . . . Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. . . . That is what jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. And that flexibility could never be given by judge trial. The judge . . . must write out his opinion, declaring the law and the findings of fact. He cannot in this public record deviate one jot from those requirements. The jury, and the secrecy of the jury room, are the indispensable elements in popular justice."

[2] See Professor Handler's scholarly article "The Supreme Court and the Antitrust Laws: A Critic's Viewpoint", 1 Georgia L. Rev., 339, 1967.

effect the amended Act had on these traditional criteria was that of creating a new defense or justification to a merger in the convenience and needs test previously mentioned. *United States v. First City National Bank of Houston, supra, 386 U.S. at 363*. It also ruled that the burden of proving this new defense was upon the proponents of the merger-the banks in this instance. The case was then remanded to this Court.

Before discussing the legal questions presented by this merger, it would be wise to have the respective positions and histories of the merging banks in view.

Provident is presently the fifth largest bank in the four-county area comprising Bucks, Montgomery, Delaware, and Philadelphia counties. As of June 30, 1965, Provident controlled approximately $683,000,000 or 9% of the total assets, $398,000,000 or 9% of the total loans, $475,000,000 or 9% of the **[**6]** total IPC deposits, and 32 or 9% of the banking offices in the four-county area.

Since 1947, Provident has acquired seven banks in the four-county area. As of April 5, 1966, these acquired banks' assets constituted 58% of Provident's present asset position.

As of June 30, 1965, Central-Penn, the seventh largest commercial bank in the four-county area, controlled approximately $369,000,000 or 5% of the total assets, $210,000,000 or 5% of the total loans, $263,000,000 or 5% of the total IPC deposits, $170,000,000 or 5% of the total IPC demand deposits, and 24 or 6% of the banking offices.

Central-Penn has acquired six commercial banks in the four-county area since 1950. No less than 24% of its present asset position is attributable to these mergers and acquisitions.

These facts must be viewed in the over-all setting of commercial banking in the four-county area. In 1945, there were 115 commercial banks in the four-county area. In 1960, there were 45. In 1965, the number of commercial banks was reduced to 37.

On December 31, 1945, the five largest commercial banks held 51% of the total assets, 54% of the total loans, 52% of the total deposits, and had 15% of the total banking **[**7]** offices. In 1965, the five largest banks controlled approximately 73% of the assets, 74% of the total loans, 71% of IPC deposits, and 57% of all banking offices. Thus, there has been a substantial reduction of independent commercial banks, most of which have disappeared through the merger route. The trend is continuing as evidenced by Girard Trust Bank's recent announcement of intent to merge with Doylestown National Bank, and Continental Bank's announcement of intent to merge with Sonsitaly Bank and Trust Company. Since these acquired banks represent only a small percentage of area assets, loans, and banking offices, it may be questioned whether these mergers will be challenged by Justice.

If this merger were approved, the resultant bank would become the fourth largest bank in the four-county area, controlling approximately 14% of the total assets, loans and deposits in the four-county area, and 15% of the commercial banking offices in the four-county area. The five bank concentration ratio previously mentioned will increase from 73.1% to 77.7% in terms of assets, 73.1% to 77.8% in terms of deposits, 73.9% to 78.6% in terms of loans, and from 57% to 63.3% in terms of total offices.

[8]** With these facts in view, we shall now turn to our first level of inquiry, which is whether the proposed merger between Provident and Central-Penn is anticompetitive, when measured by traditional Clayton Section 7 standards.

Before assessing the competitive effects of this merger, however, it is necessary to delineate a geographic market **[*6]** within which to assess the impact of this merger.

The Relevant Geographic Market

The four-county area of Bucks, Montgomery, Delaware, and Philadelphia, has been proposed by the Government as the relevant "section of the country" for this case. The Government's contention is grounded on the following facts: The defendant banks may not establish branch offices in any other area. The convenience factor localizes the area of competition, at least for retail customers. The Government also introduced statistics showing that by number, 95% of Provident's total deposit accounts are within the four-county area, and 98% of Central-Penn's total deposit accounts are located within the same area. In terms of dollar volume, 82% of Provident's total deposits are within the four-county area, while Central-Penn has 88% of its dollar volume for total **[**9]** deposits within the same area. So by number and by value, the four-county area appears to be a *relevant* section of the country. This evidence indicates to us that the four-county area is the most appropriate section of the country where the effect of the merger will be direct and immediate. *United States v. Philadelphia National Bank, 374 U.S. 321, 357, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* (hereinafter PNB).

The defendant banks accede to the Government's geographic market since it is a permissible "section of the country" for purposes of B.M.A. 1966. In so acceding, the banks feel that the case of *United States v. Pabst Brewing Co., 384 U.S. 546, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)* controls. This is undoubtedly correct. ***HN2***[] In *Pabst*, the Supreme Court did away with the requirement that Courts, or the Department of Justice, had to decide upon an appropriate geographic market as a preliminary step in discovering whether a merger was anticompetitive. The Government need prove only that there has been a merger between two corporations engaged in commerce, and that the merger may have a substantial anticompetitive effect *somewhere in the United States. United States **[**10]** v. Pabst Brewing Co., supra, at 549*. It (the Department of Justice) is no longer forced to prove what constitutes *the* relevant economic or geographic market.

The Comptroller of the Currency disagrees with the assertion that the four-county area is a relevant geographic market. He contends that the Standard Metropolitan Statistical Area (SMSA), which comprises the three New Jersey counties of Gloucester, Camden, and Burlington, and the five Pennsylvania counties of Philadelphia, Delaware, Montgomery, Bucks, and Chester, is more relevant. The Comptroller states that he is not bound by the Supreme Court's ruling in *PNB*, supra, as to what constitutes the relevant geographic market on the basis that in this case, a different factual record has been developed. This is true, but the Comptroller has neglected to point to any compelling facts which would necessitate a change from the *PNB* standard. One of the mainstays of the Comptroller's argument is the Bureau of the Budget's definition of a metropolitan area as "an integrated economic and social unit with a recognized large population nucleus." (N.T. 3119). Yet, Frank A. Cisar, of the Bureau of the Budget, and Chairman of **[**11]** the Committee on Area Definitions, admitted upon cross-examination that the SMSA in itself cannot be equated with a marketing area, since no two market areas are the same. (N.T. 3127).

While it is true that many persons from the excluded counties of Chester, Burlington, Camden, and Gloucester, work and shop in the four-county area, the statistics introduced by the Comptroller proved only that the banking done in the four-county area is minimal. [3]

[*7] Therefore, we find that the four-county area is the appropriate section of the country for the purposes of *this case*. The only caveat to our finding that the four-county area is the appropriate geographic market **[**12]** is that within this geographic market, there must be a distinction made between wholesale accounts, which, in some cases, should be relegated to the national market, and retail accounts which essentially are relegated to the local community. This awareness of the so-called national market is not a new concept. The Supreme Court referred to such a market in *PNB* when it scaled down the Department of Justice's concentration figures by approximately 16% because of accounts which should have been allocated to the national, rather than the four-county market. *PNB, supra, 374 U.S. at 364*.

This problem was also in the forefront when the House was considering the amended B.M.A. In the Report which accompanied the House Bill to the Senate, the concept of a national market was placed in clear view. Under the heading "The relevant market", the House Report stated:

> "A recurrent bone of contention in the development of general ***antitrust law*** is the problem of defining the relevant market. Sometimes this is easy, as in the case of automobile manufacturers whose market is clearly

[3] A canvas of Philadelphia Saving Fund Society's accounts revealed that 2.84% by number came from the excluded counties. The reason Philadelphia Saving Fund Society was used as a sampling device was that it was the only financial institution in the four-county area which broke down its accounts on a county basis. (Intervenor's brief p. 30).

> national, or laundries whose market is clearly local. It is not so easy in the case of the larger banks, **[**13]** which serve a local market of individuals and small businesses, but which are also competing in the regional or national financial markets for the opportunity to place large loans with major corporations which are shopping the country for funds." 112 Cong.Rec. 2440 (Feb. 8, 1966).

Therefore, in finding the four-county area as the appropriate geographic market, we do so with an awareness that not all accounts found and assessed in this market are allocable to it. Some adjustment must and will be made when we discuss the effect of this dichotomy (i.e., national and local markets) under our "Anticompetitive Effects" heading.

The Relevant Product Market

Our next level of inquiry before delving into the competitive aspects of this merger is the ascertainment of the appropriate line of commerce within which this merger is to be viewed.

Justice maintains that commercial banking is still the appropriate product market in which to assess this merger's competitive effects. In essence, it relies on the Supreme Court's ruling in *PNB* where the unique cluster of products and services offered by commercial banks was held sufficiently distinctive to constitute a relevant product market. **[**14]** However, since the *PNB* decision, as stated above, B.M.A. 1960 has been amended and the phrase "line of commerce" has been deleted. *The Supreme Court, in United States v. First City National Bank of Houston, supra, at 369*, f.n. 1, expressly left open the question whether this omission was significant.

Two lower Courts have split on the significance of this omission. In *United States v. Third National Bank of Nashville, 260 F. Supp. 869, 878, n. 5 (M.D. Tenn. 1966)*, prob. juris. noted, *388 U.S. 905, 87 S. Ct. 2111, 18 L. Ed. 2d 1345 (1967)*, the lower Court noted that such an important change in established ***antitrust law*** cannot be presumed to have been made by a mere omission, and also cites the lack of any significant legislative history in support thereof. It held that commercial banking was still the appropriate "line of commerce".

Judge Zirpoli, in United States v. Crocker-Anglo National Bank, F. Supp., filed October 30, 1967, took the opposite view and ruled that a **[*8]** broader test was intended by Congress in amending B.M.A. 1960. Relying on the canons of statutory construction, and a statement by Senator Robertson in the legislative history as to the effect of the **[**15]** omission in the statutory language, the District Court in California construed a broader line of commerce which comprises all institutions competing either for the savings or investment dollar or for the extension of credit.

This Court is persuaded by Judge Zirpoli's lucid analysis of this vexing problem presently before this Court. We are convinced that Congress did intend a change to be effected by the omission. A thorough examination of the legislative history and the House Committee Report reveals that the effect of this omission was not discussed in the House, but Senator Robertson dealt with this omission on several occasions during the Senate debates.

> "The text of paragraph (B) of the new bill follows the terms of section 1 of the Sherman Act and section 7 of the Clayton Act, with the exception that the reference to 'any line of commerce' in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the **[**16]** courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger-the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger-are irrelevant and may not be considered." See Statements of Senator Robertson, 112 Cong. Rec., 2541, 2549-50, (Feb. 9, 1966).

In so broadening the line of commerce, this Court is very much aware of the uniqueness of commercial banks in that they are the only financial institutions permitted by law which can accept demand deposits and service them. It is clear from this unique function that certain other financial services necessarily follow, such as payroll and lock box services to the corporation customer. It is also evident that commercial banks are insulated for the most part from *direct* competition in the area of trust services, corporate pension funds, etc. However, the inter-relationship of all these services is not so tightly bound or localized to preclude **[**17]** meaningful and direct competition from other financial institutions within or without the four-county area.

It was admitted by Doctor Donald R. Hodgman, one of plaintiff's expert witnesses, upon cross-examination, that in the area of mortgages, loans and savings, there are other alternative, and sometimes better, sources than commercial banks, such as mutual savings banks and saving and loan associations. (N.T. 48-49).

It was also pointed out by several witnesses that the competition for the savings dollar has intensified among commercial banks, mutual savings banks and saving and loan associations in the four-county area, and the nation as a whole. This competition was evidenced particularly by the Certificate of Deposit see-saw which took place in the four-county area during the latter part of 1965 and 1966. This competition for the savings dollar is of particular significance since the deposit base of commercial banks has undergone a drastic change in recent years. In 1960, the proportion between demand and time deposits *nationally* was 70:30. Today, it is 50:50. Thus, one-half of a bank's deposits are subject to competition, not only from other commercial banks, but **[**18]** mutuals and saving and loan associations as well.

Since there is a *reasonable* interchangeability and meaningful competition for the savings dollar and mortgage loans, such competition from other financial **[*9]** institutions must be considered in order to get a true competitive picture. The factor of convenience, which predominates the retail banking business, does not alter this conclusion, since the offices of these other financial institutions are as widespread and convenient as the commercial banking offices.

In extending the line of commerce only to these financial institutions (mutuals and saving and loan associations) because they alone offer *direct* and meaningful competition to commercial banks, our reasoning for so doing is buttressed by the Supreme Court's ruling in *United States v. Continental Can Co. et al., 378 U.S. 441, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*. In that case, the nation's second largest producer of cans desired to merge with the third largest producer of glass containers. There the Court found that Section 7 is not limited to identical products and lumped together the glass and container industries into one product market. It did so realizing **[**19]** the only actual competition between these two industries was primarily in the beer market, although potentially, they were competitors in broader markets. The Court emphasized cross-elasticity of demand and interchangeability of use as its reason for doing so. *United States v. Continental Can Co. et al., supra, at 453*. This reason exists, to a pronounced degree, in the situation at hand, only the competition is more direct and meaningful. If such interchangeability can be used negatively in antitrust jurisprudence, surely the same concept can be used positively. The underlying question remains the same in each instance, i.e., to construct reasonable product markets in which to measure probable competitive effects realistically.

Therefore, since it is no longer true that commercial banks enjoy a "settled consumer preference" for the savings dollar, *PNB, supra, 374 U.S. at 357*, the line of commerce must be broadened in this respect. Competition from life insurance companies, finance companies, lawyers for trust services, etc., should not be considered since the competition is not direct, [4] and such a consideration would extend the product market to an unrealistic range.

[20]** Furthermore, this Court has heard no compelling evidence and has observed no noted changes from the *PNB* situation during the trial of this case in competition from these other sources to extend the product market any further.

The Anticompetitive Effects of This Merger

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[4] A case in point is finance companies which allegedly compete with commercial banks in the consumer loan field. However, the rates of interest at a finance company are substantially higher (N.T. 50) and the majority of a finance company's source of funds is derived from commercial banks. Thus, finance companies cannot be said to be in direct competition with commercial banks, since they derive most of their lendable funds from commercial banks and assume loan risks which commercial banks would be unwilling to take.

We can now turn to the crucial question in this case, which is whether the proposed merger between Provident and Central-Penn is anticompetitive.

Various approaches have been suggested and used in judging whether a proposed merger is anticompetitive. The approach adopted by Justice in this case and accepted by the Courts traditionally is what is termed the "structural approach" to antitrust analysis. Given a certain industry structure, the structuralists contend that one can reasonably predict a kind of ultimate economic performance the industry is likely to turn in. This prediction is more valid when the composition of the industry remains static and new firms are not entering at a fast rate. Adopting this structural position, some legal commentators have tried to discern at which concentration **[*10]** level a merger should be outlawed. [5]

[21]** The exact purpose of Section 7 is hard to pin down since the word "competition", under the statute, has been given various shades of meaning by the Courts and the Governmental agencies. The predominant view was that Congress, in enacting Section 7, was concerned with maintaining the "little guy" in business on the premise that the dispersion of economic power in the hands of many is salutary.

However, recent Supreme Court decisions in the merger area indicate that a pronounced shift in emphasis has occurred. Although Congress is still concerned with protecting small businesses from the overreaching grasps of corporate giants, it has extended its concern to the consumer. Thus, mergers are no longer considered solely as some kind of wrong against the small businessman, but also as a welfare loss to the consumer. *United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*; see also Dixon, supra, generally.

In contending that the proposed merger between Provident and Central-Penn is anticompetitive, Justice adopts a structural position pointing to the rising tide of concentration among commercial banks which is taking place in the four-county **[**22]** area. Basically, the approach of the Supreme Court and Justice has been one focusing on the structure of the respective markets. If the structure of the market examined is highly concentrated, Justice contends inferentially in positing the structure that the incentive for independent decisions and competitive behavior is destroyed. The advantages of such an approach are apparent. It lends itself to easy application since positing a certain market share or concentration ratio, anticompetitive effects can be affirmed or denied. It is clear to us that the antitrust standards utilized in merger cases have not been changed by BMA 1966 [6] and that therefore the

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[5] Derek Bok, after examining the various structural approaches, felt that Courts or agencies, in assessing mergers, should look to the change that has taken place in the aggregate share possessed by the largest firms in the market. The number of firms selected for this purpose should be large enough to include the acquiring firm. The merger should then be disallowed if the aggregate share of the market following the acquisition substantially exceeds (by 7%-8% or more) the aggregate share of the market controlled by the same number of firms at any time during a period reasonably prior to the acquisition, e.g., (5-10 years). This rule should be subject to an exception where the share of the acquiring firm following the merger is no larger than it was in the base period. Bok, supra.

George Stigler, in his article "Mergers and Preventive Antitrust Policy", 104 U. of Pa. L. Rev. 176 (1955), also dealt with concentration ratios and the question of at what point should mergers be deemed violative of Section 7. The center of controversy, according to Stigler, arises somewhere in between what can be characterized as a competitive industry where the largest firm controls 10% or less of output and the non-competitive industries where 2-5 firms control 75% or more of output. Every merger which produces a firm controlling 20% of the industry's output should be presumed violative under the statute. In other mergers below this proscriptive percentage, several factors must be examined: (1) ease of entry into the market, (2) rate of industry growth, and (3) closeness of substitute products made by other industries.

[6] Congressman Patman stated in 112 Cong.Rec. 2334 (Feb. 8, 1966) that "It should be made very clear that there is no intent on the part of the (House) Committee to change the application of the antitrust laws as they apply to bank mergers. If the Committee had wanted to do this, it would simply have exempted bank mergers from the application of antitrust laws . . . . This bill is intended to have the effect of making the bank supervisory agencies give substantially more emphasis to the antitrust standards in determining the competitive effects of a merger than they did under the 1960 law . . .."

The only effect this amended Act has upon traditional ***antitrust law*** is that for bank mergers, the anticompetitive standard is no longer to be the sole criterion for adjudging the merits of the merger. Courts must also consider convenience and needs. (Senator Robertson, p. 2538).

structural **[*11]** analysis posited by Justice in this case is valid. But it doesn't necessarily follow that the structure to be examined by this standard must remain the same.

[23]** Our disagreement with Justice's analysis lies not with its initial approach, but on the data and statistics it has poured into this accepted structural analysis. We admit under current antitrust standards enunciated by the Supreme Court that if certain market shares are proved and are realistic, anticompetitive effects can be deduced from such shares. [7] **[**24]** It has been stated by Justice that the merged bank would control 14% of the appropriate market, a share which must be proscribed. Additionally, it has been pointed out that the concentration ratio among the five largest banks in the four-county area will be increased from 73% to 78%. This factor, coupled with the entry barriers to commercial banking, especially in the Philadelphia market, [8] will produce a highly oligopolistic banking structure, which will stifle competition and lead to a further reduction of individual competitors in the commercial banking market.

However, the Clayton Act and the Bank Merger Act are concerned with arresting mergers with anticompetitive effects. In so construing these Acts, this Court cannot close its eyes to competition from other sources or other areas which operate in the four-county area.

In shying away from the simplistic approach applied in *PNB* and other merger cases, we feel the need to do so is compelled by the uniqueness of commercial banking as an industry. A brief illustration might make this point more clearly.

Unlike two individual steel *producers* from different counties or states, two individual commercial banks from the same counties do not always compete for the same retail or wholesale customer. This is so because of the convenience factor on the retail level and the differences in services offered by large and small commercial banks on the wholesale level. Thus, concentration ratios for *non-banking industries* are more realistic in **[**25]** that competition is usually more even and equal and all firms dealing in that one or several products are justifiably lumped together. This is not true with commercial banks. A case in point are the saving and loan associations and mutual savings banks, which offer the same product as a commercial bank in time and savings accounts, yet are excluded from Justice's market structure.

In order to get a true picture of the competition for the dollar in the four-county area, it is useful to break down commercial banking into two sub-products-wholesale and retail banking. ***HN3***[] Wholesale banking is that which deals with a number of large accounts, primarily with large corporations, governmental bodies, financial institutions, and wealthy individuals, while retail banking caters "to the mass needs of the general public and small business." *United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 896 (S.D.N.Y. 1965)*.

With this breakdown of commercial banking, it becomes clear why the Government's concentration ratios and market shares are invalid. We are sure the Government would not contend that the Bank of King of Prussia competes with First Pennsylvania Banking and Trust Company **[**26]** or Philadelphia National Bank for *international* or *large corporate accounts*. Yet, all of these figures and accounts are lumped together in one hodge-podge of percentages from which we are to deduce anticompetitive effects.

[*12] This breakdown of commercial banking into subproducts does produce some analytical problems. The question invariably arises as to what accounts within the two banks before us fall into the wholesale market level and secondly, whether such wholesale accounts are subject to competition from without the four-county area.

We do not think it can be questioned that some accounts of a large commercial city bank should be placed in a national market. Put another way, it is clear that the corporations and individuals presently maintaining large

[7] *United States v. Philadelphia National Bank, supra*; *United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665, 12 L. Ed. 2d 1, 84 S. Ct. 1033 (1964)*; *United States v. Continental Can Co. et al., supra.*

[8] Since World War II, only three new commercial banks have been established in the four-county area. Another new commercial bank will be opened this year.

accounts in both Provident and Central-Penn have alternative and convenient sources for deposits or loans outside the four-county area.

The defendant banks, in support of this national market for wholesale accounts, point us to a Federal Reserve System report which refers to the composition of the national credit market. While agreeing that not all corporate accounts are national in nature, the banks contend **[**27]** that a bulk of a corporation's large loans and related deposit balances can be relegated to this market. Also, some bank services are so specialized, i.e., international business and pension trust services, that they can be obtained only from large sophisticated banks in the national market. Such specialized or large accounts are sought eagerly by banks across the nation as evidenced by advertisements published by leading banks in periodicals of national circulation. (See defendants' Exhibit 49). Aside from this fact, we also heard direct testimony from corporate officials in the Philadelphia area that they bank in New York City, Boston, or elsewhere, to obtain unusually large loans or sophisticated and expert advice and are solicited by banks across the country for their banking business. [9]

Upon arriving at a national market for certain accounts, the problem which then confronts us is just what **[**28]** accounts should be placed in the national market. Defendants assert that the following accounts should be included:

"(a) Demand deposits over $100,000;
(b) All time open accounts and corporate certificates of deposit;
(c) Savings accounts and certificates over $10,000;
(d) Time deposits of municipalities and correspondent banks over $100,000;
(e) Real estate loans over $100,000;
(f) All securities loans and loans to financial institutions;
(g) Commercial and industrial loans over $100,000;
(h) Consumer loans purchased from large dealers;
(i) Single payment loans over $25,000; and
(j) Other loans over $100,000."

Admittedly, the above accounts are substantially those adopted in *United States v. Manufacturers Hanover Trust Co., supra, at 921*. However, the same problem which existed in that case exists here to a greater degree. The defendant banks have given us the national market shares of Provident and Central-Penn, but they have not carried their analysis further to include the national market shares of the other large commercial banks in the four-county area.

> "Determination ***HN4***[] of the local market shares of the constituent banks, however, is not a simple matter **[**29]** of subtracting what we have determined to be the percentage of their deposits and loans which are allocable to the national market from their total deposits and loans. Manifestly the true local market is the total deposits and loans of all the banks located in the metropolitan area, less the aggregate of their deposits and loans which originate in the national market. We cannot deduct all national business **[*13]** from the area's total deposits and loans, however, without knowing the percentage of business which each local bank originates in the national market. Except for the constituent banks, there is no evidence before us on that subject." *United States v. Manufacturers Hanover Trust Co., supra, at 924*.

So even if we totally accept defendants' national market allocation with its resulting percentages of national business, we still find ourselves back in the position from which we started-a search for realistic market shares or concentration ratios.

Faced with this insurmountable task of formulating realistic concentration ratios, and cognizant of the fact that many of these so-called national accounts are tied to the Philadelphia market by virtue of convenience, loyalty, **[**30]** etc., this Court finds that the most practicable solution to this problem is to adopt the "shading procedure" used by the Supreme Court in *PNB*.

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[9] See Kerslake, N.T. 2591; Bradshaw, N.T. 2769; Myers, N.T. 3158-59; see also defendants' Exhibits 105, 106.

Any other type of analysis would fall within the Supreme Court's proscription in *PNB, supra, 374 U.S. at 360-1*:

> "Large borrowers and large depositors the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers of intermediate size, it would appear, deal with banks within an area intermediate between these extremes . . . ***HN5***[] But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest **[**31]** customers are considered."

Thus, in *PNB* the Supreme Court scaled down the aggregate share of the market held by PNB and Girard as a merged bank from 36-30%, or by approximately 16%. If we apply the same reduction formula between Provident and Central-Penn, we reduce their market share from 14% to 11.7%.

This reduction might seem somewhat arbitrary and non-realistic, but it is the fairest market analysis of which this Court can conceive. The defendants have asked us to include only the following statistics in our four-county analysis, based upon their breakdown of what accounts are national or local in scope. Of total deposits for Provident, approximately $245,000,000 out of $635,000,000 are attributed to the four-county area on the basis of the *MacMahon* breakdown adopted by the banks. Of total loans for Provident, approximately $86,000,000 of $427,000,000 are attributable to the four-county area. (See defendants' Exhibits 64 and 64A). On the Central-Penn side of the ledger, the banks ask this Court to include only approximately $152,000,000 of some $332,000,000 in deposits as emanating from the four-county area. They also state that only $79,000,000 of Central-Penn's **[**32]** $227,000,000 in total loans should be included in our four-county analysis, based again on the *MacMahon* criteria. (See defendants' Exhibits 46 and 46A).

For reasons stated before, a total acceptance of these proposed figures would be as unrealistic as the ones offered by Justice. Rather than becoming involved in a morass of detail and statistics, or involving ourselves in a construction of concentration ratios, which would be based on somewhat inadequate statistics and evidence, we believe the "shading procedure" adopted is the fairest and most realistic approach under the circumstances.

HN6[] On the retail level, the deposit base examined must be expanded to take into **[*14]** account saving and loan associations and mutual savings banks. Competition for the savings dollar is intense and emanates from these non-commercial bank sources, as well as from the commercial banks themselves. The retail business of the banks in question can be restricted to the four-county area realistically because such business is restricted by the factor of *convenience*. The product offered tends to be "relatively standardized in form, quality and cost." Since the two banks in question can only **[**33]** branch by law into the four-county area, there is no question that substantially all of its retail business takes place within these four counties. Unlike the competition for wholesale accounts, all commercial banks, plus saving and loan associations and mutual savings banks, compete for the savings dollar, and residential mortgages. [10]

By branching, the large commercial banks in the city compete with the small individual suburban banks for the *savings dollar* and the demand deposit accounts. Specialized personnel, large lending limits, or reserve city bank status, are not essentials for this retail business. Thus, on the retail level, the figures offered by the Government are appropriate and realistic with the one exception that they should have included saving and loan associations and mutual savings banks.

The defendant banks, during the trial of this case and in their briefs, have attempted to prove that since **[**34]** retail accounts are sufficiently localized by the factor of convenience, there is not much competitive interplay between them. More specifically, they presented in evidence detailed maps illustrating the branch locations of both

[10] See Weiler, N.T. 2871, 2882; McGinley, N.T. 2885; Wood, N.T. 2924; Moyer, N.T. 3080.

Provident and Central-Penn showing that retail customers are concentrated in proximity to the branches. While agreeing that a Central-Penn branch in Bucks County does not compete with a Provident branch in Montgomery County, they at least have the potentiality of competing in that area by *de novo* branching. The Supreme Court's rulings on this subject are clear. ***HN7***[] One purpose of Section 7 is to arrest the trends toward concentration or monopoly, before the consumer's alternatives disappear by mergers. *United States v. Philadelphia National Bank, supra, 374 U.S. at 367*; *United States v. El Paso Natural Gas Co., 376 U.S. 651, 659, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1963)*. Potential competition must also be preserved. It is not sufficient to prove only that the banks do not actually compete. It must also be proven that they probably will never compete or have the potential to compete.

The banks' proposed plotting techniques fall short on a second ground. **[**35]** Such a market characterization is a perfect illustration of what the Supreme Court condemned as an "indefensible extreme" in *PNB*. Here, the proposed market is drawn so narrowly as to place (the merging banks) in different markets, because only the smallest customers are considered. *PNB, supra, 374 U.S. at 361*. If we were to adopt the banks' plotting techniques, no banks or financial institutions would be in competition for the retail customers since such customers would be clustered around the financial institution of their choice. The mere fact that a customer chooses this one bank has nothing to do with competition, ***HN8***[] since the purpose of Section 7 and the Courts in enforcing this statute, is to preserve competition between the successful and unsuccessful providers of these banking services. *United States v. El Paso Natural Gas Co., supra, 376 U.S. at 661*. The choice to bank where the customer pleases must be preserved and the gradual elimination of potential or actual competitors takes away competitive options which the customer should have. These competitive banking options, if preserved, will also require the banks or financial institutions to maintain competitive **[**36]** **[*15]** services and interest rates which are all to the benefit of the customer. The desire to innovate new services to attract the retail customer is also present where there are many competitive options.

Therefore, we reject the defendants' proposed localized markets for the above reasons and shall consider the retail aspects of this merger within the four-county area. We shall, however, include competition from saving and loan associations and mutual savings banks where relevant.

The inclusion of saving and loan associations and mutual savings banks broadens the structural base to be examined even further. As already noted, we have reduced the market share of the merging banks from 14% to 11.7% because of accounts which are more properly allocable to the national market. But the problems which faced us there in arriving at realistic market shares reoccur in this instance. The statistics offered are incomplete and again would require the Court to delve into statistical problems which it is not fully competent to solve. The inclusion of these other institutions noticeably affects the examined deposit base. In recent years, commercial banks have become increasingly interested **[**37]** in securing time deposits, and as a result of this interest, the ratio between time and demand deposits is fast reaching an equal parity.

In 1961, the ratio of demand to time deposits in relation to total deposits was 74.6%-25.4% in the four-county area. In 1966, demand deposits increased only 14.4%, while time deposits increased 112.2%. This increase in time deposits changed the ratio to 61.2%-38.8%. Thus, time deposits now comprise approximately 40% of the total deposits held by commercial banks in the four-county area. (See defendants' Exhibit 19). Among the four-county commercial banks, Provident controls 8.3% of the IPC (Individuals, Partnerships and Corporations) time and savings deposits, while Central-Penn controls 4.6%. The resultant bank would control 12.9% of IPC time and savings deposits in the four-county area. (See plaintiff's Exhibit 15). The five largest commercial banks, as of December 31, 1965, controlled 73.2% of the total time and savings deposits held by commercial banks in the four-county area. The merger would increase this percentage to 77.8%.

When we consider competition from saving and loan associations and mutual savings banks, these above figures **[**38]** are considerably reduced. As of December 31, 1965, commercial banks held only 19.49% of the total savings dollar in the four-county area. Mutual savings banks held 45.73%, saving and loan associations 32.95%, and credit unions 1.88%. Provident and Central-Penn held 1.63% and 1.11%, respectively. (See defendants' Exhibit 20).

The resultant bank would control 2.74% of the total savings dollar in the four-county area. Since savings constitute some 40% of the total deposit base, some further adjustment must be made.

After shading down Justice's concentration figures from 14% to 11.7% because of accounts allocable to the national market, we shall further shade this 11.7% figure by including competition from the saving and loan associations. Since 2.74% represents the resultant bank's share of all time and savings deposits in the four-county area, we arrive at a final aggregate share of 9.74%. [11]

[39]** We realize these figures are not totally accurate, and that our method in arriving at them is mathematically crude. However, this figure of 9.74% is more realistic in that it represents as nearly as possible competition for only those **[*16]** accounts for which financial institutions compete in the four-county area. [12]

After arriving at a more realistic concentration ratio, we can now consider whether a merger, which produces a firm controlling **[**40]** some 9.8% of the relevant market, is anticompetitive. Here, there has been no merger which involves shares of the market so large that it approaches monopolistic proportions. See *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *PNB*, supra. Nor does it involve a merger which forecloses only a *de minimis* share of the market, since Central-Penn does not fall within that category. This merger lies somewhere in the middle of these two extremes and therefore an examination of the various economic and historical factors is necessary. *Brown Shoe Co., Inc. v. United States, supra, at 329*. Such an analysis must involve a prognosis of the probable future effect of the merger and not merely its immediate effect.

There is a distinct difference between competition and the number of competitors, especially in commercial banking. [13] When Philadelphia had many more commercial banks than it does today, the banks then were not, in any sense, full service banks. The larger banks usually concentrated on a wholesale business with little or no regard to retail business, such as savings or trust accounts. More specifically, national banks were concerned **[**41]** with commercial lending, trust companies with trusts, and State banks concentrated on the retail accounts. By the merger process, the large commercial banks extended their reach into the retail area until they became what they are today, full service banks.

The banks, in their brief, contend that if this merger is not approved, the leading banks in the Philadelphia area will become insulated from competition. They cite this merger as a case where two small firms are proposing to merge in order to compete more successfully with the leading firm in that market. To support this contention, the banks point out that this merger **[**42]** will not produce the largest bank in the Philadelphia area, as was the case in *PNB*, supra, but will merely place the resultant bank on an even parity with the other four large reserve city banks in Philadelphia. To reach this parity, the merger is necessary to increase the lending limits of the respective banks to a competitive $10,000,000 level. [14] It will also allow Provident and Central-Penn to solicit more correspondent banking business of which First Pennsylvania Banking and Trust Company and Philadelphia National Bank have

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[11] Since the ratio of time to demand deposits is 40-60 in the four-county area, we took the resultant bank's share of 2.74% in the time and savings account category and added this figure to 60% of 11.7%, which is 7%, giving us a total of 9.74%.

[12] Competition from other financial institutions for mortgage loans was not computed since the ratio of these mortgages to total loans was not known. However, we do know that commercial banks held 12.52% of the total mortgage loans in the four-county area with the remainder being held by mutual savings banks and saving and loan associations about equally. The resultant bank would control.95% or less than 1% of the total mortgage loans in the four-county area. Thus, the proposed merger would not be anticompetitive in this specific market. (Defendants' Exhibit 20).

[13] This distinction was recognized by the *Supreme Court in Brown Shoe Co., Inc. v. United States, supra, 370 U.S. at 320*: "Taken ***HN9***[] as a whole, the legislative history (of Section 7) illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen *competition*."

[14] The resultant bank would have the third largest lending limit among the four-county commercial banks. Presently, Provident has a lending limit of 8.4 million, while Central-Penn's is 3.2 million. First Pennsylvania Banking and Trust Company's legal lending limit is 12 million and Philadelphia National Bank's is approximately 15.8 million. (Defendants' Exhibit 7).

the lion's share. In the area of computer-based services, neither Provident nor Central-Penn presently have the resources to make substantial computer-based innovations. The merged bank will be able to function as a "provider" of these computer services, rather than a purchaser. Another benefit **[*17]** of the merger is that the respective banks can increase their share of international business in which the bank's size plays a determining role. It would be able to attract corporate funds by competing for corporate Certificates of Deposit.

[43]** In summary, the banks contend that the merger between the fifth and seventh largest banks in the four-county area will produce a bank better able to compete with the four leading commercial banks on a qualitative basis, since it will have more resources to be innovators in commercial banking, rather than mere takers or followers.

Similarly, Provident and Central-Penn maintain that this merger will also be pro-competitive in the retail market since the improvement of services resulting therefrom should intensify the competition with other banks and financial institutions. There is no question that a larger bank will be better equipped to serve retail customers, but it doesn't necessarily follow that improvements in quality of service will produce more competition.

However, the banks go one step further in their analysis. In retail banking, it is undisputed that convenience is a major factor in the location and competition for these accounts. Thus, as long as the number of independent banking offices in the community have remained the same, the competitive options for the retail customer will remain the same. Despite the substantial reduction of independent commercial banks in **[**44]** the four-county area, the competitive options for the retail customer have increased, and the services offered have increased quantitatively and qualitatively. For example, in thirty-five of the forty communities in the four-county area analyzed by the banks, there has been an increase in the number of bank and other financial institution offices. In seven, the number has remained the same, and in only two have the number of bank offices declined. (See defendants' Exhibits 89, 92). This fact is not so startling when one goes to the source of the increase. The large reserve city banks have branched into these areas, giving the retail customers the benefit of a large city bank with its concomitant services at minimal inconvenience. In doing so, more often than not, the large commercial banks have often merged with a smaller independent bank, but these mergers never affected competition *per se* on the retail level, since the number of banks in that community has remained the same.

This distinction between competition and the number of competitors is also true on the wholesale level of commercial banking. A large number of independent banks in the four-county area does not necessarily **[**45]** guarantee that competition for wholesale accounts will be meaningful or intense. Most of the present thirty-seven commercial banks in the four-county area are limited severely by their size, location and staff, and thus cannot compete seriously for wholesale accounts. Wholesale transactions usually require large lending limits, reserve city status, and a large and expert staff in diversified areas. Most small independent banks do not fit into this category.

The merger in question will increase the quality of competition among commercial banks for the wholesale customer. Testimony adduced at trial attests to this fact. Central-Penn is not at present a major competitive factor in the wholesale market because of its low lending limit (3.2 million) and its relatively small staff. The merger would produce another bank on par with the other leading wholesale banks in the city, thus giving a wholesale customer in the Philadelphia market a broader range from which to choose.

Our observation that competition on a qualitative basis will increase or remain the same on the wholesale and retail level is not determinative of our Section 7 analysis. We have determined generally that the **[**46]** immediate effect of this merger will not decrease competition in the four-county area. However, before a merger can be approved, this **[*18]** Court must not look only to its immediate effect, but also the probable effect this merger will have in the future.

As stated before, the number of independent commercial banks in the four-county area has been substantially reduced. At present, the number stands at thirty-seven, with at least four mergers pending. [15] Approval of this merger might well encourage more mergers which would reduce the present number substantially. Defendants

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[15] Girard-Doylestown National Continental-Sonsitaly, Fidelity-Doylestown Trust, and this merger.

counter this assertion by maintaining that the proposed merger involves unique considerations which will not be duplicated in the future. These unique considerations are that the two merging banks are the two smallest reserve city banks in Philadelphia and the resultant bank will be on parity only with the other reserve city banks. Any other merger within this group of reserve city banks would resemble the PNB-Girard merger, since it would inevitably create the largest bank in the city. Secondly, since Provident and Central-Penn have complementary branch systems, the effect on competition in the retail **[**47]** area will be minimal. Lastly, they argue, that the merger of Provident and Central-Penn is the culmination of the evolution of full service reserve city banks in Philadelphia.

These considerations are not compelling ones, however, since both banks, by their own admission, are healthy and progressive and presently are meaningful competitors in the four-county area. Although the two branching areas of the respective banks are somewhat complementary, both banks have the potential to branch into other areas. As a result, the retail customers of the outlying counties will be losing a potential entrant into their market if we allow the merger. In all respects, Provident is a full service bank, a status it has attained by the merger route. Central-Penn also is a full service bank, but admittedly, it is not on par with the other leading banks in the city. However, it is developing and strengthening its weaknesses, **[**48]** such as its trust and international departments, and always will be able to find some place in community banking.

But even assuming that this merger would not trigger more of the same, this merger is anticompetitive when viewed in light of the Supreme Court's pronouncements in interpreting Section 7 of the Clayton Act. The proposed merger is desired in a market which is becoming rapidly concentrated. Barriers to entry in this market are severe. These barriers are borne out by the fact that only three independent banks have been formed in the four-county area since World War II. (See defendant's Exhibit 54). Faced with this rigid market structure, even slight increases in concentration must be viewed with askance. *United States v. Aluminum Co. of America, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)*.

The aggregate share of total deposits which the resultant bank will hold in the four-county area is approximately 10%. Although this is relatively a small concentration ratio, the merger still runs counter to the Supreme Court's precept that competition will be most vital when there are many sellers, none of which has any significant market share. *United States v. Aluminum **[**49]** Co. of America, supra*; *United States v. Von's Grocery, 384 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*. It becomes clear that ***HN10***[] if a market can be characterized as oligopolistic, any merger which strengthens this oligopolistic structure must be struck down. This is the dilemma which confronts this Court. Philadelphia concededly has an oligopolistic banking structure. The purpose of Section 7 is to preserve and maintain competition, but in so preserving, it is also possible for the oligopolistic structure to be strengthened. Barring significant new entries into commercial banking in the four-county area, and the prospect of divestiture of the large banking institutions seemingly remote, it seems the **[*19]** necessary result of such a policy will only strengthen the present leaders while the lesser banking institutions are correspondingly weakened. Justice and the Supreme Court have offered solutions to this dilemma and in essence, these solutions amount to an absolute bar of all horizontal mergers which would increase the concentration ratio of the merging firms in question, especially in a market which is already highly concentrated.

The merging banks' percentage share **[**50]** of the market (10%) certainly is not as foreboding as the large percentage of the market which PNB and Girard would have controlled had that merger been approved. Since that time, the Supreme Court has indicated that ***HN11***[] any merger producing a firm controlling 25% of the relevant market, is presumptively bad. *United States v. Continental Can Co. et al., 378 U.S. 441, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*.

We do not find that this merger which would produce a bank controlling approximately 10% of the relevant market is presumptively anticompetitive. This percentage figure is not undue in relation to the composition of the market as a whole. The resultant bank certainly will not have market power which would enable it to persistently behave over substantial periods of time in a non-competitive fashion. (Dirlam, N.T. 414-15). The converse is true. The defendant banks desire this market power so that they can behave competitively.

Yet, Congress and the Supreme Court, in carrying out the mandate of Section 7, have stated that ***HN12***[] one purpose of Section 7 is to arrest a trend toward concentration or a tendency toward monopoly, before the consumers' alternatives disappeared through mergers. **[**51]** *United States v. El Paso Natural Gas Co., supra.* Thus, we must not focus only on the effect of this merger in the present, but must scan the horizon to see what lies ahead. The thrust of the *El Paso* decision, supra, extends to the fact situation presently before us. Provident and Central-Penn are presently competing for the retail and wholesale dollar. This competition (between these two banks) is not as keen as it could be, but potentially this competition can become more intense. In the retail area, *de novo* branching can bring these two banks into the private domain of each other. In the wholesale area, both banks presently offer sufficient alternatives for the commercial customer. This Court accepts the fact that both Provident and Central-Penn would become a better and more competitive bank after the merger, but this fact does not offset the loss of Central-Penn which is a growing and healthy bank in an oligopolistic market.

The case which we feel controls the merger before us is *United States v. Von's Grocery, supra*, which involved a merger between the third largest and the sixth largest retail supermarkets in the Los Angeles area. The resultant company would **[**52]** control only 7.5% of the total value of retail groceries sold in the Los Angeles market each year. The Los Angeles food market was characterized as one where there was a long and continuous trend toward fewer owner-competitors. In an eleven year span, the number of chain stores (two or more) increased from 96 to 150, while the number of single owner-operated stores was reduced from 5,365 to 3,818. On these facts alone, the merger was condemned without a functional inquiry into the nature and quality of the competition. ***HN13***[] The basic purpose of the Sherman and Clayton Acts (as construed by Justice Black) was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. The only exceptions to this rule are where one of the companies is about to fail, or where two companies had to merge to save themselves from destruction by some larger and more powerful competitors. This view, which shifts the emphasis of Section 7 from protecting competition to protecting competitors (see Justices Stewart's and Harlan's dissent in Von's), was reiterated in *United States v. Pabst Brewing Co., supra.*

[*20] The facts in this case are parallel **[**53]** to those in *Von's*. Here, the merger involves the fifth and the seventh largest banks in the four-county area. The resultant bank would control approximately 10% of the relevant market, thus exceeding the percentage figure in *Von's* by approximately 2%. The Philadelphia banking market unqualifiedly can be characterized as one where there has been a long and continuous trend toward concentration.

Therefore, even if we did find that competition would be improved by this merger, as it probably was in *Von's*, the inescapable fact is that the number of competitors in the four-county area has been steadily decreasing over the years, and necessarily increasing the concentration ratios among the leading banks. Since this merger falls within this trend toward merger and toward more concentration, it must be ruled anticompetitive under existing antitrust laws. This bank merger clearly does not fall within the two exceptions referred to in *Von's*. Central-Penn is not a failing bank. Nor is this an attempt by two banks to save themselves from oppressive competition. These banks are not being preyed on by the larger banks, nor are they losing appreciable ground in the struggle **[**54]** for market power. They are merely asking this Court to put them in a position where they can fight on equal terms and we cannot put them there because it is not absolutely necessary.

The Convenience and Needs of the Community

Our disposition of this case does not end with the conclusion that this merger is anticompetitive under current Section 7 standards. ***HN14***[] B.M.A. 1966 has carved out a new exception or defense to such anticompetitive mergers in the form of the convenience and needs test. *12 U.S.C. § 1828(c)(7)(B)*. This defense or justification is available to the banks once it has been determined that the proposed merger would be anticompetitive as judged by normal antitrust standards. *United States v. First City National Bank of Houston, supra, 386 U.S. at 366*.

Again, the lower Courts have taken opposite views on the meaning of this new test. *The District Court, in United States v. Crocker-Anglo National Bank, supra*, felt that the merger between Crocker and Citizens met the convenience and needs test because (a) it caused an immediate increase in the number of statewide banks competing within the State; (b) produced a bank having increased ability to mobilize financial resources **[**55]** in a capital deficit area; (c) created a bank which is better equipped and therefore more likely to engage in credit gap financing; (d) created another substantial competitor in the underwriting of municipal bonds, and (e) enhanced the merged bank's ability to compete more vigorously in international banking. A quick appraisal of these reasons reveals that the *Crocker* Court adopted a broad public interest approach rather than a restricted narrow exception test in analyzing the scope of this new exception.

The District Court, in United States v. Third National Bank of Nashville, supra, 260 F. Supp. at 877, did not reach the question of convenience and needs directly since it found that the merger between Third National Bank and the Trust Company was not anticompetitive. However, the Court referred to the Supreme Court's characterization of the convenience and needs test. In the "somewhat larger contours of the failing company doctrine", the District Court placed the problem of the "floundering" or "stagnating" bank. Such a bank is one which has reached a point of deterioration or stagnation, but has not reached the status of a failing bank which is an admitted exception in **[**56]** all merger cases. These floundering or stagnating banks do fall within the convenience and needs exception because they are no longer able to serve the public on a competitive basis with other banks **[*21]** in the market area. *United States v. Third National Bank of Nashville, supra, at 884*. The Tennessee Court's reference to the convenience and needs test is at best a restricted one, but it places in view the two conflicting interpretations of this new exception which has been debated in Congress and is now being argued in the Courts.

The banks, in their brief, state that the merger between Provident and Central-Penn will serve the convenience and needs test in the following ways: (1) The merged bank will be more comparable in resources, services and prestige to the larger banks in other cities. As such, it will help the City of Philadelphia in its competition with those cities to attract and retain job-creating enterprises. It will also aid the Port of Philadelphia in its competition with other ports and help to attract and retain foreign commerce; (2) the merged bank will provide more competition for the larger banks in Philadelphia; (3) the merged bank will provide better **[**57]** service to individuals and small businesses in the communities served by its branches.

Before attempting any in-depth analysis of the defendant banks' contentions as to what the convenience and needs test embraces, this Court finds, at the outset, that it is necessary to make some general observations concerning the new exception. Since the community's primary need is for a competitive banking market, an anticompetitive merger, if approved, eliminates one aspect of the community's need for banking services. Thus, ***HN15***[] anticompetitive mergers should be approved only in those few instances where these anticompetitive effects are overwhelmed by the more compelling needs of the community. [16]

In *United States v. First City National Bank of Houston, supra, 386 U.S. at 369*, the Supreme Court alluded to the convenience and needs test exception as one "related although . . . remotely, **[**58]** to the failing-company doctrine." This language does not mean that the defense of convenience and needs must be equated with the failing bank doctrine because this concept was already firmly engrained into our antitrust jurisprudence. Congress, in amending the Bank Merger Act of 1960, intended a wider embrace under the new exception. Just what this embrace involves is the problem before this Court.

In construing the meaning of the convenience and needs test, this Court has turned for guidance to the legislative history of the amended Bank Merger Act. Before doing so, we are reminded at the outset by Congressman Reuss' remarks that the words "convenience and needs of the community" are capable of some meaning, but they will require some Court interpretation.

Realizing that we must interpret this new defense, we must of necessity seek enlightenment from the legislative history. In examining the convenience and needs of the community, the question arises as to what community should be examined. Is the test limited to the appropriate geographic market utilized in determining anticompetitive effects, or can our analysis extend beyond this territorial limitation? The legislative **[**59]** history on this subject reveals that the sponsors of the House Bill intended that "conditions in the regional market or national market are relevant only insofar as they affect the convenience and needs of the community to be served." With this statement, we agree. In particular cases, a community might need a larger bank which can handle larger loans and provide more sophisticated services. A merger, albeit anticompetitive, might be allowed in this instance if the community's

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[16] See Via, Jr., "Antitrust and the Amended Bank Merger and Holding Company Acts: The Search for Standards", 53 Va. L. Rev., 1115 (1967).

need and convenience for a larger bank clearly outweigh the anticompetitive effects. **[*22]** Another instance for allowing a merger on the basis of convenience and needs, by considering the national or regional market, is where an entire *region* might be without a large commercial bank. A merger creating such a large bank to meet the convenience and needs of this community, whether it be local or regional, might be allowed.

Beyond these general observations, perhaps ***HN16***[] the most common application of the convenience and needs test, and the one primarily intended by Congress, is the "floundering" or "stagnating" bank. Congress was intensely concerned that under the rigid test propounded in *PNB*, such **[**60]** floundering banks could never be saved by merging with a stronger and healthy bank. The concern was not without justification since the only announced exception to the strict anticompetitive standard enunciated in PNB was the failing company doctrine.

The House Report which accompanied the House Bill to the Senate dealt with the floundering bank situation quite specifically under the heading, "The floundering bank":

> "Under general ***antitrust law*** criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking agencies, with some differences in degree among **[**61]** themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general ***antitrust law*** criteria in a substantial lessening of competition." H.R. Rep. No. 1221, 89th Cong., 2d Sess. 3 (1966).

Congressman Todd, in the legislative debate, clarified this concept of the floundering bank even further:

> "The floundering bank case arises when it is not absolutely certain that a bank is failing, but when it may be in a position of stagnation, which might lead, at a later date, to a closing of its doors." 112 Cong. Rec., 2352 (Feb. 8, 1966); see also Congressman Widnall's remarks at 2335.

Senator Robertson, in explaining the effect of the House amendment on convenience and needs to the Senate stated:

> "There are times, when there are two banks in a community and one is about to fail because of poor loans **[**62]** or bad management, and the banking agencies say, 'It would be bad to have a bank failure; will you see if you can arrange to merge?' Everybody will agree that such a merger would be in the public interest. But unfortunately, Section 7 of the Clayton Act is so harsh that if two banks seek to merge into one, any judge could say, 'You have ipso facto lessened competition. If you have lessened competition, you are illegal and we will destroy you.'" 112 Cong. Rec., 2545 (Feb. 9, 1966).

Under the amended Act, a compromise was effected. The anticompetitive standard was made stronger since it was no longer to be diluted by the other banking factors. It was to be considered singly. The other important change was the new convenience and needs exception which takes into account the banking factors that were previously enmeshed with the competitive factor under the old standard. **[*23]** However, the competitive factor does remain pre-eminent and any exceptions to this standard would indeed be rare.

The legislative history confirms our belief that ***HN17***[] the convenience and needs test must be read restrictively. It is not a mandate for mergers between banks across the board. It merely **[**63]** allows bank mergers in those cases where the needs and convenience of the community are so compelling that competition will be enhanced rather than decreased by the merger. This will occur in only a very few instances. [17]

With these observations in view, we shall now turn to the defendant banks' contentions that they have met their burden of proof as to the convenience and needs test. The banks contend that the primary issue in this case is the convenience and needs of the community to be served. With this, we disagree, since the convenience and needs test has already been characterized by the Supreme Court as a defense or an exception to the primary issue of anticompetitive effects. *United States v. First City National Bank of Houston, supra.*

Generally, **[**64]** the banks state that the proposed merger would create a more efficient bank offering a broader range of services. This broader based bank will be able to attract and retain job-creating enterprises. It will also be able to compete with the large Philadelphia and New York banks. Lastly, the merger will provide better services to industries and small businesses.

More specifically, the banks maintain that we are on the threshold of a "checkless society" whereby computer and other automated services will be of prime use. This increased cost and specialization will require large capital outlays for personnel and equipment which can only be met by the larger banks. It is true that the resultant bank would be better able to provide these services because it would simply have more funds at its disposal. However, the fact that improved service to the wholesale and retail customer will result from this merger is not controlling. The question in this area is-does the Philadelphia banking community need another billion dollar institution aside from the four which it already has? The reasons proffered by the banks for such a need or convenience are not compelling since improved services **[**65]** will almost invariably result from every merger. Something more direct or unique in the way of convenience and needs is required by the Act.

The banks also argue that the merger will assist Philadelphia in its efforts to solve its economic problems. They point to the fact that Philadelphia's employment growth has lagged behind the national average, citing the loss of textile companies which employed many unskilled workers. In recruiting science-based industries to fill this employment gap, adequate financing and specialized personnel familiar with the technology of the industry are required. They also state that the merger will improve the Philadelphia Port situation. New York City currently finances 70% of all foreign commerce in the United States at a decided disadvantage to the Philadelphia Port.

Again, it is true that the proposed merger *may* help the above situation, but there are too many other causes and reasons involved in these economic problems, which were testified to during the trial of this case, to convince the Court of the legal validity of the banks' assertions. At most, these assertions are tenuous. It was admitted that the textile companies did not leave **[**66]** Philadelphia because of inadequate or poor financial support, but because the South offered a better deal, tax-wise and employment-wise. Also, the Philadelphia Port does **[*24]** not suffer from inadequate financing, but loses most of its general cargo trade to New York because that city is the hub of commercial activity in the East, with the largest population. The loss of corporate headquarters in the Philadelphia area cannot be attributed to the Philadelphia banks either, since in most cases, the industry or company itself remains, with merely the headquarters shifting. Testimony at trial revealed that corporate headquarters have been moved from Philadelphia to elsewhere for a plethora of reasons, but nowhere, in no case, were the banks blamed. In any event, the fact that Philadelphia presently has four billion dollar banks indicates that the desired expertise or capital can be furnished in a particular situation by these four larger banks.

If specific facts were shown that Philadelphia was losing accounts, corporations, or was suffering in any way from the lack of an additional billion dollar bank, this Court would be of a different disposition. However, there has been **[**67]** no showing or proof of a linkage between such an additional billion dollar bank and Philadelphia's problems. The mere supposition that a larger bank might assist Philadelphia and its economic problems just is not enough under the convenience and needs test which we feel is a narrow and restricted exception.

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[17] Congressman Reuss, in 112 Cong. Rec., 2337 (Feb. 8, 1966) put it this way: (The convenience and needs exception) "intentionally creates a heavy burden for the proponents of a merger, and I anticipate very few cases in which this burden can be sustained."

The banks also have alleged that the proposed merger will be pro-competitive and, in this sense, also meets the convenience and needs of the community. They justify the Provident and Central-Penn merger as a case where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market. This merger, unlike the PNB-Girard merger, would not produce a bank which is the largest in the four-county area, but one which merely challenges the leaders. If the merger is not allowed to go through, the banks contend that the leading banks will become insulated from competition because of their head start on lending limits, branches, correspondent business, and computer-based services. Only by this merger can the five largest reserve city banks be on an even parity. More or less, this type of analysis goes more to the convenience **[**68]** and needs of the respective banks themselves, rather than to the community. Perhaps the merger would increase competition for the wholesale accounts, but it would decrease one substantial option for some wholesale accounts and definitely for retail accounts. The pro-competitive effects of the merger are definitely offset by the anticompetitive effects which were dealt with under our previous discussion of the anticompetitive effects of this merger.

The banks have declined to justify this merger as one which would join a healthy and prosperous bank with one which is floundering. Central-Penn does have some capitalization and officer replacement problems, but they are not serious. Central-Penn recently declared an extra dividend at Christmas time which does not reflect a bank with capitalization difficulties. Its position in Philadelphia is relatively secure. Perhaps it never will be able to challenge the largest banks in Philadelphia on equal terms, but it will be able to challenge the medium-sized and smaller banks on more than equal terms.

The burden of proof upon the banks to prove that this merger meets the convenience and needs of the community is indeed a heavy one. BMA **[**69]** 1966 requires that the convenience and needs of the community must *clearly* outweigh any anticompetitive effects before a merger can be approved. This burden has not been met in the instant case. At best, it has resulted in a tie. Justice has shown anticompetitive effects and the banks have pointed to convenience and needs. However, in a tie situation, the banks necessarily lose. [18] As stated before, **[*25]** Congress intended that exceptions to anticompetitive mergers should be rare. In those few instances, the convenience and needs of the community must be so compelling that the merger's anticompetitive effects become only a sidelight to the overall good of the community.

[70]** In the case before us, the banks have proved the convenience and needs of the Philadelphia community in a persuasive, but not compelling fashion. Although we are persuaded that this merger would be good for Philadelphia and its banking community, this Court has seen no compelling evidence which would except this merger from our antitrust laws.

In short, the banks have failed to meet their burden of proving that this merger would have the *probable* effect of meeting the convenience and needs of the community. At best, they have convinced us that this is a *possibility*. They have failed to establish "that ***HN18***[] the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Title *12 U.S.C. § 1828(c)(5)(B)*.

The Comptroller of the Currency presented a very appealing jury case. His witnesses, outstanding bankers and businessmen, established by a fair preponderance of the evidence (a) that they were convinced that the merger was a good thing for Philadelphia, as well as the banks; (b) that instead of the fears voiced by the economists **[**71]** for Justice that competition would be lessened, there would be strengthened competition both at the retail and wholesale level; (c) that not entirely as a measure of civic pride, another bank of the size contemplated would redound to the economic benefit of Philadelphia. It is not necessary to delineate in detail the testimony adduced. It was extremely persuasive and most interesting, but where the Judge must declare the law

[18] On December 6, 1967, Frederic L. Ballard, Esquire, counsel for the banks, during the final argument of this case, characterized the banks' burden of proof in the following manner: "And I think that 'clearly' is something that has to go within your Honor's judgment, and I think that it is probably of no more significance than the baseball rule that a tie favors the runner. I'm afraid that I would have to say here that a tie favors the Department of Justice." (N.T. 89).

and the findings of fact, he cannot deviate one jot from those requirements. The present posture of the antitrust laws, as declared by the Congress and the Opinions of the Supreme Court, require the result reached. Comptroller Saxon's remarks about the necessity of financing urban renewal, redevelopment of the ghettos, etc., are in this day and age peculiarly appropriate. However, since the Court must adhere to a quantitative, rather than a qualitative theory, the result is inevitable.

It might also be pertinent to comment at this point on the effect of the Government's rebuttal testimony after the banks' and the Comptroller's showing of convenience and needs. The witnesses, a small banker, a city official, and small businessmen, were apparently produced **[**72]** for the purpose of showing that where the larger urban bank moved into suburban territory, it was not a good thing for the community. The banker, a very estimable gentleman, who lives on the perimeter but within the four-county area, clearly indicated that he knew nothing about the problems confronting the Philadelphia banks and could throw no light on whether the merger was good or bad for the community. The other witnesses definitely proved and established beyond peradventure of doubt that the coming of the branches of the urban bank into the suburban community created banking competition where none had been in existence before and definitely added to the well-being generally and economy of the entire community. Instead of proving that branch banking into small towns was harmful, Justice definitely proved the contrary.

The foregoing will constitute the general Findings of Fact and Conclusions of Law of the trial Judge. Each party, Justice, the banks, and the intervenor, have submitted, in different forms, Requests for Findings of Fact and Conclusions of Law. The rulings thereon will be filed as an appendix [not reproduced] to this **[*26]** Opinion. In any instance where **[**73]** there may be any lack of clarity in approved Requests for Findings of Fact or Conclusions of Law, the language of the Opinion will govern.

Order

And Now, to wit, this 12th day of February, 1968, for the reasons set forth above, it is Ordered, Adjudged and Decreed as follows:

That the Agreement of Merger dated November 10, 1965 between the defendants, Provident National Bank and Central-Penn National Bank of Philadelphia, be and it is hereby Adjudged and Decreed to be unlawful, in violation of B.M.A. 1966 (80 Stat. 7);

Further that defendants, Provident National Bank and Central-Penn National Bank of Philadelphia, and all persons acting on their behalf, be enjoined from carrying out the Agreement of Merger or any similar plan or agreement, the effect of which would be to merge or consolidate said defendants.

United States v. Third Nat'l Bank

Supreme Court of the United States

December 11, 1967, Argued ; March 4, 1968, Decided

No. 86

Reporter

390 U.S. 171 *; 88 S. Ct. 882 **; 19 L. Ed. 2d 1015 ***; 1968 U.S. LEXIS 2904 ****; 1968 Trade Cas. (CCH) P72,372

UNITED STATES v. THIRD NATIONAL BANK IN NASHVILLE ET AL.

Prior History: [**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

Disposition: *260 F.Supp. 869*, reversed and remanded.

Core Terms

merger, district court, banks, convenience, public interest, bank merger, antitrust, Clayton Act, merging, anticompetitive, factors, largest, lessen competition, outweighed, benefits, consummated, managerial, weighing, courts, loans, Sherman Act, recruiting, appraised, deposits, effects, judging, lending

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN1[] **Regulated Industries, Financial Institutions**

See *12 U.S.C.S. § 1828(c)*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] **Financial Institutions, Bank Mergers**

The Bank Merger Act, *12 U.S.C.S. § 1828(c)*, provides for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but creates a new defense, with the merging banks having the burden of proving that defense.

Banking Law > Regulators > General Overview

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN3[] **Banking Law, Regulators**

The task of the district courts, in scrutinizing a bank merger under the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, is to inquire de novo into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by the convenience and needs of the community to be served.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] **Financial Institutions, Bank Mergers**

Congress intended bank mergers under the Bank Merger Act, *12 U.S.C.S. § 1828(c)*, first to be subject to the usual antitrust analysis; if a merger fails that scrutiny, it is to be permissible only if the merging banks can establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Financial Institutions, Bank Mergers**

The purpose of the Bank Merger Act, *12 U.S.C.S. § 1828*, is to permit certain bank mergers even though they tend to lessen competition in the relevant market.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN6[] **Regulated Industries, Financial Institutions**

If a merger poses a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit are to be weighed and decision is to rest on which alternative better serves the public interest.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN7[] **Financial Institutions, Bank Mergers**

Under the Bank Merger Act, *12 U.S.C.S. § 1828*, a much smaller risk of failure than that required by the failing company doctrine is sufficient to justify the rather radical preventive step of an anticompetitive merger.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN8[] **Regulated Industries, Financial Institutions**

Securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

HN9[] **Regulated Industries, Financial Institutions**

The Bank Merger Act, *12 U.S.C.S. § 1828*, directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

HN10[] **Regulated Industries, Financial Institutions**

The Bank Merger Act, *12 U.S.C.S. § 1828*, requires that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist, is determining whether the merging bank is capable of obtaining its own improved management.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > General Overview

HN11[] **Regulated Industries, Financial Institutions**

Before a merger injurious to the public interest is approved, a showing must be made that the gain expected from the merger cannot reasonably be expected through other means.

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Summary

Under the Bank Merger Act of 1966, which authorizes approval of a merger having anticompetitive effects if it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the Comptroller of the Currency approved a merger between the second and fourth largest banks of Nashville, Tennessee. Thereafter, the United States instituted an action in the United States District Court for the Middle District of Tennessee, challenging the merger under 7 of the Clayton Act. The District Court upheld the merger on the basis that the merger would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by the convenience and needs of the community, finding, inter alia, that the smaller bank had a high percentage of unsound loans, that its rating had been changed from "satisfactory" to "fair," and that its problems resulting from unsatisfactory and backward management would be solved by the merger. (*260 F Supp 869*.)

On direct appeal, the Supreme Court of the United States reversed and remanded the case for further proceedings. In an opinion by White, J., expressing the view of five members of the court, it was held that (1) the lower court erred in concluding that the merger did not offend antitrust standards, since it was established that the merged bank had 40 percent of the city's banking business and that the smaller bank, which had been operating profitably and was not shown to be a failing company, had previously been an important competitive element in certain facets of city banking, (2) the District Court had misunderstood the weight to be given the relevant factors under the convenience-and-need provision of the Bank Merger Act of 1966, and had erred in holding that the anti-competitive effects of the merger were outweighed by the benefits to the community, since there were no findings of the unavailability of alternative solutions other than merger for solving the problems of the smaller bank, and (3) the case should be remanded for reconsideration of the application of the Bank Merger Act to the facts, particularly since the District Court had erroneously concluded that the merger would not tend to lessen competition and a proper conclusion as to the merger's anticompetitive effect was necessary to weigh adequately such effect against the asserted benefits to the community.

Harlan, J., joined by Stewart, J., concurred in part and dissented in part, agreeing that a violation of the Clayton Act by the merger was established, and that the case should be remanded for a new application of the balancing process under the Bank Merger Act, but concluding that the District Court had made adequate findings that the benefits to the community from the merger could not reasonably have been achieved in other ways, and that the only question for the District Court on remand should be whether the antitrust violation should yield to other factors bearing on public convenience and needs.

Fortas and Marshall, JJ., took no part in the consideration or decision of the case.

Headnotes

BANKS §3.5 > mergers -- > Headnote:
LEdHN[1][] [1]

The Bank Merger Act of 1966 (*12 USC 1828(c)*) was passed to make substantial changes in the law applicable to bank mergers, the statute being more clear, however, in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §93 > bank merger -- scope of review -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

In an action by the government challenging under 7 of the Clayton Act (*15 USC 18*) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court must review the issues in the case de novo, rather than by a determination of whether the Comptroller's findings are supported by substantial evidence.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank mergers -- antitrust standard -- relevant market -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, there is no intention to adopt a different "antitrust standard" for bank cases than that used generally in the law, and no intention to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger; Congress intended bank mergers first to be subject to the usual antitrust analysis, and if a merger fails that scrutiny, it is permissible only if the merging banks can establish that the merger's benefits to the community will outweigh its anticompetitive disadvantages.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- relevant market -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

In an action by the government challenging under 7 of the Clayton Act (*15 USC 18*) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, commercial banking in the county where the banks are located is the relevant market for appraising the anticompetitive effect of the merger.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- anticompetitive effect -- > Headnote:
LEdHN[5][] [5]

In an action by the government challenging under 7 of the Clayton Act (*15 USC 18*) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court errs in concluding that the merger does not offend antitrust standards, and the tendency of the merger substantially to lessen competition is established, where (1) the city's only middle-sized bank was absorbed by the second largest of the city's three big banks, giving the merged bank 40 percent of the city's banking business and increasing the market share of the three largest banks from 93 to 98 percent, (2) the middle-sized bank had been an important competitive element in certain, though not in all, facets of city banking, having offered somewhat different services at somewhat different rates, and (3) during a period of approximately 8 years before the merger, the middle-sized bank had been operated profitably, the absolute size of its business increasing steadily, and there being nothing to permit a conclusion that it was in any way a "failing" company.

APPEAL §1692.2 > APPEAL §1699 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR, TRADE PRACTICES §34.5 > bank merger -- benefit to community -- > Headnote:
LEdHN[6A][] [6A]LEdHN[6B][] [6B]

In an action by the government challenging under 7 of the Clayton Act (15 USC 18) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (12 USC 1828(c)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court misapplies the convenience-and-need provision of the Act, misunderstands the weight to be given the relevant factors, and errs in holding that any anticompetitive effects of the merger were sufficiently outweighed by the benefits to the community from the merger, where (1) the finding that the combined bank would have a greater lending capacity is entitled to very little weight, absent findings showing the beneficial consequences for the community, (2) although the District Court found that the smaller bank involved in the merger had a high percentage of unsound loans and that its rating had been changed from "satisfactory" to "fair," there were no findings as to the feasibility of curative measures short of merger or as to whether there was any danger of failure of the bank in the foreseeable future, the court's general finding that the merger was "a business necessity" not establishing the possibility of eventual failure, and (3) although the smaller bank had significant problems resulting from unsatisfactory and backward management, which problems would probably be ended by the merger, it was incumbent upon those seeking to merge to demonstrate that they had made reasonable efforts to solve the management problems by steps short of merger or that such efforts would have been unlikely to succeed, and the findings did not establish the unavailability of alternative solutions; the case must be remanded so that the District Court may consider again the application of the Bank Merger Act to the facts of the merger, particularly where the court had erroneously concluded that the merger would not tend to lessen competition, a proper conclusion as to the merger's anticompetitive effect being necessary to weigh adequately such effect against the asserted benefits to the community from the merger.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > Bank Merger Act of 1966 -- purpose -- > Headnote:
LEdHN[7][] [7]

The purpose of the Bank Merger Act of 1966 (12 USC 1828(c)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, is to permit certain bank mergers even though they tend to lessen competition in the relevant market, the public interest being the ultimate test imposed.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- better service for community -- > Headnote:
LEdHN[8][] [8]

In an action challenging the validity of a merger of banks under 7 of the Clayton Act (15 USC 18), securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition under the Bank Merger Act of 1966 (12 USC 1828(c)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; if the gains in better service outweigh the anticompetitive detriment and the merger is essential to secure such net gain to the public interest, the merger should be approved, but if the injury to the public interest flowing from the loss of competition can be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the merger should not be approved.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- managerial deficiencies -- > Headnote:
LEdHN[9][] [9]

In an action by the government challenging under 7 of the Clayton Act (*15 USC 18*) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, taking into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, appraisal of the factor that managerial deficiencies of the merging bank will be cured by the merger includes determining whether the merging bank is capable of obtaining its own improved management, and before a merger is approved, a showing must be made that the gain expected from the merger cannot reasonably be expected through other means.

EVIDENCE §343.5 > EVIDENCE §979 > antitrust action -- bank merger -- burden and sufficiency of proof -- > Headnote:
LEdHN[10][] [10]

In an action by the government challenging under 7 of the Clayton Act (*15 USC 18*) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 (*12 USC 1828(c)*), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the burden of showing that the anticompetitive merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks, and a showing that one bank needed more efficient management, absent a showing that the alternative means for securing such management without a merger would present unusually severe difficulties, does not satisfy such burden.

Syllabus

Third National Bank in Nashville and Nashville Bank and Trust Co., the second and fourth largest banks in Davidson County, Tennessee, merged on August 18, 1964. After the merger the three largest banks had 97.9% of the total bank assets in the county, and the two largest banks had 76.7%. The Government's suit challenging the merger had not come to trial when the Bank Merger Act of 1966 took effect, on February 21, 1966. The Act did not provide antitrust immunity for the merger but did state that courts "shall apply the substantive rule of law set forth" in the Act to pending cases. Section 5 of the Act prohibits approval of a merger whose effect "may be substantially to lessen competition" unless the anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The District Court asserted that the Act altered **[****2]** the standards used in determining whether a merger violated § 7 of the Clayton Act and *§ 1* of the Sherman Act and mandated a return to *United States v. Columbia Steel Co., 334 U.S. 495 (1948)*. The court found that Nashville Bank and Trust was a "stagnant and floundering bank," suffering from lack of young and aggressive officers. It held that the merger would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by benefits to the "convenience and needs of the community." *Held*:

1. The Bank Merger Act of 1966 requires *de novo* inquiry by the district courts into the validity of bank mergers to determine whether the merger offends the antitrust laws, and, if it does, whether the banks have established that the merger is justified by benefits to the "convenience and needs of the community." *United States v. First City National Bank of Houston, 386 U.S. 361 (1967)*. P. 178.

2. The Act, which adopted the language of § 7 of the Clayton Act, "substantially to lessen competition," did not provide a different antitrust standard for bank cases, and therefore the District Court applied **[****3]** an erroneous Clayton Act standard to the merger. Pp. 181-182.

3. On the facts of this case, the merger did tend substantially to lessen competition in the Nashville commercial banking market. P. 183.

4. The lower court misapprehended the meaning of the phrase "convenience and needs of the community," and misunderstood the weight to be given the relevant factors in determining whether the anticompetitive effects are "clearly outweighed in the public interest" by the effects on the convenience and needs of the community. Pp. 184-192.

(a) While the District Court noted the increased loan capacity of the merged bank, it was not specific in describing the beneficial consequences thereof to the Nashville community, or in defining the value of such increase, especially as compared with less desirable results of the merger. P. 186.

(b) The District Court's analysis did not explore possible ways of satisfying the community's convenience and needs without merger. It was incumbent on the banks to demonstrate that they made reasonable efforts to solve Nashville Bank and Trust's management dilemma short of merger with a major competitor. P. 189.

(c) The findings of the District Court do **[****4]** not sufficiently establish the unavailability of alternative solutions to Nashville Bank and Trust's problems. Pp. 190-192.

5. The case is remanded so that the lower court can consider again the Act's application to the facts of this merger; and since the District Court heard this case before *Houston Bank, supra*, was decided, it may wish to consider reopening the record to permit the presentation of new evidence in light of the intervening interpretations of the Act. P. 192.

Counsel: Daniel M. Friedman argued the cause for the United States. On the brief were Solicitor General Griswold, Assistant Attorney General Turner, Richard A. Posner and Barry Grossman.

E. William Henry argued the cause for appellees Third National Bank in Nashville et al. With him on the brief were Paul A. Porter, Dennis G. Lyons, Frank M. Farris, Jr., Edwin F. Hunt and John J. Hooker, Jr. Joseph J. O'Malley argued the cause for appellee Camp, Comptroller of the Currency. With him on the brief were Robert Bloom and Charles H. McEnerney, Jr.

Judges: Warren, Black, Douglas, Harlan, Brennan, Stewart, White; Fortas and Marshall took no part in the consideration or decision of this case.

Opinion by: WHITE

Opinion

[**5]** **[*173]** **[***1019]** **[**885]** MR. JUSTICE WHITE delivered the opinion of the Court.

In this case the United States appeals from a District Court decision [1] upholding the merger of Third National Bank in Nashville and Nashville Bank and Trust Company against challenge under § 7 of the Clayton Act. The court below concluded that the merger, which joined the second largest and the **[***1020]** fourth largest banks in Davidson County, Tennessee, into a bank which immediately after the merger was the county's largest bank but since has become the second largest, would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by the "convenience and needs of the community to be served." We disagree with the District Court on both issues. We hold that the United States established that this merger would tend to lessen competition, and also that the District Court did not point to community benefits in terms of "convenience and needs" sufficient to outweigh the anticompetitive impact.

[**6]** I.

Like other urban centers in the Southeast, Nashville has grown steadily since World War II in both population and economic activity. Commercial banks, as "the intermediaries in most financial transactions," [2] grew **[*174]** along with their city. From 1955 to 1964, for example, total assets of all banks located in Davidson County increased from $ 548,300,000 to $ 1,053,700,000, an increase of 92.2%. The number of banks hardly changed. Indeed, since 1927 there has been only one new bank in the county, Capital City Bank, and at the time of this merger it had achieved only .9% of the county's bank assets. The other banks at the time of the merger, and their percentage of total bank assets in Davidson County, were First American National, 38.3%; Third National, 33.6%; Commerce Union, 21.2%; Nashville Bank, 4.8%; and three small banks, two of them located in Davidson County towns outside Nashville, .6%, .3%, and .3%. [3] The merger before us thus joined one of the three very large banks in Nashville and the one middle-sized bank. Its result was to increase from 93.1% to 97.9% the percentage of total assets held by the three largest banks and from 71.9% to 76.7% the percentage **[****7]** held by the two largest institutions.

The two merging banks played significantly different roles in Nashville banking. Third National was characterized by the Comptroller of the Currency as one of the strongest and best managed banks in the Nation and by the District Court as "strong, dynamic and aggressive." [4] **[**886]** It had "a history of innovating services or promptly providing new services," [5] a recruitment program at local universities, a continuous audit program, and a legal lending limit of $ 2,000,000. It had 14 branches at the **[*175]** time of the merger and served **[****8]** as correspondent for smaller banks located throughout the central south.

Nashville Bank and Trust approached the merger with a more checkered history and a less dynamic present. Until 1956 it was largely a trust institution. In that year, under the direction of W. S. Hackworth, it changed its name from Nashville Trust Company and embarked on a drive to become a full-service commercial bank. This program enjoyed considerable success. **[***1021]** Between 1955 and 1964, Nashville Bank's deposits grew from $ 20,800,000 to $ 45,500,000, and its loans and discounts from $ 8,100,000 to $ 22,800,000. In both categories it grew faster than the county average and faster than Third National. This growth, however, occurred at a substantially faster rate before 1960 than after that year. Before 1960 it was growing more rapidly than the other banks in the county, and after that year more slowly. Its share of total Nashville banking business thus **[****9]** declined from a high of 5.72% on June 30, 1960, to 4.83% on June 30, 1964.

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[1] The opinion of the District Court is reported at *260 F.Supp. 869 (D. C. M. D. Tenn. 1966)*. Its findings of fact and conclusions of law are unreported. Probable jurisdiction was noted at ***388 U.S. 905 (1967)***.

[2] *United States v. Philadelphia National Bank, 374 U.S. 321, 326 (1963)*.

[3] We cite percentages of total assets for convenience, not because they are alone a valid indication of a bank's market share. The percentages of total deposits and of total loans held by the eight Davidson County banks varied insignificantly from the percentages of total assets. See the District Court's Finding of Fact No. 66.

[4] *260 F.Supp., at 881*.

[5] Finding of Fact No. 91.

The District Court made elaborate findings as to why Nashville Bank and Trust "reached a plateau on which it remained until the date of the merger" and why in this period "it was a stagnant and floundering bank." [6] From those findings, and from the broad picture of Nashville Bank's history and operations which emerges from the testimony and exhibits in this case, it appears that the principal reason was that key members of its management, the men who had been responsible for the bank's progress in the late 1950's, had advanced in age and either retired or slowed their activities. The bank's officials nonetheless made but scant efforts to recruit and advance young talent. Nashville Bank paid substantially **[*176]** lower salaries than the other Nashville banks, had no funded pension plan, and conducted no systematic recruiting program. On January 1, 1964, the bank's board of directors had 13 members, of whom four were 75 or over, nine were 65 or older, and 11 were 63 or older. Of the six department heads four were 65 or older and the other two were 59. The average age of the 15 officers working outside **[****10]** the trust department was over 60. The District Court painted in somber hues the banking policies and the economic results which seemed to flow from the failure to hire young talent. Essentially, Nashville Bank was not aggressive or efficient, and it had stopped growing, so that it could not open branches (it had only one) or embark on a correspondent banking program. It was nevertheless an institution of substantial size, with assets of $ 50,900,000 and deposits of $ 45,500,000. It was profitable, and it offered somewhat different services, occasionally at somewhat lower rates, than its competitors.

In January 1964, the individuals who had owned controlling shares of Nashville Bank and Trust decided to sell 10,845 shares, a controlling interest, to a group of prominent Nashville citizens headed by William Weaver. The price was $ 350 per share. In February 1964, the Weaver group opened negotiations looking to a merger with Commerce Union Bank, Nashville's third largest. The negotiations **[****11]** were unsuccessful, however, because Weaver demanded $ 460 per share while Commerce Union offered only $ 360. Weaver then negotiated the sale to Third **[**887]** National, at a price of about $ 420 per share. The merger was approved by the boards of directors of both banks on March 12, 1964, and, after approval by the Comptroller of the Currency, was consummated on August 18, 1964.

[*177] II.

LEdHN[1][] [1]The legislative history of the Bank Merger Act of 1966 [7] **[****13]** leaves no **[***1022]** doubt that the Act was passed to make substantial changes in the law applicable to bank mergers. Congress was evidently dissatisfied with the 1960 Bank Merger Act as that Act was interpreted in *United States v. Philadelphia National*

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[6] Finding of Fact No. 134.

[7] 80 Stat. 7, *12 U. S. C. § 1828 (c) (1964 ed., Supp. II)*. The Act provides, in relevant part:

HN1[] "(5) The responsible agency shall not approve --

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

. . . .

"(7) . . . .

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than [§ 2 of the Sherman Act], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Bank, 374 U.S. 321 (1963), and in United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964), and wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging **[****12]** those mergers. The resulting **[*178]** statute, however, as some members of Congress recognized, [8] was more clear and more specific in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.

Last Term, in United States v. First City National Bank of Houston, 386 U.S. 361 (1967), this Court interpreted the procedural provisions of the 1966 Act, holding that ***HN2***[] the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. ***HN3***[] The task of the district courts was to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by "the convenience and needs of the community to be served." *Houston Bank* reserved "all questions" concerning the substantive meaning of the **[****14]** "convenience and needs" defense. See 386 U.S., at 369, n. 1.

III.

The proceedings that have occurred until now regarding validity of the merger here before us have been scrambled and confused, largely because the relevant statute, the 1966 Bank Merger Act, became law just prior to the trial and did not receive its first interpretation **[**888]** by this Court, in *Houston Bank*, until the decision below had been rendered.

The two banks agreed to merge on March 12, 1964. On April 27, 1964, they applied to the Comptroller **[***1023]** of the Currency for approval, as the 1960 Bank Merger Act required. Pursuant to that Act, the Federal Reserve **[*179]** Board, the Federal Deposit Insurance Corporation, and the Department of Justice reported to the Comptroller of the Currency on "the competitive factors involved." The Federal Reserve Board reported that the merger "would have clearly adverse effects on competition" by "eliminat[ing] direct competition which exists between participants and . . . increas[ing] significantly . . . already heavy concentration . . . ." The Federal Deposit Insurance Corporation reported that "the effect of the proposed merger on competition **[****15]** would be unfavorable." The Department of Justice reported that the merger "would have severe anticompetitive effects upon banking competition in Metropolitan Nashville." The Comptroller of the Currency, however, concluded that the merger would not lessen competition and would "improve the charter bank's ability to serve the convenience and needs of the Nashville public." On August 4, 1964, he approved the merger.

On August 10, 1964, the United States, as this Court's decision in *Philadelphia Bank* authorized, sued in federal district court charging that the proposed merger was in violation of § 7 of the Clayton Act [9] and § 1 of the Sherman Act. [10] On August 18, 1964, the District Court refused the Government's request for a preliminary injunction staying consummation, and on that day the two banks merged.

[**16]** The antitrust suit against the merger had not come to trial when, on February 21, 1966, the Bank Merger Act of 1966 took effect. Congress had devoted much attention to the impact of that Act on bank mergers still in the process of litigation. In § 2 of the Act, 80 **[*180]** Stat. 10, Congress excluded from all antitrust liability [11] **[****17]** mergers which had been consummated before June 17, 1963, the date of this Court's *Philadelphia Bank* decision, and those consummated between June 17, 1963, and February 21, 1966, as to which the Attorney General had not

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[8] See, *e. g.*, 112 Cong. Rec. 2447 (remarks of Congressman Fino).

[9] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18.

[10] 26 Stat. 209, 15 U. S. C. § 1. The United States appealed to this Court only from the dismissal of the § 7 Clayton Act charge. The § 1 Sherman Act count is therefore not before us.

[11] Liability for monopolization under § 2 of the Sherman Act was not excluded.

begun litigation on February 21, 1966. However, although Congress considered amendments which would have provided antitrust immunity also for those bank mergers [12] consummated after June 17, 1963, and already the subject of litigation, a decision was made to leave those mergers subject to liability, apparently [13] because the merging parties had known, from *Philadelphia Bank*, that their consummation was with the risk of an eventual order to dissolve. Congress did provide, in § 2 (c) of the Act, that courts hearing such cases "shall apply the substantive rule of law set forth" in the Act.

LEdHN[2A][] [2A]Since the trial had been held after the 1966 Act took effect, and since the Comptroller of the Currency and other witnesses, directed by counsel, had addressed themselves to the statutory language **[***1024]** contained in that Act, the District Court saw no need to remand to the Comptroller for a new opinion in **[**889]** light of the Act, as was ordered in *United States v. Crocker-Anglo National Bank, 263 F.Supp. 125 (D. C. N. D. Cal. 1966)*. Proceeding to decide the case, the District Judge held that under the new Act, violation of antitrust standards was "primarily **[*181]** a legal issue . . . [on which courts should make] an **[****18]** independent determination," while "convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, 'plainly and unquestionably a legislative or administrative determination' . . . [on which] the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence." [14] The court concluded that the merger did not offend antitrust standards and that the Comptroller's conclusion that it would benefit the community was supported by substantial evidence. The relief sought by the Justice Department was denied.

LEdHN[2B][] [2B]

[**19]** IV.

LEdHN[3A][] [3A]**LEdHN[4A]**[] [4A]The District Court asserted that one effect of the Bank Merger Act of 1966 was to alter the standards used in determining whether a merger is in violation of § 7 of the Clayton Act and *§ 1* of the Sherman Act. Essentially, the District Court mandated a return to *United States v. Columbia Steel Co., 334 U.S. 495 (1948)*, which this Court has held to be "confined to its special facts." *Lexington Bank, 376 U.S., at 672*. In later cases, especially *Philadelphia Bank, supra; Lexington Bank, supra; United States v. Aluminum Co. of America, 377 U.S. 271 (1964)*; and *United States v. Continental Can Co., 378 U.S. 441 (1964)*, this Court has rejected the *Columbia Steel* approach to determining whether a merger will tend "substantially to lessen competition." We find in the 1966 Act, which adopted precisely that § 7 Clayton Act phrase, as well as the "restraint of trade" **[*182]** language of Sherman Act *§ 1*, no **[****20]** intention to adopt an "antitrust standard" for bank cases different from that used generally in the law. [15] Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: **HN4**[] Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could

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[12] Three mergers are in this category: the Nashville merger at issue here; a California merger, see *United States v. Crocker-Anglo National Bank, 263 F.Supp. 125 (D. C. N. D. Cal. 1966)*; and a St. Louis merger. See H. R. Rep. No. 1221, 89th Cong., 2d Sess., 4.

[13] See, *e. g.*, 112 Cong. Rec. 2465 (remarks of Congressman Ashley).

[14] *260 F.Supp., at 874*. If the District Court failed to review the issues in the case *de novo*, as this quotation suggests, it committed error. *Houston Bank, supra.* Other statements in the opinion and findings below suggest that a *de novo* judgment may also have been reached by the District Court. Our disposition of the case makes it unnecessary to decide whether undue deference was paid to the Comptroller's judgment.

[15] We also find in the Act on intention to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger, and so agree with the District Court that commercial banking in Davidson County was the relevant market for appraising this merger.

establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages. See *Houston Bank, supra.* Congressman Minish spoke in tune with the language of the Act and the statements of his colleagues when he said:

"It should also be clear from the language of paragraph (5)(b) of this bill, which establishes this single **[***1025]** standard, that the competitive factor to be used is drawn directly from Clayton Act section 7 and Sherman Act *section 1*. Thus, all of the principles developed over the last 75 years in regard to these statutes, such as the definition of relevant market and the failing company doctrine are **[**890]** carried forward unchanged by this proposed **[****21]** legislation." [16]

LEdHN[3B][] [3B] ***LEdHN[4B]***[] [4B]

LEdHN[5][] [5]We therefore hold that the District Court employed an erroneous standard in applying § 7 of the Clayton Act to the merger. In addition we hold that, appraised by the test enunciated in recent Clayton Act **[****22]** cases, the **[*183]** tendency of the merger substantially to lessen competition is apparent. Nashville had three large banks and one of middle size. In this merger the bank of middle size was absorbed by the second largest of the big banks. By the merger the market share of the three largest banks rose from 93% to 98%; the merged bank alone had almost 40% of the Nashville banking business. In addition, the record is replete with evidence that Nashville Bank and Trust was in fact an important competitive element in certain, though not in all, facets of Nashville banking. It offered somewhat different services, at somewhat different rates, from those offered by other banks, and some customers found those services desirable. Although Nashville Bank failed to increase its percentage share of the Nashville banking market after 1960, the absolute size of its business increased steadily from 1956, when it entered seriously into the commercial banking market, to the date of the merger. Throughout this period it was profitable. The record permits no conclusion that Nashville Bank was in any way a "failing" company. See *International Shoe Co*. v. *FTC, 280 U.S. 291 (1930)*. **[****23]** On these facts, the conclusion is inescapable that the merger of Third National Bank in Nashville with Nashville Bank and Trust Co. tended to lessen competition in the Nashville commercial banking market. *Philadelphia Bank, supra.*

V.

LEdHN[6A][] [6A]Because the District Court erroneously concluded that the merger would not tend to lessen competition, its conclusion upon weighing the competitive effect against the asserted benefits to the community is suspect. To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court **[*184]** can perform again the balancing process mandated by the Act. [17]

[**24]** There is, however, an additional reason to remand. In our view, the **[***1026]** District Court misapprehended the meaning of the phrase "convenience and needs of the community"; it misunderstood the weight to be given the relevant factors when seeking to determine whether the anticompetitive effects of a merger are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

LEdHN[7][] [7]***HN5***[] The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market. Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though **[**891]**

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[16] 112 Cong. Rec. 2451. See also 112 Cong. Rec. 2441-2442 (remarks of Congressman Patman); 112 Cong. Rec. 2455 (remarks of Congressman Annunzio); 112 Cong. Rec. 2452 (remarks of Congressman Reuss); 112 Cong. Rec. 2655 (statement of Senator Robertson).

[17] Although the District Court erroneously determined the antitrust impact of the merger, its judgment that the merger was not unlawful under the Act may nevertheless have resulted from a sufficient weighing of the evidence before it. Some of the findings below suggest the view that the merger would tend to lessen competition but that this anticompetitive effect would be outweighed by benefits to the community. The argument need not be pursued, however, since we hold that the District Court also misapplied the Act's convenience-and-needs provision.

the merger lessened competition. The public interest was the ultimate test imposed. This is clear not only from the language of the Act but from the statements of those who supported it while the Act was under consideration:

"Mr. ASHLEY. **[****25]** . . . In other words, the merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, on balance, it may properly be regarded as in the public interest.

. . . .

[*185] "Mr. MULTER. . . . I believe it was the intention of the Congress originally in 1960 when we enacted the Bank Merger Act that the public interest should be paramount in making any determination with reference to a merger. The words 'in the public interest' are again written into this bill now and will remain in the law so that there will be no question but that the courts and the agencies must take the public interest into account.

. . . .

"Mr. ASHLEY. Is the gentleman saying, as I believe he is, that it is the consensus of the committee, in drafting this bill, that the public interest is to be considered as combining the consideration both of the anticompetitive factors of a particular merger on the one hand, and, on the other, the needs and convenience of the community that may derive from that merger, which, as I say, may result in a diminution of competition; in other words, that the public interest has got to involve a consideration of both **[****26]** of these rather considerable factors?

"Mr. STEPHENS. That is correct . . . ." 112 Cong. Rec. 2446, 2449, 2450.

It is plain that Congress considered both competition in commercial banking and satisfaction of "the convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. ***HN6***[] If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

The necessity of choosing is most clearly posed where the proposed merger would create an institution with **[*186]** capabilities for serving the public interest not possessed by either of the two merging institutions alone and where the potential could be realized only through merger. Thus, it might be claimed, as it is in this case, that a combined bank would have a greater **[***1027]** lending capacity and hence be better equipped to serve the financial needs of the community. **[****27]** In *Philadelphia Bank, 374 U.S., at 370-371*, this Court, acting under the 1960 Bank Merger Act, rejected the relevance of the combined bank's ability to serve Philadelphia by making large loans that could otherwise only be obtained in New York. The Court found no statutory authorization for considering such a benefit in appraising the legality of a merger. Expressions in Congress during consideration of the 1966 Act suggest that one purpose of that Act was to give this factor, not previously relevant in appraising bank mergers, suitable weight in judging their validity. [18] In the case before us the District Court's findings of fact suggest that the new bank, with a 20% greater lending limit than Third National Bank previously had, was able to make larger loans, for which Nashville area companies had previously to go to Chicago or New York. The District Court also stated that because Third National Bank operated with a higher loans-to-deposits ratio than Nashville Bank and Trust, combining their deposits **[**892]** and applying the Third National Bank ratio to the total increased available lending capacity in Nashville by about $ 2,800,000. But the District Court **[****28]** was not specific in describing the beneficial consequences of such results for the Nashville community, or in defining the value of these additions, especially as compared with the other, and less desirable, results of the merger. Absent such findings, the increased lending capacity of the new bank weighs very little in the balance.

[*187] Congress was also concerned about banks in danger of collapse -- banks not so deeply in trouble as to call forth the traditional "failing company" defense, but nonetheless in danger of becoming before long financially unsound institutions. [19] **[****30]** Congress seems to have felt that a bank failure is a much greater community

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[18] See, *e. g*., 112 Cong. Rec. 2663 (remarks of Senator Robertson).

catastrophe than the failure of an industrial or retail enterprise, and that ***HN7***[] a much smaller risk of failure than that required by the failing company doctrine should be sufficient to justify the **[****29]** rather radical preventive step of an anticompetitive merger. The Findings of Fact of the District Court included the information that Nashville Bank and Trust Company had a higher than usual percentage of unsound loans, the result of unsatisfactory procedures for investigating and judging credit risks, and that its "rating" had been changed in 1962 from "satisfactory" to "fair." The District Court drew no conclusion about the extent of the danger these conditions posed for Nashville Bank and Trust's future, about the feasibility of curative measures short of merger, or about whether other healthy aspects of the bank's condition -- for instance its steady profitability, including after-tax earnings of $ 368,000 in 1963 [20] -- removed **[***1028]** any danger of failure in the foreseeable future. Absent findings and conclusions of this nature, [21] **[*188]** the District Court seemed to be holding that the merger should be approved simply because Nashville Bank and Trust Company could be a better bank and could render better banking services.

The District Court, it appears, considered the merger beneficial to the community because Nashville Bank and Trust had only one branch, because it had no program of correspondent banking, because its operations were not computerized, because it emphasized real estate loans rather than commercial loans, because its management was old and unable **[****31]** to render sound business advice to borrowers, because it was not recruiting new talent, and because its salary scale was low. Hence a merger was justified because it would solve these problems and produce an institution which, in the words of the House Report, would be capable of

"furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result *under general **antitrust law** criteria* in a substantial lessening of competition." H. R. Rep. No. 1221, 89th Cong., 2d Sess., 3. (Emphasis in original.)

[893]** ***LEdHN[8]***[] [8]Undeniably, Nashville Bank and Trust had significant problems of the kind outlined in the findings of the District Court, problems which were primarily rooted in unsatisfactory and backward management. Just as surely, ***HN8***[] securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss **[****32]** of competition. Nor is there any doubt on this record that merger with Third National would very probably end the managerial problems of Nashville Bank and Trust and secure the better **[*189]** use of its assets in the public interest. Thus if the gains in better service outweighed the anticompetitive detriment and the merger was essential to secure this net gain to the public interest, the merger should be approved.

But this analysis puts aside possible ways of satisfying the requirement of convenience and need without resort to merger. If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the situation is radically different. In such circumstances, we seriously doubt that Congress intended a merger to be authorized by either the banking agencies or the courts. If, for example, just prior to this merger, an experienced banker with competent associates had offered to take over the active management of the bank or another competent businessman with a willingness to tackle the management problems of the bank **[****33]** had offered to buy out the Weaver interests at an acceptable price, it seems obvious that the Weaver group, which seeks to justify the merger in terms of producing an institution rendering better banking service, should not be permitted to merge and to ignore an available alternative. Otherwise, the benefits of **[***1029]** competition,

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[19] See, *e. g*., 112 Cong. Rec. 2459-2460 (remarks of Congressman Multer).

[20] In Finding of Fact No. 181 the District Court concluded that the bank's "apparently good earnings record" would have been diminished, absent a merger, by "the expenditures which needed to be made for the proper maintenance of the bank." Among these expenditures were increased salaries, automation, and establishment of additional branch offices. There is no reason to think that such investment of accrued profits would not have been rewarded with a fair return in the form of increased future profits.

[21] The District Court did conclude, in Finding of Fact No. 184, that the merger was "a business necessity" for Nashville Bank and Trust Co. This general conclusion, without supporting findings, hardly establishes the possibility of eventual failure.

acknowledged by Congress, would be sacrificed needlessly. For the same reasons, we think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed.

LEdHN[9][] [9]This seems to us the most rational reading of the Act, which was a compromise and satisfied none of the protagonists **[*190]** in this extended controversy. ***HN9***[] The Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. However, **[****34]** ***HN10***[] the Act requires as well that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist as they do in this case, is determining whether the merging bank is capable of obtaining its own improved management. This test does not demand the impossible or the unreasonable. It merely insists that ***HN11***[] before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

The question we therefore face is whether the findings of the District Court sufficiently or reliably establish the unavailability of alternative solutions to the woes of Nashville Bank and Trust Company. In our view, they do not. The District Court described the nature and extent of the bank's managerial shortcomings. It noted that the Weaver group had discussed these matters extensively with a number of persons, including bankers, and had learned that recruiting new management would be "extremely **[****35]** difficult" at the salaries paid by Nashville Bank. And it concluded that management procurement was difficult for banks in general and an "almost insoluble" problem for Nashville Bank and Trust.

Just how insoluble was not made clear. The District Court did not ask **[**894]** whether the Weaver group had made concrete efforts to recruit new management, especially a chief executive officer, who was needed most. The record seems clear that they made no proposals to any individual prospects in or outside of Nashville, save one rather casual letter to a banking acquaintance in New York, and that they neither sought nor cared to seek the help of firms specializing in finding or **[*191]** furnishing new management. [22] The court made no reference to the possibility that the new owners themselves might have taken active charge of the bank. None of them was a banker, but their successful predecessor Hackworth had not been one before becoming president of Nashville Bank. [23] **[****37]** Nor did the **[***1030]** court assess the possibility of a sale to others who might have been willing to face up to the management difficulties over a more extended period. We find nothing in the findings indicating **[****36]** that a bank with assets of $ 50,000,000 was simply too small to attract competent management [24] **[*192]** or that the Weaver group, the new owners, were intransigently insisting on unreasonably conservative managerial policies. Indeed, the Weaver group included competent and experienced men who realized the

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[22] An official of a company specializing in recruitment of executives did testify for the banks at the trial. In his opinion, recruiting executives for Nashville Bank and Trust would have been extremely difficult.

[23] The record contains the revealing statement by William C. Weaver, Jr., the leading member of the group which owned the bank at the time of the merger:

"We finally concluded before we agreed to the merger agreement with the Third National Bank that, if one of us, one of our group, was unable to go down there to the Trust Company and devote full time to its affairs -- I would like to say right here that none of us in the group had any commercial banking experience, and that was a serious problem.

"But we concluded that if we were unable to devote our full time to the affairs of the bank, it would be in the best interests of the customers of the bank, the employees of the bank, the stockholders of the bank, and the Nashville community, for us to merge with the Third National Bank."

Mr. Weaver seems to have felt that one or more members of the new ownership group would have been able to furnish satisfactory executive leadership for the bank.

[24] Capital City Bank, founded in 1960 and but one-fourth the size of Nashville Bank and Trust Co., was apparently flourishing.

In this regard, a recent study concluded that "the small bank can compete successfully with the large bank -- if it has the will to do so." Kohn, Competitive Capabilities of Small Banks, 60 Banking, January 1968, at 64, reporting on the New York State Banking Department's research study, The Future of Small Banks.

desirability of improving an unsatisfactory situation. Rather than making serious efforts to do so themselves or to sell to others who would, they preferred to merge with a competing bank -- a step which produced a profit of $ 750,000 on a two-month investment of $ 3,800,000.

LEdHN[10][] [10]The burden of showing that an anticompetitive bank merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks. *Houston Bank, supra.* A showing that one bank needed more lively and efficient management, absent a showing that the alternative means for securing such management without a merger would present unusually severe difficulties, cannot be considered to satisfy that burden.

We therefore conclude that the District Court was in error in holding that the factors **[****38]** it cited as ways in which this merger benefited the Nashville community were sufficient

LEdHN[6B][] [6B] to outweigh the anticompetitive effects of the merger. The case must be remanded so that the District Court can consider again the application of the Bank Merger Act to the facts of this merger. Because the **[**895]** District Court heard this case before *Houston Bank* was decided, it may wish to consider reopening the record, so that the parties will have an opportunity to present new evidence in light of the intervening interpretations of the Act. The judgment below is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Concur by: HARLAN (In Part)

Dissent by: HARLAN (In Part)

Dissent

[*193] MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

My understanding of the procedural structure of the Bank Merger Act of 1966, [1] based on our decision last Term in *United States v. First **[***1031]** City National Bank of Houston, 386 U.S. 361, 364*, **[****39]** is that the Act requires the District Court to engage in a two-step process. First, the District Court must decide whether the merger, considered solely from an antitrust viewpoint, would violate the Clayton Act standard embodied in the Bank Merger Act. If it would not, the inquiry is over. If there would be a violation, then the District Court must go on to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." [2] In making the latter decision, the District Court must again evaluate the antitrust factor, this time in a less polar way. For a comparatively minor violation of the Clayton Act, like that in this case, obviously may be more readily outweighed by factors relating to "convenience and needs" than may a relatively serious infraction.

[**40]** Turning to the application of the Act to this case, the first question is whether the merger, as an antitrust matter, would violate the Clayton Act. I continue to disagree, particularly in the banking field, with the "numbers game" test for determining Clayton Act violations which was adopted by this Court in *United States v. Philadelphia National Bank, 374 U.S. 321*. However, I consider myself bound by that decision, and under its dictates I concur in the Court's finding that this merger would violate the Act.

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[1] 80 Stat. 7, *12 U. S. C. § 1828 (c) (1964 ed., Supp. II)*.

[2] Bank Merger Act of 1966, amending *§ 18 (c)(5)(B)* of the Federal Deposit Insurance Act, *12 U. S. C. § 1828 (c)(5)(B) (1964 ed., Supp. II)*.

[*194] I also concur in the Court's decision that this case must be remanded so that there may be a new application of the second-step balancing process. In this case, which was decided before our decision in *Houston Bank, supra*, the District Court either omitted the first of the two indicated procedural steps or concluded, incorrectly, that the merger would not violate the Clayton Act. [3] In either event, the error may have caused the District Court to misconceive the antitrust "threshold" at which the second-step balancing process was intended to come into play. This, in turn, may have led the court to give the "anticompetitive effect" of **[****41]** the merger a different weight in the balance than was intended by the framers of the Bank Merger Act. Hence, the case must be remanded to the District Court so that it may reweigh the competing factors in light of the correct antitrust threshold.

With regard to the "convenience and needs" side of the balance, I am in accord with the Court's ruling that a merger should not be approved under the 1966 Act unless the District Court finds that **[**896]** the benefits conferred upon the community by the merger could not reasonably have been achieved in other ways. Unlike the Court, however, I conclude from the record that the District Court *did* make adequate findings on this issue. The record reveals that many witnesses testified that Nashville Bank had problems of real magnitude, the greatest being to find replacements for key executives. Mr. Weaver, the leader of the **[****42]** group which purchased control of the bank not long before the merger, testified that initially his group had intended to operate the **[***1032]** bank themselves, but that talks with many bankers had convinced him that his group could not solve the bank's problems. The head of an executive-placement firm **[*195]** testified that he did not believe that he could have found new executives for Nashville Bank, in light of its overall situation. [4] Although there was testimony in rebuttal, including that of another recruiter of executives, to the effect that the problems were not unsolvable, I cannot conclude that the District Court committed error when it held that

"While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure . . . to provide itself with the facilities, procedures and equipment required to maintain a competitive posture." *260 F.Supp. 869, 881*.

[**43]** In sum, what I would consider to be the scope of the proceedings on remand is this. In light of our holding that a Clayton Act violation has been made out, further consideration of the first-step antitrust issue by the District Court is foreclosed. Believing, as I do but contrary to the Court, that the findings already made by the District Court as to the alternatives to merger are adequate, in my view the only question for the District Court to consider respecting the second step is whether, because of its character in light of the antitrust standard now set forth, the antitrust violation should yield to other factors bearing on public "convenience and needs."

References

Am Jur, Monopolies, Combinations, and Restraints of Trade (1st ed 95, 147-154)

US Digest Anno, Restraints of Trade and Monopolies 34.5

ALR Digests, Restraints of Trade and Monopolies 17.5

L ed Index to Anno, Banks; Restraints of Trade and Monopolies

ALR Quick Index, Banks and Banking; Restraints of Trade and Monopolies

Annotation References:

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[3] The District Court's opinion is unclear as to whether the court considered it necessary to make a discrete finding under the Clayton Act.

[4] An account of Nashville Bank's overall situation appears in the Court's opinion, *ante*, at 175-176.

Construction, by Supreme Court of the United States, of 7 of **[****44]** the Clayton Act (*15 USC 18*), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Application to banks and banking institutions of antimonopoly or antitrust laws. 83 ALR2d 374.

End of Document

State v. McBride Transp., Inc.

Supreme Court of New York, Special Term, New York County

March 5, 1968

No Number in Original

Reporter
56 Misc. 2d 90 *; 288 N.Y.S.2d 170 **; 1968 N.Y. Misc. LEXIS 1676 ***; 1968 Trade Cas. (CCH) P72,382

State of New York, Plaintiff, v. McBride Transportation, Inc., et al., Defendants

Disposition: **[***1]** The motion is in all respects denied.

Core Terms

carriers, transportation, conspiracy, anti-trust, protest, milk, rates, commission's approval, primary jurisdiction, proposed agreement, milk product, Donnelly Act, defendants', practices, immunity, tariffs, prices

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

N.Y. Pub. Serv. Law § 63-cc(7) provides: Parties to any agreement approved by the Public Service Commission under § 63-cc and other persons are, if the approval of such agreement is not prohibited by paragraph three or four, hereby relieved from the operation of the N.Y. Gen. Bus. Law § 340 with respect to the making of such agreement, and with respect to the carrying out of such agreement.

Administrative Law > Judicial Review > Administrative Record > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN2[] Judicial Review, Administrative Record

A court is limited upon judicial review of an ex parte administrative record before the Public Service Commission (PSC) of an approval or disapproval of an application or by-laws to examine only that question which the applicable statute, N.Y. Pub. Serv. Law § 63-cc, has specified for determination, i.e., approval of an agreement only if in furtherance of State transportation policy. Judicial review of the PSC's determination of the ex parte application is not a substitute for judicial enforcement under the Donnelly Act of anti-competitive practices.

Governments > State & Territorial Governments > Claims By & Against

HN3[] State & Territorial Governments, Claims By & Against

The State cannot be estopped on any equitable grounds from exercising its sovereign power with respect to claimed unlawful conspiracy and continuing activities.

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

Even though Public Service Commission approval would serve to render certain of the conduct charged immune from challenge such activities may nevertheless be challenged as components of a conspiracy to achieve an unlawful end. The practices immunized, if such practices are part of a conspiracy to achieve an unlawful end, would, by the loss of that immunity be rendered unlawful.

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

Energy & Utilities Law > Utility Companies > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN5[] Regulated Practices, Price Fixing & Restraints of Trade

Donnelly Act violation may not be used as immunity or shield to achieve the regulation of commerce, envisioned by agreement under the Public Service Law, and thus unlawfully to restrain commerce and competition and to dilute the standards adopted in the public interest. The Public Service Commission cannot give relief under the Donnelly Act.

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Administrative Law > Separation of Powers > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

HN6[] **Sherman Act, Remedies**

The court will not abdicate its responsibility nor surrender its jurisdiction to an administrative agency where the regulatory statute does not provide for adequate or similar relief under the Sherman Act.

Headnotes/Summary

Headnotes

Monopolies -- action by Attorney-General -- motion to dismiss complaint by Attorney-General charging milk transportation companies with violation of *antitrust law* including use of force and other unlawful means is denied -- Public Service Commission does not have exclusive jurisdiction of matter because defendants filed agreement as permitted by section 63-cc of Public Service Law seeking Commission approval; acts alleged in complaint cannot be sanctioned by approval of agreement -- by protesting to Commission, State has not conferred exclusive jurisdiction on Commission.

1. Defendants' motion to dismiss the complaint in an action commenced by the Attorney-General pursuant to the Donnelly Antitrust Act (*General Business Law, § 340*) upon an agreement in restraint of competition and free exercise of activity in the conduct of business in the transportation of milk and milk products, including the use of force or other unlawful means to achieve price stability, is denied.

2. Subdivision 7 of section 63-cc of the Public Service Law provides that parties to any agreement approved by the Public Service Commission are relieved from the **[***2]** operation of *section 340 of the General Business Law* with respect to the making and carrying out of such agreement. Defendants alleged that they filed an agreement with the Public Service Commission and are awaiting a decision thereon, that plaintiff filed objections to approval, that plaintiff has failed to exhaust its remedy before the Commission, and that the Commission has primary jurisdiction of the matter. Should the Commission act, upon judicial review of such action, the court would be able to review only the question whether the agreement was in furtherance of the State's transportation policy and therefore would not be able to dispose of the issues presented here including the acts alleged in the complaint to be harmful to the People and involving activities not to be sanctioned by the agreement or its approval. The Commission's jurisdiction does not exclude that of the court. Commission approval does not approve the machinery used to carry out the purposes of the agreement. The Commission cannot deal with activities in excess of those it is empowered to approve and cannot give relief under the Donnelly Act. The issue of antitrust violation must be determined in this **[***3]** action.

3. By lodging a protest before the Commission, the State has not conferred exclusive jurisdiction on the Commission.

Counsel: *Zelby & Burstein* for defendants.

Louis J. Lefkowitz, Attorney-General (*Louis Smigel, Samuel A. Hirshowitz* and *George C. Mantzoros* of counsel), for plaintiff.

Judges: Samuel A. Spiegel, J.

Opinion by: SPIEGEL

Opinion

[*90] [172]** Defendants move for dismissal of the complaint, or, in the alternative, for a stay of proceedings upon the ground that the court does not have jurisdiction of the subject matter.

Defendants contend that this matter is in the exclusive primary jurisdiction of the Public Service Commission (hereinafter referred to as Commission or PSC), that the plaintiff has failed to exhaust its remedy before the Commission, and, alternatively, that the regulation of milk-handling is reserved exclusively **[*91]** to the Secretary of Agriculture, in pursuance of the Agricultural Adjustment Act (*U. S. Code, tit. 7, § 601 et seq.*), pre-empting the entire field of regulation.

It is alleged in the complaint that this action is instituted by the Attorney-General, pursuant to the Donnelly Antitrust Act (*General Business Law,* ***[***4]*** *§ 340*), upon an agreement in restraint of competition and free exercise of activity in the conduct of business in the transportation of milk and milk products.

Defendant Tank Carriers Conference, Inc. (hereinafter called "Conference") is a membership corporation whose purpose, among other things, is to "provide a medium thereof which its members may engage in publication and filing of rates and tariffs with State and Federal regulatory agencies." The Conference certificate of incorporation further provides that nothing therein contained "shall authorize or empower the corporation to perform or engage in any acts or practices prohibited by *Article 22 of the General Business Law* or other antimonopoly statutes of this State."

The Attorney-General charges that for many years the defendants and others arranged and combined to restrain competition and free exercise of activity in the business of the transportation of milk and milk products in violation of *section 340 of the General Business Law*.

In furtherance of such arrangement and combination, it is charged that the defendants and others did solicit, induce and persuade, urge and coerce other carriers to participate in the Conference's **[***5]** price-fixing procedures and to adopt the prices as thus fixed, and to increase their **[**173]** transportation prices. The Conference filed protests and complaints before a regulatory agency against noncomplying carriers which were charging lower prices. It is further charged that it negotiated with carriers against whom such protests and complaints had been filed, to join the Conference, and to increase their prices. Thereafter, said Conference withdrew protests and complaints upon increase of their rates by such carriers. It was also represented in the "purpose" clause of the Conference's certificate of incorporation that it was formed to publish and file tariffs of member carriers, but, it is alleged, the Conference's contemplated purpose to establish procedures for the joint consideration and determination of rates was omitted and concealed.

It is alleged that the effect of such arrangement and combination and of the actions taken in pursuance thereof is to raise the transportation and hauling price, to maintain and stabilize noncompetitive transportation rates and tariffs, to prevent and interfere with the freedom of carriers to establish their own **[*92]** transportation **[***6]** prices, to reduce, suppress, and eliminate competition in the transportation of milk and milk products, thus depriving consumers and bottlers and processors of fluid milk and the users of other dairy products in bulk of the benefits of competition.

Defendants McBride Transportation, Inc. and C & E Trucking Corporation are common carriers authorized by the Public Service Commission to transport milk and milk products between points within the State of New York. They are members of the defendant Conference, a membership corporation whose members are authorized carriers. Said Conference filed an application with the Commission on November 28, 1966, for approval of an agreement which, defendants assert, purports to permit members of the Conference to jointly consider, negotiate, and establish transportation rates within the State of New York. The application for approval of the agreement states:

"In order to provide reliable and regular service required it is necessary for these carriers to have a forum available for the discussion of rate matters in order that said carriers may be enabled to maintain their ability to provide the necessary standards of service to the public. Further **[***7]** the applicant Conference makes possible compliance with the Commission's rules and regulations at a minimum cost and expense to the member carriers. For the reasons afore-mentioned applicant respectfully states that approval of this application will be in harmony with the transportation policy of this state and in furtherance of the public interest. * * *

"Filed herewith as Exhibit 1 is a copy of the Conference's By-Laws which together with Exhibit 2, its membership application, constitutes the agreement between and among the members of the Conference for which approval is sought. **[**174]** " Listed as constituting the members of the Conference are the two codefendants.

HN1[] Subdivision 7 of section 63-cc of the Public Service Law provides: "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 three or four, hereby relieved from the operation of the general business law section three hundred forty, with respect to the making of such agreement, and with respect to the carrying out of such agreement". If the application is approved, the Conference and its members will be free to **[***8]** engage in joint consideration and the establishment of rates.

Defendants urge that plaintiff is endeavoring here to prevent by judical adjudication that which the Commission is designed **[*93]** to permit on approval of the application before it and that until the Commission has acted, this suit is premature. Of course, this is true if the grievances tendered by the complaint pertain solely to activities to be lawfully engendered by approval of the pending application before the Commission in implementation of the proposed agreement.

Before considering the merit of the contentions of the parties as to the power of the court to entertain the action or, in the alternative, the propriety of a stay pending a resolution of the matter before the Commission, it is in order to note that while there is a lifting of the application of the Donnelly Act to activities in the effectuation of the agreement, if it is approved, said immunity does not attach until there is such approval. This may well be the key to the basic question whether the matters now before this court are the same matters before the Commission on the Conference application and plaintiff's protest thereto. Nor can it be **[***9]** contested that relief from the operation of the Donnelly Act cannot go to acts beyond orderly and lawful activity in carrying out the proposed agreement upon approval thereof for joint consensual action.

In short, the question is whether there remains overriding State interest in the prevention of unlawful activity.

Milk is the most precious food for babies. Along with bread, it is the staff of life for practically everyone. The best interests of the public are served by free competition and by preventing the price of milk and milk products from being fixed directly or indirectly by a conspiracy or by coercion. To that end this action to prevent unlawful activity was appropriately instituted.

This is akin to that area of State power in labor relations to enjoin and to enforce claims and rights in respect of alleged tortious conduct, which at the same time may include actions protected by Federal act, and constituting unfair labor practice, even while a charge of unfair labor practice may be pending before the National Labor Relations Board.

[175]** Thus, as defendants argue, the Commission does indeed have primary jurisdiction over the matters which are the subject of the **[***10]** application before it. Does that primary jurisdiction, however, before or after approval of application, furnish an umbrella under which defendants may with impunity engage in the additional activities of which the plaintiff complains? We do not believe so. Is this court action premature? Again, we do not believe so. Does the primary jurisdiction of the PSC mean sole jurisdiction to the exclusion of the court. The answer is no.

[*94] Judicial review upon an ex parte administrative record before the PSC of an approval or disapproval of the defendant Conference's application or by-laws, on the limited issue of furtherance of the State's transportation policy, would be insufficient to a disposition of the issues presented in the case at bar. (*Matter of Reynolds v. Triborough Bridge & Tunnel Auth., 276 App. Div. 388*.) ***HN2***[] This court, therefore, would be limited upon judicial review, to examine only that question which the applicable statute (Public Service Law, § 63-cc) has specified for determination, i.e., approval of an agreement only if in furtherance of State transportation policy. (*Staten Is. Edison Corp. v. Maltbie, 296 N. Y. 374*.)

Judicial review of **[***11]** the PSC's determination of the defendant Conference's ex parte application is not a substitute for judicial enforcement under the Donnelly Act of the anti-competitive practices alleged in the case at bar.

If defendants' view is adopted this court, under *CPLR 7803* (subd. 3), would then be limited in determining only whether the administrative determination was "arbitrary and capricious or an abuse of discretion." This court could never pass upon the defendants' predatory acts and practices set forth in the complaint, which are harmful to the people of the State of New York. (*Matter of Wager v. State Liq. Auth., 151 N. Y. S. 2d 274*, affd. *3 A D 2d 934*; *Matter of Mouakad v. Ross, 274 App. Div. 74*.) Judicial review would be after approval of the application by the Commission. Such approval neither determines the validity or culpability of acts previously engaged in nor predetermines the validity and culpability of actions taken in the future in claimed implementation of the approved agreement.

Thus, defendants argue that the Commission has sole jurisdiction over rate-making and that price-fixing is permitted if an agreement therefor is approved. To that extent, certainly, **[***12]** price-fixing is indeed involved, both here, of which plaintiff complains, and before the Commission, for which defendants seek approval. Stated in that manner, the issue appears to be confined, circumscribed and limited to the same in each instance. On examination, however, it is not so. Commission approval does not sanction or approve the machinery used **[**176]** to carry out the purposes of the agreement. Such Commission approval is not to be construed as a license to use force or other unlawful means to achieve price stability, and standards of service to the public not in harmony with the State transportation policy and not consonant with the furtherance of the best interests of the public.

[*95] The purpose of the State transportation policy and of Commission approval is certainly not for the elimination of competition by unlawful means.

HN3[] The State cannot be estopped on any equitable grounds from exercising its sovereign power with respect to claimed unlawful conspiracy and continuing activities. (*State of New York v. New York Movers Tariff Bur., 48 Misc 2d 225*.) This is so particularly where the acts of which complaint is made appear to involve activities **[***13]** not to be sanctioned by the proposed agreement and its approval.

In *Movers Tariff Bur*. (*supra, pp. 233-234*) the essence of the complaint as it was summarized by the court there was: "and the essence of the complaint is the existence of agreements between and among carriers, such alleged agreements being of the nature set forth in subdivision 1 of section 63-cc of the Public Service Law. It would appear, therefore, that the Legislature has given the Public Service Commission express jurisdiction to consider the alleged activities and transactions set forth in the complaint." Despite recognition of the mandate of the Legislature, the court there permitted the plaintiff to maintain the action.

Here, the essence of the complaint, as it relates to alleged conspiracy, is not directed alone to a conspiracy by joint consideration of rate-making, but also to activities to coerce others, including nonmembers, to comply with Conference agreements and thereby to eliminate competition by unlawful and unsanctioned means.

In this litigation, the Attorney-General, while protesting in the administrative proceeding, is not seeking similar relief here collaterally.

The Attorney-General's **[***14]** protest to the Public Service Commission, as distinguished from this broader litigation, on the narrowly defined issues presented before said Public Service Commission, pursuant to the defendants' prior application, for a section 63-cc exemption, cannot be characterized as an administrative remedy which should be "exhausted" and "cognizable in the first instance by an administrative agency". (See *United States v. Western Pacific R. R. Co., 352 U.S. 59, 63, 64*.)

Before us is not a question solely of the merit of the Conference's application for approval of agreement. It is not the fact, as defendants urge, that the Attorney-General fails to advise the court of the Commission's competence and primacy in that matter, or that section 63-cc authorizes **[**177]** a party to the agreement to take independent action. The fact is that **[*96]** the matter of the independence of carriers, to which it is said the Attorney-General does not allude, is not considered until it is alleged that the acts of the carriers are not independent. It is precisely the absence of any such independence, and the presence of coercive action, of which the plaintiff complains. The question is whether **[***15]** actions of the members and nonmembers are truly independent or actually coerced. In the latter event, an overriding State interest prevails.

The answer may well be inherent in defendants' statement that they "cannot coerce or compel carriers to adopt a particular rate." If thereby they mean that the law does not sanction it, the court agrees. If they mean that in fact it cannot be done, then that remains to be ascertained. However, for the purposes of this motion the allegations of the complaint must be deemed to be true.

In *Movers Tariff Bur*. (*supra, p. 246*) the court not only sustained the complaint while an application was pending before the Commission, but stated, in addition: "Further, ***HN4***[] even though commission approval would serve to render certain of the conduct herein charged immune from challenge such activities might nevertheless be challenged as components of a conspiracy to achieve an unlawful end, and the instant action is based on alleged conspiracy. As I see it, the practices immunized, if such practices are part of a conspiracy to achieve an unlawful end, would, by the loss of that immunity be rendered unlawful".

In considering the complaint, the court must **[***16]** look to the entirety of the alleged unlawful scheme to discover whether there are elements going beyond the permissible limits of the proposed agreement, as the allegations show they do. Nor are the activities in excess of those permissible within the power of the Commission to deal with and to redress. Thus, ***HN5***[] Donnelly Act violation may not be used as immunity or shield to achieve the regulation of commerce, envisioned by agreement under the Public Service Law, and thus unlawfully to restrain commerce and competition and to dilute the standards adopted in the public interest. (*Continental Co. v. Union Carbide, 370 U.S. 690*; *Georgia v. Pennsylvania R. R. Co., 324 U.S. 439*.) The Commission cannot give relief under the Donnelly Act (*Slick Airways v. American Airlines, 107 F. Supp. 199*, app. dsmd. *204 F. 2d 230*, cert. den. *346 U.S. 806*). There the District Court stated (p. 207):

"Further I cannot accept the thesis that since the CAB has the power to approve agreements or combinations which **[*97]** might otherwise violate the anti-trust laws, it would be necessary first to prove before the CAB a conspiracy to restrain trade and then **[**178]** have the Board **[***17]** disapprove the conspiracy before a litigant could seek redress for damages in the courts. Such a conspiracy being inherently secretive and furtive in nature is not the type of subject matter which would be dealt with by an order made under §§ 488, 489 or 492 so as to be relieved from the operation of the anti-trust laws. * * *

"The *Cunard* case does not stand for the proposition that an administrative body has remedial jurisdiction to determine the existence of the conspiracy under the anti-trust laws. It stands for the proposition that to the extent a complaint alleging a conspiracy under the anti-trust laws also sets forth a violation of another regulatory act under which an enforcing administrative body is established and where a complete remedy has been provided in said act, then the administrative body established thereunder has exclusive primary jurisdiction over such a matter, even though the facts alleged may state a conspiracy under the anti-trust laws, and to that degree the anti-trust laws are thus superseded." (p. 211).

In the circumstances here and the allegation of the existence of a conspiracy, dealing with antitrust violation, stay of action and answer is not **[***18]** warranted. The issue of antitrust violation must be determined here (*Lesron Jr.,* *Inc. v. Feinberg, 13 A D 2d 90*; *Slick Airways v. American Airlines, supra*). The conduct, of which plaintiff complains, goes beyond the conduct of which defendants seek Commission approval in consonance with the proposed agreement.

The fact that the Attorney-General has filed a protest in a separate and independent proceeding before the Public Service Commission to oppose an application by the Conference for an exemption from the State antitrust laws cannot be deemed to confer exclusive jurisdiction on that administrative body.

HN6[] This court will not abdicate its responsibility nor surrender its jurisdiction to an administrative agency where the regulatory statute does not provide for adequate or similar relief under the Sherman Act. (*Slick Airways v. American Airlines, supra.*)

Under the circumstances herein the court has the inherent and mandated authority and obligation, to grant the relief requested, particularly since the best interests of the public are involved in this issue which affects the entire State.

The Legislature did not grant the Public Service Commission the machinery **[***19]** to enforce antitrust laws or to remedy the **[*98]** evils created by the defendants' systematic pattern of antitrust violations set forth in **[**179]** the complaint. Accordingly, the defendants may not now attribute or otherwise impute this added jurisdiction to the Public Service Commission.

The motion is in all respects denied.

Iowa v. Union Asphalt & Roadoils, Inc.

United States District Court for the Southern District of Iowa, Central Division

March 14, 1968

Civil No. 7-1932-C-2

Reporter

281 F. Supp. 391 *; 1968 U.S. Dist. LEXIS 12545 **; 12 Fed. R. Serv. 2d (Callaghan) 493; 1968 Trade Cas. (CCH) P72,473

State Of Iowa, Iowa State Highway Commission, and every other Political Subdivision of the State of Iowa, Plaintiffs, v. Union Asphalt & Roadoils, Inc., et al., Defendants

Core Terms

suppression, seized, cases, member of the class, attorney's fees, class action, documents, notice, search and seizure, products, asphalt, withdrawal, exclusionary rule, court order, parties, records, political subdivision, representative party, illegally seized, criminal case, civil case, proceedings, circumstances, substitution, defendants', questions, grounds, gained, prices, ancillary jurisdiction

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Constitutional Law > The Judiciary > Jurisdiction > General Overview

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

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Congressional Duties & Powers > Lower Federal Courts

HN1[] **Jurisdiction Over Actions, Limited Jurisdiction**

Federal courts are courts of limited jurisdiction. They have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them. A state legislature cannot expand the jurisdiction of the federal courts. A state legislature cannot confer jurisdiction which is not authorized by Congress upon a federal court.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN2[] Supplemental Jurisdiction, Ancillary Jurisdiction

Under the doctrine of federal ancillary jurisdiction, once federal jurisdiction properly attaches to a primary case, the court also has jurisdiction over certain subsidiary or subordinate disputes even though it might not independently be able to proceed to adjudicate them.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN3[] Remedies, Costs & Attorney Fees

Upon substitution of attorneys in litigation, a client may be required to either pay the attorney or to post security for reasonable fees as ancillary to the court's jurisdiction of the main case.

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN4[] Practice & Procedure, Jurisdiction

The precepts of the ancillary jurisdiction doctrine dictate that the federal courts should extend their jurisdiction to encompass orbital disputes subordinate to the principal action so that complete justice may be done. Considerations of judicial economy and fairness to all parties underlie the ancillary jurisdiction theory. And once jurisdiction has attached, it will generally continue until it has been fully exhausted.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN5[] Pleading & Practice, Pleadings

A proper application for removal or substitution of counsel does not have to be made where the authority of the new attorney is recognized and he has been permitted to appear without objection. An attorney himself may make such a motion where he has been notified of his discharge by the client but he has not promptly made the motion.

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > General Overview

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Excusable Neglect

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Inadvertence

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Mistake

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Surprise

HN6[] Grounds for Relief from Final Judgment, Order or Proceeding, Excusable Mistakes & Neglect

Under *Fed. R. Civ. P. 60(b)*, a court has the power to relieve a party from a final judgment, order or proceeding due to (1) mistake, inadvertence, surprise, or excusable neglect; or (6) any other reason justifying relief from the operation of the judgment. The rule is to be liberally construed to accord justice. Such a motion may be made within a reasonable time.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN7[] Remedies, Costs & Attorney Fees

A court may condition its order of substitution upon a grant of attorney fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN8[] Attorney Fees & Expenses, Reasonable Fees

Where an attorney is employed upon a contingent fee and the clients desire to terminate the relations, the proper practice is to set a motion for substitution down for a hearing, notify the attorney of record of the motion, ascertain all that is due and owing him by reason of his services and expenses, and provide for payment of his compensation as a condition precedent to the allowance of the order of substitution.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN9[] Attorney Fees & Expenses, Reasonable Fees

The material criteria guiding compensation of attorneys on a quantum meruit measure are generally: the nature, extent, and difficulty of the services; the time devoted to the litigation; the loss of opportunity for other employment; the skill and standing of the lawyer; the value of interests involved and the responsibility assumed; the results secured; and, the customary charges for similar services.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN10[] Class Actions, Prerequisites for Class Action

See *Fed. R. Civ. P. 23(a)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] **Class Actions, Prerequisites for Class Action**

For purposes of the third requirement of *Fed. R. Civ. P. 23(a)* in a proposed class action alleging violation of federal ***antitrust law*** plaintiffs must demonstrate: (1) that there was a conspiracy to fix prices in violation of the antitrust laws; (2) that prices were fixed pursuant thereto; and (3) that plaintiffs purchased products at prices which, as a result of the conspiracy, were higher than they should have been.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] **Class Actions, Prerequisites for Class Action**

See *Fed. R. Civ. P. 23(d)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN13[] **Class Actions, Prerequisites for Class Action**

See *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14[] **Class Actions, Prerequisites for Class Action**

Fed. R. Civ. P. 23(c)(2) provides for class inclusion of all members who do not request exclusion.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

HN15[] **Search & Seizure, Scope of Protection**

In general, the test to be applied in determining whether searches and seizures are unreasonable is whether the thing done, or attempted to be done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered. The test is the same under both *Iowa Const. art. I, § 8* and *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Consent to Search > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > General Overview

HN16[] Search & Seizure, Scope of Protection

Only in a carefully defined class of cases is a search without proper consent reasonable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Civil Procedure > Remedies > Forfeitures > General Overview

HN17[] Search & Seizure, Exclusionary Rule

A forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. It would be anomalous indeed to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.

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

HN18[] Private Actions, Remedies

An action for treble damages under the antitrust laws is quasi-criminal.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN19[] Search & Seizure, Exclusionary Rule

Suppression of illegally seized evidence is a proper procedure in a civil case.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN20[] Search & Seizure, Exclusionary Rule

Decisions holding that search warrants must be obtained to inspect homes and business premises may be taken to indicate that the right to be free from unconsented searches is the foremost concern of the *Fourth Amendment* (*U.S. Const. amend. IV*) and that the use of illegally seized evidence in a criminal prosecution is merely a common incident of the search which is proscribed. The cases extending the exclusionary rule to civil proceedings are based on the conclusion that it is the right of privacy that is protected and that there exists no valid distinction for varying the exclusionary rule in a civil case.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN21[] **Search & Seizure, Exclusionary Rule**

For purposes of the *Fourth Amendment* (*U.S. Const. amend. IV*) and the exclusionary rule, no distinction can be made based on the fact that commercial premises were illegally searched as opposed to residential premises.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN22[] **Search & Seizure, Exclusionary Rule**

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Independent Source Doctrine

HN23[] **Methods of Discovery, Inspection & Production Requests**

Information illegally obtained can be used if it is later gained from an independent source.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Independent Source Doctrine

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN24[] **Search & Seizure, Exclusionary Rule**

When knowledge of documents is gained independent of an illegal search and seizure the documents can be obtained by legal means.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN25[] **Search & Seizure, Exclusionary Rule**

It is clear that illegally seized evidence may not be used against codefendants in a criminal case but the rule is limited to a situation of joint trial. Evidence wrongfully seized from one person may be used against his alleged partner in crime if the two are tried separately.

Judges: [1]** Hanson, District Judge.

Opinion by: HANSON

Opinion

[*394] Memorandum and Order

Hanson, District Judge.

This ruling is predicated upon an application by attorneys Verne Lawyer and Lex Hawkins for attorney fees and upon their motion to amend an Order of the Court filed on January 10, 1967, permitting their withdrawal. It is only fair to note that there is complete agreement by all that counsel are entitled to fees in some amount. The only question is under what process this can ultimately be consummated.

On January 10, 1967, Lex Hawkins and Verne Lawyer made an application to withdraw as attorneys for the State of Iowa in the above entitled litigation. **[*395]** The Application related that on September 30, 1966, they had been employed to prosecute the action by the then Attorney General of the State of Iowa, Lawrence F. Scalise. On January 5, 1967, the present Attorney General of the State of Iowa, Richard Turner, requested Verne Lawyer to resign and to take no further legal action in the case and on January 6, 1967, made the same request and direction to Lex Hawkins. He further instructed Lex Hawkins to relinquish the files of the cause on January 9, 1967. The applicants **[**2]** complied with the latter demand on January 9 by delivering them to the Attorney General's Office. Due primarily to these events, the applicants made a motion for the Court to permit them to withdraw their appearance and to be relieved of any further responsibility in the case. On January 10, 1967, the Court issued an Order which granted the Application "for good cause shown."

The next day, the Attorney General and Roger H. Ivie, Assistant Attorney General, made a motion for the Court to authorize them to appear in behalf of the State and for "an order withdrawing the names of Lawrence F. Scalise and Nolden Gentry as attorneys of record." The State did not include the Applicants' names in its motion and apparently did not notify them of the motion. The Court granted that motion on the same day.

On August 16, 1967, Mr. Lawyer and Mr. Hawkins presented an application for attorney fees. By an Act of the Sixty-Second General Assembly, their employment was "legalized, validated and confirmed." In addition, Exhibit 1 reads as follows:

> "Sec. 2. Awards to such attorneys for services rendered and expenses incurred as a result of such legal representation shall be set and determined **[**3]** by a judge of a court having jurisdiction over the subject matter thereof, after holding a hearing thereon.
>
> "Sec. 3. Any such award of judgment rendered by such court shall be a judgment in favor of Lex Hawkins and Verne Lawyer against the state of Iowa and shall be paid in the same manner as a judgment or award against the state of Iowa is paid pursuant to section twenty-five A point eleven (25A.11) of the Code."

The Application alleges that this Court is authorized "pursuant to the authority granted by said Act" to set the amount of attorneys' fees and expenses and render judgment for such amounts. A hearing was held on the Application on September 7, 1967.

A motion was filed by applicants on November 6, 1967, and the motion is grounded on *Federal Rule of Civil Procedure 60(b)*. The applicants urge that the Court should amend its Order of January 10, 1967, upon the grounds of mistake, inadvertence and surprise and permit their withdrawal as counsel only upon condition that they be paid reasonable attorney fees.

The Application can be construed as alleging that the Iowa legislature has bestowed jurisdiction upon this Court. ***HN1***[] Federal Courts are courts of limited jurisdiction. **[**4]** They have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them. See *Giancana v. Johnson, 335 F.2d 366* (7 Cir.), cert. den. *379 U.S. 1001, 13 L. Ed. 2d 702, 85 S. Ct. 718 (1964)*; *Badger v. Reich Bros. Const. Co., 161 F.2d 289* (5th Cir.); aff'd *333 U.S. 163, 92 L. Ed. 614, 68 S. Ct. 587 (1947)*, rehear. den. *333 U.S. 878, 68 S. Ct. 900, 92 L. Ed. 1153*; *Fisch v. General Motors Corp., 169 F.2d 266* (6th Cir.), cert. den. *335 U.S. 902, 93 L. Ed. 436, 69 S. Ct. 405 (1949)*. A state legislature cannot expand the jurisdiction of the federal courts. *Chicago R.I. & P. Ry. Co. v. Stude, 346 U.S. 574, 98 L. Ed. 317, 74 S. Ct. 290*, rehear. den. *347 U.S. 924, 74 S. Ct. 512, 98 L. Ed. 1078*; *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)*; *Davis v. Ensign-Bickford Co., 139 F.2d 624* (8th Cir.). A state legislature cannot confer jurisdiction which is not authorized by Congress upon a federal court. *In re Borough **[*396]** of Fort Lee, 230 F.2d 200* (3rd Cir.); Chicago R.I. & P. Ry. Co. v. Ten (10) *Parcels of Real Estate Located in Madison County, Iowa, 159 F. Supp. 140* (D. Iowa); *Range Oil Supply Co. v. Chicago R.I. & P. **[**5]** Ry. Co., 140 F. Supp. 283* (D. Minn.). Moreover, the legislature could not control or supervise this Court by directing a hearing to be held upon this matter. *Stephenson v. Grand Trunk Western Ry. Co., 110 F.2d 401* (7th Cir.), cert. granted *310 U.S. 623*, cert. dism'd *311 U.S. 720, 60 S. Ct. 1107, 85 L. Ed. 469*. However, the Court must determine whether it has jurisdiction under the federal Constitution, federal laws, or principles of federal jurisdiction.

The Court will first give its attention to whether the Application for attorney fees should be granted, apart from the question of whether the motion to amend the Court's Order of January 10, 1967, will be granted. The resolution of two issues will be dispositive of the first question: (1) whether the determination of attorney fees is within the boundaries of the traditional realm of federal jurisdiction; and, (2) whether consideration of the Application is now precluded because of the Order of January 10. The Court will then discuss the question of whether that Order must be amended to condition withdrawal upon the remittance of reasonable attorney fees. If the Court decides to amend its Order, the application for attorney fees **[**6]** will automatically be granted.

The applicants urge that jurisdiction of the matter of attorney fees may be sustained by the ***HN2***[] doctrine of federal ancillary jurisdiction. The ancillary jurisdiction theory is relatively simple - once federal jurisdiction properly attaches to a primary case, the court also has jurisdiction over certain subsidiary or subordinate disputes even though it might not independently be able to proceed to adjudicate them. See, e.g., *Murphy v. Kodz, 351 F.2d 163* (9 Cir.); *Lee v. Terminal Transport Co., 282 F.2d 805* (7 Cir.), cert. den. *365 U.S. 828, 5 L. Ed. 2d 705, 81 S. Ct. 713 (1960)*; *Aetna Ins. Co. v. Chicago, R.I. & P.R. Co., 229 F.2d 584* (10 Cir.); *Glens Falls Indem. Co. v. United States, 229 F.2d 370* (9 Cir.). It is well-settled that ***HN3***[] upon substitution of attorneys in litigation, a client may be required to either pay the attorney or to post security for reasonable fees as ancillary to the Court's jurisdiction of the main case. See e.g., *National Equipment Rental, Ltd. v. Mercury Typesetting Co., 323 F.2d 784* (2 Cir.); *Maddox v. Jinkens, 66 App. D.C. 362, 88 F.2d 744 (1936)*; *Woodbury v. Andrew Jergens Co., 69 F.2d 49* (2 Cir.). In the situation at hand, **[**7]** the Court's jurisdiction to fix attorney fees is generated by its auxiliary relation to the antitrust action by the State. It may be true that the practice of injecting a condition of departure into an Order of removal is proper, but the Court cannot agree that it must be done in every case. ***HN4***[] The precepts of the ancillary jurisdiction doctrine dictate that the federal courts should extend their jurisdiction to encompass orbital disputes subordinate to the principal action so that *complete* justice may be done. See *Walmac Co. v. Isaacs, 220 F.2d 108* (1 Cir.); *Cooperative Transit Co. v. West Penn Elec. Co., 132 F.2d 720* (4 Cir.); Ancillary Jurisdiction of the Federal Courts, 48 Iowa L.Rev. 383 (1963). Considerations of judicial economy and fairness to all parties underlie the ancillary jurisdiction theory. *Consolo v. Federal Maritime Comm., 383 U.S. 607, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966)*. And once jurisdiction has attached, it will generally continue until it has been fully exhausted. *Rhodes v. Houston, 202 F. Supp. 624 (D. Neb. 1962)*, aff'd *309 F.2d 959* (8 Cir.), cert. den. *383 U.S. 971, 16 L. Ed. 2d 311, 86 S. Ct. 1282 (1965)*. It would appear that the sound policies behind **[**8]** the doctrine and its elasticity would command the Court to retain jurisdiction over the auxiliary matter of attorney fees even though it entered a previous Order allowing the counsel to withdraw without such a condition. Cf. *United Mine Workers of **[*397]** America v. Gibbs, 383 U.S. 715, 727, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1965)*.

Taking the position that before there can be a fee determination there must be an application for removal by a party adverse to counsel seeking fees in which there is no allegation of misconduct or there is an allegation of misconduct that is not substantiated, or taking the position that where applicants voluntarily applied for and were granted withdrawal, the Court has no jurisdiction, is untenable and without merit. ***HN5***[] A proper application does not have to be made where the authority of the new attorney is recognized and he has been permitted to appear without objection. See, e.g., *In re Goldstein, 43 F.2d 698* (2 Cir.), cert. den., *Goldstein v. Klages, 282 U.S. 879, 75 L. Ed. 776, 51 S. Ct. 83*; *In re Morgan's Estate, 94 Cal.App. 617, 271 P. 762*; *Doerle v. Doerle, 159 N.Y.S. 637, 96 Misc. 72*. An attorney himself may make such a motion where he has **[**9]** been notified of his discharge by the client but he has not promptly made the motion. See *United States v. McMurtry, 24 F.2d 145* (D.N.Y.). The motion does not have to be in any rigid form. This would seem to be particularly true here as Local Rule E of the Local Rules of the United States District Court for the Southern District of Iowa requires that an attorney obtain leave of court before withdrawing.

In the case at hand, the applicants stated that the Attorney General made a motion for continuance on January 6, 1967, which was prior to the withdrawal of applicants. The Court signed an Order of continuance of discovery upon his oral application. The applicants further stated that Verne Lawyer was requested to resign by the Attorney General on January 5, 1967, and Lex Hawkins was asked to resign on January 6. They resigned on January 9 when they conveyed the files of the case to his office. There has been no allegation contrary to these statements by the State. The Court does not feel the State promptly presented a motion for substitution on their discharge. Further, an application on behalf of the State was not necessary to protect the State against misconduct by the applicants. **[**10]** There has never been any question that attorney fees were due and owing them. The Act of the Sixty-Second General Assembly destroyed any possible contention in that regard by legalizing the employment of the applicants and providing that awards for their services and expenses "shall be set." Thus, there is no necessity of determining the validity of any non-existent allegation of misconduct.

However, assuming that the process is irregular, the State has acquiesced in the retention of jurisdiction by this Court over the determination of fees. It is manifest that both the State and the applicants anticipated no difficulties in relation to the presentation of an application to this Court for the determination of reasonable attorney fees and securing an adjudication thereof. There was no attack upon the propriety of a fee determination by the Court at the time it granted the withdrawal of the applicants even though the State was obviously conscious of that process. The State made no allegation of misconduct then or the next day when it presented its own motion for substitution. The legislature apparently had no reservations about the applicants being entitled to fees for the services **[**11]** they had rendered for the State and that this Court would be the appropriate judicial body to set them because they were to be fixed "by a judge having jurisdiction over the subject matter thereof." In fact, the State and the applicants were operating under the supposition that the procedure taken was without defect until the hearing upon the application on September 7, 1967. The Court was the first to raise the possibility of a legal deficiency in the process when it questioned the jurisdictional basis of the determination at the hearing. But, most importantly, even at that stage, and with knowledge of the Court's remarks in that regard, the State elected to move forward **[*398]** with the offer of evidence as to the amount of fees and to defer examination of the Court's jurisdictional power with the objective of sustaining its jurisdiction. By that act, the State acquiesced in the procedure instituted for fee determination and the adjudication itself.

But in any event, the Court is compelled to grant the motion of applicants under *Federal Rule of Civil Procedure 60(b)* and the Court will amend its Order of January 10, 1967, to condition the withdrawal of applicants upon the **[**12]** payment of reasonable attorney fees. ***HN6***[] Under that Rule, a court has the power to relieve a party from "a final judgment, order or proceeding" due to "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." The rule is to be liberally construed to accord justice. See, e.g., *In re Casco Chemical Co., 335 F.2d 645* (5 Cir.); *United States v. Gould, 301 F.2d 353* (5 Cir.); *Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538* (2 Cir.); *Patapoff v. Vollstedt's, Inc., 267 F.2d 863* (9 Cir.); 3 Barron and Holtzoff, Federal Practice and Procedure, Section 1322 (1958 ed.). Such a motion may be made within a reasonable time.

It has authoritatively been prescribed ***HN7***[] that the Court may condition its order of substitution upon a grant of attorney fees. *First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & E. Co., 245 F.2d 613* (8 Cir.). See also *National Equipment Rental, Ltd. v. Mercury Typesetting Co., supra*; *Doggett v. Deauville Corp., 148 F.2d 881* (5 Cir.); *Woodbury v. Andrew Jergens Co., supra*; *The Flush, 277 Fed. 25* (2 Cir.); *Kotsifakis v. A. Lusi, Ltd., 138 F. Supp. 945* (D. Va.). In *John Griffiths **[**13]** & Son Co. v. United States, 72 F.2d 466, 468* (7 Cir.), the court declared:

> " . . . ***HN8***[] where an attorney is employed upon a contingent fee and the clients desire to terminate the relations, the proper practice is to set a motion for substitution down for a hearing, notify the attorney of record of the motion, ascertain all that is due and owing him by reason of his services and expenses, and provide for payment of his compensation as a condition precedent to the allowance of the order of substitution."

It will be recalled that both parties and the legislature maintained the belief that the procedure undertaken to attain fee determination by this Court was proper and the Court has taken evidence upon the amounts to be granted. Similarly, the Court has previously dealt with the proposition that the procedure is not amenable to a fee determination here. The equities of the integrated factual picture strongly militate in favor of granting applicants' motion. Further, out of judicial courtesy to the legislative branch of government of the State of Iowa, the Court should not lightly abdicate its responsibility in this regard even though its authority is not necessary to pursue **[**14]** this matter.

It appears that a very analogous situation confronted the Court in the John Griffiths & Son Co. case, supra. In that case, an order of substitution was granted apparently without a condition of payment of attorney fees. The former counsel made a motion to set aside the order and to ascertain the amount due him before passing upon substitution. The Court permitted the order to remain intact but retained jurisdiction of the matter of attorney fees. The Court of Appeals held that: "In this procedure there was no reversible error."

Moreover, in addition to *Rule 60*, the Court deems it desirable to utilize its inherent power to correct what it feels to be a faulty order. See *Wallace v. United States, 50 F. Supp. 178 (W.D.N.Y. 1943)*, reversed on other grounds, *142 F.2d 240* (7 Cir.), cert. den. *323 U.S. 712, 89 L. Ed. 573, 65 S. Ct. 37 (1944)*; *Bucy v. Nevada Const. Co., 125 F.2d 213* (9 Cir.); *Myers v. Westland Oil Co., 96 F. Supp. 667* (D.N.D.).

Thus, as a matter of law the Court has power to adjudicate the matter of attorney **[*399]** fees for applicants under federal ancillary jurisdiction, by amendment of its Order under *Rule 60(b)*, and under its inherent power to correct **[**15]** orders.

It will be ordered that the application for reasonable attorney fees by Lex Hawkins and Verne Lawyer will be granted in the amounts to be fixed by the Court.

It remains for the Court to adjudge the amounts of attorney fees which shall be paid to the applicants. After a thorough consideration of all evidence adduced at the hearing held upon the subject, and in accordance with established quantum meruit principles, the Court must conclude that each should receive the sum of $50.00 an hour for the time consumed in relation to the case. The Court will not engage in a long, prolix discourse upon the basis for this calculation but will outline some of the more salient reasons behind it.

HN9[] The material criteria guiding compensation of attorneys on a quantum meruit measure are generally: the nature, extent, and difficulty of the services; the time devoted to the litigation; the loss of opportunity for other employment; the skill and standing of the lawyer; the value of interests involved and the responsibility assumed; the results secured; and, the customary charges for similar services. See Annot. 56 A.L.R.2d 13; ABA Canons of Professional Ethics 12(4); *7 Am. Jur.2d Attorneys **[**16]** at Law, Sections 232, et seq.*

The case at bar is one of a species of highly complex litigation. The preparation of an antitrust suit involves a myriad of details and the organizational problems are great. See, e.g., *Cape Cod Food Products, Inc. v. National Cranberry Ass'n, 119 F. Supp. 242* (D. Mass). The intricate economic problems presented in a case of this sort demand seasoned trial lawyers with some expertise in the area. The applicants were a primary stimulus in the prosecution of the case against the defendants who are represented by a formidable army of capable attorneys. Should the State prevail, the monetary fruits to the public could be great. Also, if the allegations made by the State are found to have substance, an intangible vindication of a public wrong would be accomplished.

The resumes of Lex Hawkins and Verne Lawyer, and the Court's experience with their legal work, convince the Court that they are men belonging to the highest echelon of the legal ranks. No challenge has been made to the integrity and ethical orientation of these lawyers. They are experienced trial lawyers who were both employed by the State of Alaska last year as Special Attorney Generals **[**17]** for the prosecution of antitrust actions.

The time expended in preparation of the State's case has not been minimal. Mr. Lawyer spent 167 3/4 hours in furtherance of the cause and Mr. Hawkins worked 238 1/2 hours on the case. Mr. Lawyer had an additional 31 hours of time through an employed lawyer, Mr. M. R. Dunn. It is unquestionably true that the applicants were forced to pass up other lucrative employment due to their involvement in this demanding piece of litigation. The applicants submitted detailed time reconstruction sheets as to the utilization of their time. The Court has no question that the time was exhausted as set out in the summaries. The State has not in any manner made any serious or realistic attack upon the validity of the reconstruction in the documents.

Mr. Hawkins and Mr. Lawyer generally receive remuneration in excess of $50.00 an hour for their legal activities, but it appears that the State paid a maximum of $50.00 an hour for outside assistance in protracted litigation about the period in which they were employed. The present Attorney General was aware of at least one attorney who received $50.00 an hour during the previous Attorney General's tenure **[**18]** in office. Neither the Attorney General nor Mr. Ivie had any opinion as to the value of applicants' **[*400]** services when questioned in that regard.

The Court is of the opinion that the quantum meruit factor of benefits secured is not an appropriate consideration in this case as the applicants' employment was terminated prior to the ultimate disposition of the suit. The Court is fully cognizant that only a percentage of the research and investigation conducted by attorneys blossom into valuable weapons for use in the arena of legal battle and that the extent of this work can never be ascertained with certainty, even at the conclusion of a case. But even though the outcome of the litigation is not subject to prognosis, and the Court can make no intimation in that regard, it is clear that the State has received substantial benefits from their efforts at this stage of the proceedings. The State's case has been bolstered by virtue of materials contained in the attorneys' files delivered to the State, the Complaint drawn by applicants, correspondence by the applicants to the Attorney General's Office, the conversations between the applicants and Mr. Ivie on the case, and a meeting **[**19]** held before the Executive Council of the State of Iowa on September 7, 1967, in which certain facts were disclosed to the State by the applicants. Finally, the Executive Council concurs with the Court in that they felt that the applicants had fully and completely discharged their responsibilities in providing all the useful information that they could upon the case.

Therefore, it will be ordered that Verne Lawyer receive compensation of $8,387.50 for his services. He will receive the further sum of $775.00 for the 31 hours of Mr. Dunn at a rate of $25.00 an hour. He will also be reimbursed for $1,053.99 out-of-pocket expenses.

It will further be ordered that Lex Hawkins be paid $11,925.00 for his services and will receive remuneration of $1,989.15 for expenses.

Memorandum and Order

HANSON, D.J.:

This ruling is predicated upon the defendants' motions to dismiss the class action or to strike paragraphs 7, 8, and 9 of the Complaint or, in the alternative, for an Order limiting the class of plaintiffs.

This is an action to recover treble damages for injuries allegedly resulting from violations by the defendants of the Sherman and Clayton Acts. The defendants are business entities **[**20]** which have engaged in the business of distributing and selling liquid asphalt and allied materials in the State of Iowa. The plaintiffs are parties which have purchased these products from the defendants. The Complaint alleges that the defendants owned or controlled substantially all of the sources of liquid asphalt products reasonably available to supply the needs of the State of Iowa, the Iowa State Highway Commission, and the political subdivisions of the State. It further alleges that the defendants combined and conspired to restrain interstate commerce by fixing prices charged for asphalt products.

Fifteen of the defendants have objected to the maintenance of this suit as a class action. They contend that the requirements of *Rule 23* have not been met and that the Attorney General of the State of Iowa does not have authority to represent the political subdivisions of the State of Iowa.

The defendants present several reasons why it is thought that a class action is not appropriate. Stated briefly, the defendants contend that the four pre-requisites to a class action set out in *Rule 23(a)* have not been met and that the two prerequisites of *Rule 23(b)(3)* are also not fulfilled. **[**21]** These will now be considered in order.

HN10[] *Rule 23(a)* permits a class action 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 **[*401]** protect the interests of the class."

There is no contention that the first of these requirements is not met. Without considering at this point which political subdivisions would be included in the class, it is clear that taking only the counties, cities, and towns, the potential number of members is so large as to make joinder of all impractical. It may be that notice to all potential members of the class would bring about sufficient exclusions to allow joinder, but there may be no speculation as to that possibility.

Nor is there any difficulty with the second requirement of *Rule 23(a)*. Undoubtedly there would be questions of law and fact common to the class. Whether they predominate over individual interests will be taken up shortly.

The third requirement is the subject **[**22]** of dispute between the parties. It is argued that the claims of the representative parties are not typical of the claims of the members of the class, that the relief sought is not typical, and that the defenses to the claims of the representatives are not typical. Numerous disparate facts are set out in the defendants' brief which are said to indicate the unavailability of a class action. Many have to do with the manner in which the members of the alleged class have purchased asphalt products from the defendants. Some members purchased directly from the defendants while others negotiate with contractors who agree to supply asphalt products. Variations in the kind of asphalt product purchased, differences in prices due to transportation charges and quantity of purchase, normal variations in price due to market conditions, and other factors are described in detail in the briefs and affidavits.

The difficulties presented by a disparity of facts such as these were satisfactorily resolved recently in a similar price-fixing suit. See ***HN11***[] *Philadelphia Electric Company, et al. v. Anaconda American Brass Company, 43 F.R.D. 452 (E.D. Pa. 1968)*. There it was concluded that the overriding considerations **[**23]** typifying each claim were the need to prove:

> "(1) that there was a conspiracy to fix prices in violation of the antitrust laws; (2) that prices were fixed pursuant thereto; and (3) that plaintiffs purchased products at prices which, as a result of the conspiracy, were higher than they should have been."

The import of varied circumstances surrounding purchase transactions giving rise to a claim was persuasively stated in these terms:

> "The defendants point out that the products mentioned in the complaint include 'at least twelve separate groups of products which are separately priced and have distinct end uses;' that plaintiffs may have purchased like products from other manufacturers, at prices not shown to have been affected by the alleged conspiracy; that during the period covered by the alleged conspiracy there were dozens of price changes in each product-line; and that there were wide variations in methods of purchase and in prices actually paid. But these circumstances, it seems to me, demonstrate merely (1) the possible desirability of establishing sub-classes as the facts develop; (2) the likelihood that plaintiffs may be unable to prove all they claim; **[**24]** and (3) the fact that many of the issues relating to damages are individual rather than common to the class. Cf. *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)*; *Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966)*; *Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966)*."

This Court adopts the reasoning of the above quoted opinion in finding that the third requirement of *Rule 23(a)* is met.

The defendants raise two questions in regard to the fourth requirement of *Rule 23(a)*. First, it is urged that the Attorney General does not have the authority under Iowa law to represent the alleged members of the **[*402]** class. This Court regards this contention as being without merit. In representing the class in a suit such as this, the representative parties act principally in furtherance of their own claim. An underlying assumption of a class suit is that substantial similarity of claims allows all members to benefit from the efforts of the representative parties. If the prerequisites to a class action are present in this suit, the Court will not consider the question of formal authorization under Iowa law. The right to be represented here **[**25]** is established by the Federal Rules of Civil Procedure. Limitations on the authority of the Attorney General would more properly be raised when and if he departs from the areas of unquestioned authority to pursue the individual claims of members of the class. This preliminary determination of the existence of a class action does not attempt to dispose of all questions that may arise. The common need to prove conspiracy and price-fixing sufficiently indicates that the Attorney General is a proper representative under *Rule 23*.

The defendants have also argued the dissimilar factors in each claim require the representative parties to act in their own interests. The preceding discussion of overriding considerations of commonality meets this objection. Furthermore, members of the class would be required to assume the responsibility of proving some matters such as the amount of damages. Also in answer to the question of adequate and proper representation, it is important not to overlook the power of the Court under ***HN12***[] *Rule 23(d)* to make appropriate orders,

> " . . . (2), requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that **[**26]** notice be given in such manner as the court may direct to some or all of the members of any step in the action, or the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters."

In addition to the requirements of *Rule 23(a)*, the requirements of ***HN13***[] 23(b)(3) which must be met if this suit is to be maintained as a class action are that

> "(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 **[**27]** 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."

What has been said earlier concerning the typicalness of the representative claims is also the Court's basis for concluding that common questions of law and fact predominate over questions affecting individual members. There certainly will be individual questions in regard to damages but these are not the dominant problems in this suit.

The Court is convinced that a class action is superior to other methods of settling the controversy. The factors set out in the Rule as pertinent considerations clearly support this conclusion. There is no other litigation concerning this controversy already commenced by members of the class and no interest of **[*403]** members in individually controlling the prosecution. This particular forum is the natural and desirable place for combining the claims since all members of the class are legal entities of **[**28]** this State. Although it is impossible to estimate with any degree of certainty the number of parties who wish to be represented in this suit, it does not appear that difficulties of management will be so great as to prevent its maintenance. Difficulties in devising adequate notice procedure are relevant to the question of manageability but here they are not controlling.

It has been assumed throughout the foregoing that the class would be as inclusive as the representatives have proposed. By means of that assumption the Court has been able to make the preliminary determination without regard to the possibility that the class would later be expanded. It is now incumbent upon the Court to specify the members of the class. In this there is no need to look further than the list of prospective members submitted by the representative parties. These legal entities are:

1. All ninety-nine (99) counties
2. Nine hundred forty-seven (947) cities and towns
3. Four hundred seventy-four (474) school districts
4. County boards of education
5. Park boards
6. Drainage districts or water districts
7. County conservation boards
8. County boards of health
9. Local boards **[**29]** of health
10. County boards of social welfare
11. Area vocational schools and community colleges
12. County public hospitals
13. Sanitary districts
14. County library districts
15. Townships

At this time, in reliance on the statements of the Assistant Attorney General, Nos. 8, 9, and 14 will be excluded on the ground that they have not purchased asphalt products. The remaining twelve political subdivisions shall be included within the class. It has been noted that the defendants suggest prospective members of the class not named by the Attorney General which may have equal right to inclusion. To provide for that contingency, the Court again emphasizes that this is a preliminary determination. Joinder of additional parties will be allowed if circumstances require.

The defendants' alternate motion sets forth a procedure for determining which political subdivisions actually will participate in the suit. ***HN14***[] *Rule 23(c)(2)* provides for inclusion of all members who do not request exclusion. The proposed procedure would preserve the right to elect not to be bound by the judgment in this case, but would require all political subdivisions desiring to participate to affirmatively **[**30]** state that intention in writing. The requested procedure would make an early determination of which parties intend to offer proof of damages, a matter which would require some notice to the Court and the defendants in any event. *Rule 23(c)(2)* does not prohibit the suggested procedure since the rule does not limit the matters that may be included within the notice. The authority to employ the requested procedure is implied in *Rule 23(d)*. In *Philadelphia Electric Company, et al. v. Anaconda*

American Brass Company, et al., supra, the Court ordered that the first notice to the members should include a notice that members of the class not electing to file proofs of claim on or before a specified date would be forever barred. In *Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966)*, the Court provided for a second notice to accomplish this objective, stating:

> "Within a reasonable time after a determination of exclusion from the class as a result of the foregoing notices, and with appropriate relationship to the prospective date of trial and the necessities of discovery, there will be a further notice directed to members of the class requiring them to file **[*404]** simple statements **[**31]** of their claims upon furnished forms, particularly with reference to the types and sources of representation, if any, upon which they relied in purchasing their securities and the time they first learned any representations were false. An order will be made, and notice given, that if such statements without good cause are not filed within the time specified the action may be dismissed with prejudice as to defaulting members for failure diligently to prosecute. When the latter stage has been completed the court should be in a position better to determine the adequacy of the existing representation, more effectively to define the class or to establish practical guides for the trial of the cases and, it is hoped, the submission of the issues for meaningful determination by a jury."

The effect on members of the class of the two-notice procedure is the same as the requested procedure in that failure to act affirmatively would bar recovery. The Court believes that in the interests of expediency and fairness to the defendants, the notice of maintainence of a class action should include a provision requiring members to indicate in writing their intent to submit claims.

Accordingly, **[**32]** it is hereby ordered that all the motions by the defendants to dismiss the class action or to strike paragraphs 7, 8, and 9 of the Complaint are denied.

It is further hereby ordered that the alternate motion for an Order limiting the class of plaintiffs is sustained except as it relates to the time allowed for filing a written statement.

The Liaison Committee heretofore appointed by this Court are directed to submit to the Court within ten (10) days from receipt of this Order a proposed form of notice which will meet the requirements of *Rule 23(c)(2)* and this Order. The form of notice shall allow sixty (60) days for members of the class to file a written statement.

Motions to Suppress Evidence

These rulings are predicated upon motions to suppress evidence.

The circumstances which gave rise to these motions are as follows: On December 5, 1966, representatives of the Iowa Attorney General entered the Des Moines offices of Bitucote Products Co., Bituminous Material & Supply Co., Pioneer Asphalt Co., and Central States Oil & Asphalt Co., Inc. for the purpose of searching through and impounding certain business records. These actions were purportedly authorized by Court Orders signed **[**33]** by an Iowa District Court Judge. The applications for the Court Orders request "an Order authorizing applicant to impound, take custody and remove from the premises all records, books, correspondence, documents, and accounts of [each of the above-named defendants] and keep them in his possession until the completion of the proceedings pursuant to Chapter 438, Acts of the 61st General Assembly." The applications were signed by an Assistant Attorney General. All of the offices were entered by groups of men which included Assistant Attorneys General and law enforcement officers. The men proceeded to search throughout the offices, in one instance gaining access to the documents by employing a locksmith, and eventually hauled away file cabinets and desk drawers containing substantially all of the business records contained in the offices. On the following day, the Complaint in this case was filed against the four companies whose records had been seized and numerous other defendants.

It appears that at no time prior to or after the searches and seizures herein described were any legal actions instituted against the defendants pursuant to Chapter 438, Acts of the 61st General Assembly. **[**34]** (Iowa Code Section 713.24 (1966)). Moreover, the defendants contend that such actions were never seriously considered by the plaintiffs and that the sole purpose of the seizures was to obtain information to be used in this case. The defendants urge the Court **[*405]** to find that the Attorney General's representatives violated state and federal constitutional guarantees against unreasonable searches and seizures in that their acts were not authorized by a valid court order and were carried out in an unreasonable and oppressive manner. The remedy sought is an order suppressing all evidence obtained in the search, preventing use of any information derived from the search, and requiring the return of all documents and all copies of documents seized by the State of Iowa.

Pioneer Asphalt Co. and Central States Oil & Asphalt Co., Inc., joined in one motion to suppress, setting out grounds for suppression and supporting the motion with exhibits and affidavits, while Bitucote Products Co. and Bituminous Material & Supply Co. each filed such motions of their own. The motion by each of these defendants has been joined in and adopted by substantially all of the other defendants in this **[**35]** case. Thus, the Court is requested to prevent use of allegedly tainted evidence not only against the parties whose records were seized but also against the other defendants.

The plaintiffs in this case are the State of Iowa, the Iowa State Highway Commission, and every other political subdivision of the State of Iowa. Inclusion of the political subdivisions has been disputed by the defendants by motions to dismiss the class action or to strike. Since those motions have now been overruled, any suppression Order resulting from the actions of the Assistant Attorneys General will apply to all members of the class. If it is found that the searches and seizures were illegally carried out to aid in preparation of this case, the consequences must be borne by all because the Assistant Attorneys General were preparing this case in behalf of all plaintiffs.

HN15[] In general, the test to be applied in determining whether searches and seizures are unreasonable is "whether the thing done, or attempted to be done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered." **[**36]** *Schwimmer v. United States, 232 F.2d 855* (8th Cir.), cert. den. *352 U.S. 833, 1 L. Ed. 2d 52, 77 S. Ct. 48 (1956)*; *State v. Hagen, 258 Iowa 196, 137 N.W.2d 895 (1965)*. The test is the same under both *Article I, Section 8 of the Iowa Constitution* and the *Fourth Amendment*. In applying the test to the facts of this case, the first matter to be considered is the validity of the Court Orders purporting to authorize the searches and seizures. The Orders are subject to attack on two grounds: that no actions were to be commenced under Section 713.24 of the Iowa Code, and that, even if such actions were contemplated, the statute does not authorize searches and seizures of the kind accomplished. The statute in question deals with consumer frauds in the advertising and sale of merchandise. The portions of the statute relied on by the State of Iowa in seeking the Court Orders provide that the Attorney General may:

> "Examine any merchandise or sample thereof, record, book, document, account or paper as he may deem necessary." (Section 713.24(3)(c))
>
> "Pursuant to an order of district court impound any record, book, document, account, paper or sample of merchandise that is produced in accordance **[**37]** with this section, and retain the same in his possession until the completion of all proceedings in connection with which the same are produced." Section 713.24(3)(d).

The possibility cannot be precluded that an action under this statute could have been started against the four companies in December of 1966 or some time thereafter. There is virtually no evidence, however, to show that the State of Iowa ever intended to take any action under the statute except to seize the records. Former Attorney General Scalise testified that nothing more was done, but also stated: "I assume the matter is still open, however, in the event the new Attorney General wishes to pursue **[*406]** it." (Defendants' Exhibit 2, p. 63). On the other hand, former Assistant Attorney General Nolden I. Gentry testified that the purpose in seeking the Orders for the impounding of the documents was to inspect them for use in this case. (Defendants' Exhibit 2, p. 330). Statements made by one of the attorneys who originated the applications for the Orders clearly indicate this purpose. (Defendants' Exhibit 1, pp. 34, 43, 45). The exhibits also show that the seized documents were examined and copied for use **[**38]** in this case. In addition, the fact that more than a year has passed since the records were seized without any further action under the state statute is strong evidence in favor of the defendants' contention. Anyone familiar with the facts could hardly arrive at any conclusion but that the plaintiffs used the statute for a purpose not intended by the Legislature. The proof of this is more than a preponderance; it is clear and convincing.

There is little room for doubt that the statute itself does not authorize such extensive searches and seizures under any circumstances. As the defendants point out in their brief, the statute provides for notice and hearing and the issuance of subpoenas in order to accomplish its objectives. The subsection providing for a court order to impound refers to materials "*produced* in accordance with this section." While the investigative powers conferred upon the Attorney General by the statute are considerably broader in scope than those available to him in a criminal prosecution, the statute cannot be construed to authorize the sweeping searches and seizures made in this case. The Court has no doubt that the Order would not have been issued if **[**39]** the motives of the applicants had been disclosed.

It is on two separate grounds that this Court finds the Court Orders invalid. There is no need to go further in finding the searches and seizures unreasonable and violative of *Article I, Section 8 of the Iowa Constitution* and of the *Fourth Amendment*. ***HN16***[] Only in a carefully defined class of cases is a search without proper consent reasonable. See See v. *City of Seattle, 387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967)*; *Aguilar v. State of Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964)*; *Nathanson v. United States, 290 U.S. 41, 78 L. Ed. 159, 54 S. Ct. 11 (1933)*. There is more than lack of consent, however, which makes the illegal conduct unreasonable in this instance. The courts have found the Constitution to have been breached where the harm resulting from an illegal search appears slight in comparison. In this instance, not only were the searches and seizures carried out without regard to the interference in the business activities of the defendants, but they constituted an abuse of government power that is clearly offensive to a sense of justice. The grievous consequences of the government becoming a lawbreaker **[**40]** are sufficiently stated in *Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)* and *Elkins v. United States, 364 U.S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960)*. The abuse of power is especially reprehensible where, as here, the government enlists the aid of statutes and deceives a court to carry out its illegal objective.

Concluding as it does, that the constitutional guarantees against unreasonable search and seizure have been breached, the Court must now determine whether the remedy of suppression is available in a civil case such as this. It is said that this is a question upon which the Supreme Court has not passed and the Courts of Appeals are divided. The Courts which have extended the remedy to civil cases have placed considerable reliance on cases involving forfeiture of property used in the commission of a crime. It is made clear in this type of case that illegally seized evidence cannot be used to prove the violation causing the forfeiture, but the proceeding against the property itself is not a criminal case and some dispute existed as to the use of a suppression order in a civil action. The matter has been settled by the decision in *One 1958 Plymouth* ***[**41]*** *Sedan v.* ***[*407]*** *Pennsylvania, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965)*, wherein it is stated:

> " . . . ***HN17***[] a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. . . . It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts."

The Court in *Plymouth Sedan* emphasized the quasi-criminal nature of the proceedings. The principle set out in the quotation above applies with equal force to the present case. ***HN18***[] An action for treble damages under the antitrust laws is also quasi-criminal. See, e.g., *United States v. Borden Co., 347 U.S. 514, 98 L. Ed. 903, 74 S. Ct. 703 (1954)*; *Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891 (5th Cir.* ***[**42]*** *1954)*, cert. den., *348 U.S. 912, 99 L. Ed. 715, 75 S. Ct. 292 (1955)*; *United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955)*. The matters which must be proved by the plaintiffs are the same matters which must be proved in a criminal proceeding against the defendants. There is a possibility that criminal proceedings may be commenced. If the defendants were found guilty, the penalty imposed could be considerably less than the amount of damages requested in the present case.

It may be argued that a distinction exists between a forfeiture proceeding and a private antitrust suit in that the former always involves enforcement of laws by government officials. The remedy of suppression seems more necessary to curb excesses of government officials who have the ability to coerce and the opportunity to conduct illegal seizures. While it is true that the Government in this case is in the position of a private party bringing suit under the Sherman and Clayton Acts, the uncertainty over the applicability of the exclusionary rule in cases not involving government officials is not pertinent here. In bringing the suit, the Attorney General was fulfilling the duties **[**43]** of his office and his representatives acted in furtherance of ends within the scope of their duties. By improperly availing themselves of statutory powers granted only to the Attorney General in his official capacity, the plaintiffs have subjected themselves to the impact of the exclusionary rule as a remedy against arbitrary acts of governments insofar as the rule applies to civil cases.

The conclusion that ***HN19***[] suppression of illegally seized evidence is a proper procedure in a civil case is supported by the following decisions: *Rogers v. United States, 97 F.2d 691 (1st Cir. 1938)*; *United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966)*; *Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962)*; Carlisle v. State Ex rel. *Trammell, 276 Ala. 436, 163 So.2d 596 (1964)*; Carson v. State Ex rel. *Price, 221 Ga. 299, 144 S.E.2d 384 (1965)*; *Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (Super.Ct. 1966)*; *Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (Com. Pleas 1966)*. In *United States v. Blank, supra*, a civil action for assessment of taxes, the Court ordered suppression of illegally seized evidence stating that, "Our decision today follows necessarily from the reasoning explicitly **[**44]** expressed by the Supreme Court in One 1958 Plymouth Sedan v. Com. of Pennsylvania." Similarly, the decisions in the three state cases above relied on the Plymouth Sedan case.

Support for this conclusion may also be found in statements of the Supreme Court such as that in *Weeks v. United States, 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914)*: "This protection reaches all alike, whether accused of **[*408]** crime or not . . . ." Also, in *Abel v. United States, 362 U.S. 217, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1959)*, Mr. Justice Brennan dissented from the majority's finding that a search had not been unconstitutional and made the following statement:

> "We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other 'civil' proceeding - such as matter bearing on the issue whether a man should forcibly be sent from the country. The distinction is rather hollow here, where the proofs that turn up are in fact given in evidence in a criminal prosecution. And the distinction, again, invites a trial of the officers' purposes. But in any event, I think it perverts the Amendment to make this **[**45]** distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the 'right of the people to be secure in their persons, houses, papers, and effects.' See *Boyd v. United States, 116 U.S. 616, 627, 29 L. Ed. 746, 6 S. Ct. 524*. Like most of the *Bill of Rights* it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it 'reaches all alike, whether accused of crime or not.' *Weeks v. United States, supra, 232 U.S. at 392*. It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers. It is true that the greatest and most effective preventive against unlawful searches that has been devised is the exclusion of their fruits from criminal evidence, see *Weeks v. United States, supra*; *Boyd v. United States, supra*; but it is strange reasoning to infer from this that the central thrust of the guarantee is to protect against a search for such evidence. The argument that it is seems **[**46]** no more convincing to me now than when it was made by the Court in *Frank v. Maryland, 359 U.S. 360, 3 L. Ed. 2d 877, 79 S. Ct. 804*. To be sure, the Court in *Boyd v. United States, supra*, and in subsequent cases has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said to be erroneous history; if it was, it was even less than a harmless error; it was part of the process through which the *Fourth Amendment*, by means of the exclusionary rule, has become more than a dead letter in the federal courts. Certainly this putative relationship between the guarantees is not to be used as a basis of a stinting construction of either - it was the Boyd case itself which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can 'only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.' *116 U.S., at 635*."

The ***HN20***[] decisions in *Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967)*, **[**47]** and See v. *City of Seattle, supra*, holding that search warrants must be obtained to inspect homes and business premises, may be taken to indicate that the right to be free from unconsented searches is the foremost concern of the *Fourth Amendment* and that the use of illegally seized evidence in a criminal prosecution is merely a common incident of the search which is proscribed. The cases extending the exclusionary rule to civil proceedings are based on the conclusion that it is the right of privacy that is protected and that there exists no valid distinction for varying the exclusionary rule in a civil case. In Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963), rev'd on other grounds, *371 F.2d 697 (6th Cir. **[*409]** 1967)*, the District Court pointed out that society's interest in proof obtained by illegal means is less in a civil case than in criminal cases in which the evidence is suppressed. This Court is persuaded that the evidence seized from the four defendants must be suppressed.

HN21[] No distinction can be made based on the fact that commercial premises were illegally searched as opposed to residential premises. See See v. *City of Seattle, supra*; *Go-Bart Importing Co. **[**48]** v. United States, 282 U.S. 344, 75 L. Ed. 374, 51 S. Ct. 153 (1931)*; *Amos v. United States, 255 U.S. 313, 65 L. Ed. 654, 41 S. Ct. 266 (1921)*; *Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920)*.

The defendants rely on Hinchcliff v. Clarke, supra, in urging that the illegally seized evidence be suppressed completely and the plaintiffs barred from reacquiring it by any means. Putting aside for the moment the question of reacquisition, the Court has no doubt that the plaintiffs are barred from profiting in any way by the illegal search and seizure. This is the unmistakable teaching of *Silverthorne Lumber Co. v. United States, supra*, wherein it is stated:

> "The ***HN22***[] essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

There is no dispute among the cases that the government cannot use the information obtained illegally either directly or indirectly to discover other evidence. To hold that the only prohibition should be against introduction of the evidence at trial would be an empty remedy and an **[**49]** inducement to the violation of constitutional rights. While the Silverthorne case and the other cases establishing this principle were criminal proceedings, there is no rational basis for varying the rule in a civil case.

The question of reacquisition of the evidence has not been decisively settled by the cases in point. Part of the answer is supplied by Mr. Justice Holmes' statements in the Silverthorne case:

> "Of course this does not mean that facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like many others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

This principle has not been altered by subsequent cases and must be applied to the present case. It is clear then that ***HN23***[] information illegally obtained can be used if it is later gained from an independent source. It seems likely that most of the relevant documents and information obtained illegally in this case would in normal circumstances be discoverable under the rules of discovery applicable in civil cases. Have the plaintiffs forfeited the right to make use of discovery procedures **[**50]** to regain the previously seized documents or the information contained in them? The statement of Mr. Justice Holmes does not resolve this issue. Subsequent legal means of acquiring the documents could well be considered "independent" of previous illegal means.

In Hinchcliff v. Clarke, supra, the Court ruled unequivocally that illegally obtained evidence could not be reacquired by any means. The Court in Hinchcliff reasoned that to hold otherwise would reduce the suppression Order to a futile gesture and added that the scope of its Order was discretionary, saying that,

> "This Court, being a court of equity as well as a court of law, has the power to fashion an appropriate order which will achieve the ends of justice."

Were this Court to view the matter as discretionary only, it could base its decision on the equities of the case without further consideration of whether complete suppression is constitutionally compelled. There are cases contrary to Hinchcliff which, by a preponderance of numbers as well as by greater persuasiveness, **[*410]** lead this Court to deny complete and permanent suppression.

In *Lord v. Kelley, 223 F. Supp. 684* (D. Mass.), appeal dismissed, **[**51]** *334 F.2d 742 (1st Cir. 1964)*, the Court refused to prohibit reacquisition by an appropriate summons to produce on the ground that the complainants should not be better off than before the unlawful seizures. The Court stated:

> "If it be argued that the Internal Revenue Service should be taught a lesson and penalized for Flattery's misconduct, there are many answers, of which the best is that exclusionary rules of evidence are designed not as punishment but to prevent the public prosecutor from using 'dirty hands' to achieve a conviction."
>
> " . . . while the complainants may be disappointed that they have not won immunity, they have vindicated the right of an independent accountant's clients not to have their papers seized by arbitrary, high-handed methods of tax enforcement."

The Appellate Court in Lord v. Kelley characterized the ruling in Hinchcliff as a penalty, indicating that the reasons for the ruling were that the wrongful seizure had put the taxpayers to great expense, that the fact that the taxpayers wanted the documents back might of itself cause the government to believe that they were not innocent, that to rule otherwise would give the taxpayers but a **[**52]** "hollow victory" and finally, that the U.S. Attorney there showed no contrition.

Other cases have also approved the principle that ***HN24***[] when knowledge of documents is gained independent of an illegal search and seizure the documents can be obtained by legal means. See *McGarry's, Inc. v. Rose, 344 F.2d 416 (1st Cir. 1965)*; *Wagman v. Arnold, 257 F.2d 272 (2d Cir. 1958)*; *United States v. Sheba Bracelets, 248 F.2d 134 (2d Cir. 1957)*, cert. den. *355 U.S. 904, 2 L. Ed. 2d 259, 78 S. Ct. 330 (1957)*; *United States v. Mahler, 254 F. Supp. 581 (S.D.N.Y. 1966)*; Cf. *Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1962)*; *Nardone v. United States, 308 U.S. 338, 84 L. Ed. 307, 60 S. Ct. 266 (1939)*. While in some of these cases the government knew of the documents before they were seized, this is not a significant distinction where, as in this case, the plaintiffs could have used the civil rules of discovery to learn of the existence of relevant documents.

Looking to the factors considered in Lord v. Kelley, as weighing in favor of a limited suppression order, it is well to point out here that the government has tacitly admitted wrongdoing, that the illegal method of gaining **[**53]** access to the corporate records was unique and will not soon occur again, and that the defendants have vindicated the right to be free from misuse of statutes as a means of violating constitutional rights. A limited suppression order is far short of immunity but it is not a futile gesture. The relief to be granted in this case complies with the exclusionary rules as they now stand. In some cases a limited suppression order is of great benefit to the complainant while in others the impact is less. It is not the duty or the inclination of this Court to ensure the greatest effect. The defendants will be restored to their earlier position but will not gain immunity. In ruling on any discovery motions by the plaintiffs, the Court will take care to prevent, insofar as possible, the use of illegally obtained information.

Another significant issue raised by the motions to suppress is the question of standing. It must be determined whether the right to move for suppression belongs only to the four defendants whose records were seized or whether it extends to their codefendants as well. Implicit in this choice is the certainty that if the right belongs only to the four corporations, **[**54]** each has standing only to move for suppression of the evidence seized from it. In resolving this matter, reliance must again be placed on exclusionary rule as it has been developed in criminal cases.

[*411] ***HN25***[] It is clear that illegally seized evidence may not be used against codefendants in a criminal case but the rule is limited to a situation of joint trial. See *McDonald v. United States, 335 U.S. 451, 93 L. Ed. 153, 69 S. Ct. 191 (1948)*; *Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966)*; *Schoeneman v. United States, 115 U.S. App. D.C. 110, 317 F.2d 173 (1963)*; *Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961)*. Heretofore in this ruling where criminal cases have been relied upon in applying the exclusionary rule to civil proceedings, the purpose has been to derive from them that which is an integral part of constitutional rights. The Court believes, however, that the rule of exclusion applied in the cases just cited is compulsive only in criminal cases. It is apparent from Rule of Criminal Procedure 41(e) that the government may in certain situations use illegally seized evidence against persons who were not personally subjected to an illegal search **[**55]** and seizure. Evidence wrongfully seized from one person may be used against his alleged partner in crime if the two are tried separately. See *United States v. Beigel, 370 F.2d 751 (2d Cir. 1967)*; *United States v. Granello, 365 F.2d 990 (2d Cir. 1966)*; *United States v. Konigsberg, 336 F.2d 844 (3d Cir. 1964)*; Cf. *United States v. Chieppa, 241 F.2d 635 (2d Cir. 1957)*. The protections given to codefendants in criminal cases by the McDonald case can be attributed to the need for more stringent safeguarding of the rights of persons accused of crime. The prohibitions against self-incrimination, deprivation of legal counsel, cruel and unusual punishment and the right to confrontation of witnesses and a jury trial are likewise examples of protection having less applicability to defendants in civil proceedings. The McDonald case and the cases following it have established an exception to the requirement of standing to object but is an exception peculiarly applicable to criminal cases.

Accordingly, it is hereby ordered that the motions to suppress made by Pioneer Asphalt Co., Central States Oil & Asphalt Co., Inc., Bitucote Products Co. and Bituminous Material & Supply Co. are granted insofar **[**56]** as each of these parties has moved to suppress evidence seized from it. The plaintiffs are ordered to return all items seized from these defendants together with all copies made from the seized items. It is further ordered that the plaintiffs may not in any manner use the seized items or any knowledge gained by the illegal searches against the party from whom the knowledge was gained or the items seized, except that the plaintiffs may make use of all evidence and knowledge if it is gained from an independent source.

It is further ordered that all other motions to suppress are denied.

American Safety Equip. Corp. v. J. P. Maguire & Co.

United States Court of Appeals for the Second Circuit

March 20, 1968, Decided

Nos. 31658, 31709

Reporter

391 F.2d 821 *; 1968 U.S. App. LEXIS 7623 **; 1968 Trade Cas. (CCH) P72,387; 3 A.L.R. Fed. 901

American Safety Equipment Corp. v. J. P. Maguire & Co., Inc. American Safety Equipment Corp. v. Hickok Mfg. Co., Inc.

Core Terms

arbitration, License, district court, declaratory judgment action, antitrust, royalties, arbitration clause, courts, antitrust violation, decisions, equitable, parties, cases, agreement to arbitrate, antitrust claim, proceedings, trademark, orders

LexisNexis® Headnotes

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[] **Entry of Judgments, Stays of Judgments**

An order staying or refusing to stay proceedings in the district court is appealable under 28 U.S.C.S. § 1292(a)(1) only if (A) the action in which the order is made is an action which, before the fusion of law and equity, is by its nature an action at law; and (B) the stay is sought to permit the prior determination of some equitable defense or counterclaim.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN2[] **Alternative Dispute Resolution, Validity of ADR Methods**

The remedy a statute provides for violation of the statutory right it creates may be sought not only in any court of competent jurisdiction but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.

Judges: [1]** Lumbard, Chief Judge, Kaufman and Feinberg, Circuit Judges.

Opinion by: FEINBERG

Opinion

[*822] FEINBERG, Circuit Judge:

These two appeals by American Safety Equipment Corp. (ASE) are from orders of the United States District Court for the Southern District of New York, Constance B. Motley, J., which stayed, pending arbitration, two declaratory judgment actions by ASE, one against Hickok Manufacturing Co., Inc., and the other against J. P. Maguire & Co., Inc. The merits of these actions are not now directly in question, but the propriety of directing arbitration is. We conclude that the court should have decided itself at least some of the issues it referred to the arbitrators. Accordingly, we remand for further proceedings.

In August 1963, ASE and Hickok entered into a License Agreement under which Hickok granted to ASE an exclusive license to use the "Hickok" trademarks in connection with "safety protective devices" and "accessories." [1] The former were principally seat belts; the latter were defined as anything intended for use in a vehicle provided it was not a safety protective device or a regular body or motor part. Several substantive elements of the License Agreement, **[**2]** which had a fifteen year term, [2] are relevant here. Paragraph 3 provided for royalties based on ASE's total annual sales of safety protective devices (whether or not the Hickok trademarks were used) and of accessories (if sold under trademark). Paragraph 27 allowed ASE to grant sublicenses for territories outside the United States, subject to approval by Hickok, if certain conditions were met; the most important of these was that the sublicensee could not be "a competitor of Hickok or of any of its licensees with respect to any products sold or dealt with by said proposed sublicensee." Among Hickok's products are trouser belts, suspenders, a variety of **[*823]** gift items for men, and several types of men's wearing apparel. Paragraph 28 limited each company to its own field of activity; Hickok would neither sell nor market safety protective devices or accessories, and ASE would "not directly or indirectly engage in the business of manufacturing, selling or dealing with any items or types of items of wearing apparel, apparel accessories and gift sets, other than sets related to transportation." Three other provisions of the License Agreement are also relevant: One allowed assignment **[**3]** only with the consent of the other party; another contained a standard severability clause, and the third provided:

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[1] There was also a contemporaneous Manufacturing Agreement under which Hickok agreed to manufacture seat belts for ASE. Various claims under the Manufacturing Agreement between the two parties and Maguire, as purported assignee of Hickok's royalty rights, had, at the time of the district court proceedings, been submitted to arbitration. None of the parties has raised any question in this proceeding concerning either that agreement or that arbitration.

[2] This was later changed to sixteen years.

> All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration . . . .

The 1963 License and Manufacturing Agreements [3] extended a business relationship which had started in 1959. Under the agreements, operations apparently continued on a mutually satisfactory **[**4]** basis for several more years, during which time ASE and Hickok did many millions of dollars worth of business together. But, as so frequently occurs, there was a falling out. On October 21, 1966, ASE filed a complaint against Hickok in the district court seeking a declaratory judgment that the License Agreement was illegal and void *ab initio* and that no royalty obligations had or would accrue under it. The complaint alleged that paragraphs 3, 27 and 28 of the agreement violated the Sherman Act because they unlawfully extended Hickok's trademark monopoly and unreasonably restricted ASE's business. [4] Twelve days later, J. P. Maguire & Co., Inc., claiming to be the assignee of Hickok's royalty rights, invoked the arbitration clause quoted above and demanded arbitration of a claim to $321,000.25 for royalties due under the License Agreement. In response, ASE filed another declaratory judgment action, this time against Maguire. This complaint repeated the claim for relief already made against Hickok; in addition, it sought an injunction against the arbitration proceeding commenced by Maguire. The grounds urged were: (1) that the License Agreement was illegal because of antitrust **[**5]** violations, and that the district court had exclusive jurisdiction to determine that illegality; and (2) that Maguire had no right to demand arbitration under the License Agreement because the purported assignment by Hickok was invalid. Subsequently, ASE sought a preliminary injunction; Maguire, in turn, moved under the United States Arbitration Act, *9 U.S.C. §§ 2-4*, *6*, to stay the declaratory judgment action against it, pending arbitration of all issues. A similar procedural position was reached in ASE's action against Hickok. In December, Hickok formally abandoned all rights to enforce the challenged provisions of paragraph 28 of the License Agreement. A month later, Hickok demanded that ASE arbitrate all issues relating to the License Agreement, and moved to stay ASE's declaratory judgment action pending that arbitration; ASE countered with a motion for a preliminary injunction against that arbitration also.

[6]** The two sets of motions growing out of this procedural morass were heard in February 1967. Thereafter, Judge Motley denied ASE's motions to enjoin arbitration and granted the motions of Maguire and Hickok. The judge held that the arbitration clause was broad enough to encompass the claims of antitrust violations and found no public policy against referring them to arbitration; the validity of the assignment would also be resolved in that forum. Accordingly, the judge stayed ASE's two declaratory judgment actions pending arbitration, and directed arbitration with respect to "all claims, disputes and controversies between the parties relating to the License **[*824]** Agreement, including the issue as to the validity thereof."

The basic question we must resolve is whether the district court erred in staying ASE's actions and ordering arbitration of ASE's antitrust allegations. [5] Before reaching it, however, we must determine whether these orders are properly before us at all, i.e., whether they are appealable. That issue was not initially noticed by the parties; we brought it to their attention, however, and they subsequently submitted briefs on the matter. A very recent case **[**7]** in this circuit, *Standard Chlorine, Inc. v. Leonard, 384 F.2d 304 (2d Cir. 1967)*, is dispositive of the law to be applied. As we stated there, adopting the Fifth Circuit's formulation, *id. at 308*:

> ***HN1***[] An order staying or refusing to stay proceedings in the District Court is appealable under *§ 1292(a) (1)* only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim.

[3] See note 1 supra.

[4] A fourth allegation, that the term of the License Agreement was unreasonably long, has apparently been withdrawn.

[5] The arbitrability of the validity of the assignment to Maguire is also before us, and is discussed below.

The second requirement has clearly been met here; setting up the arbitration agreement is itself an equitable defense. Id.; see *Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 452, 79 L. Ed. 583, 55 S. Ct. 313 (1935)*.

[8]** Whether the first requirement has been fulfilled is more complicated. A declaratory judgment action is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable. Where, as here, such an action has required classification, the courts have looked to the basic nature of the suit in which the issues involved would have arisen if Congress had not created the Declaratory Judgment Act, *28 U.S.C. §§ 2201-02*. E.g., *Simler v. Conner, 372 U.S. 221, 9 L. Ed. 2d 691, 83 S. Ct. 609 (1963)*; *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 515, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959)*; see Wright, Federal Courts § 100, at 392-93 (1963). Were it not for the availability of declaratory relief, the dispute between ASE and Hickok would normally arise in one of two ways. ASE could bring an action for treble damages based upon the alleged antitrust violations. On the other hand, ASE could wait until Hickok attempted to collect outstanding royalties, and then assert the illegality of the agreement as a defense. In either instance, the action would be legal, not equitable. See *Beacon Theatres, Inc. v. Westover, supra*; **[**9]** *Ring v. Spina, 166 F.2d 546* (2d Cir.), cert. denied, *335 U.S. 813, 93 L. Ed. 368, 69 S. Ct. 30 (1948)*. Since the basic nature of ASE's declaratory judgment action against Hickok is thus legal, the conditions set forth in *Standard Chlorine* are met, and the appeal will lie. [6]

As to Maguire, it asserts that ASE's demand for an injunction in its declaratory judgment complaint shows **[**10]** that the basic nature of the proceeding is equitable. This argument might be persuasive if the action against Maguire were analyzed in isolation; a suit to enjoin pending arbitration proceedings, coupled with a claim for declaratory relief, has a pronounced equitable cast. See *Greenstein v. National Skirt & Sportswear Ass'n, 274 F.2d 430 (2d Cir. 1960)*; *Wilson Bros. v. Textile Workers Union, 224 F.2d 176* (2d Cir.), cert. denied, *350 U.S. 834, 100 L. Ed. 745, 76 S. Ct. 70 (1955)*. However, the action against Maguire is not in a vacuum; it is, instead, an integral **[*825]** part of the dispute between ASE and Hickok, including ASE's declaratory judgment action against Hickok. ASE sought to enjoin the arbitration that Maguire had already commenced merely as an adjunct to ASE's second declaratory judgment action, which stated the basic issues of the controversy between all three parties. Thus, we conclude that the Maguire order is also appealable. We are not gratified that this exercise in following convoluted case law is necessary, but we are heartened that the result reached is desired by both ASE and Hickok, the original major principals.

[11]** We now come to the merits of the district court orders, which stayed the declaratory judgment actions and required ASE to proceed to arbitration on all disputes with Hickok and Maguire, including the validity of the License Agreement. The basic issue was aptly phrased by this court fifteen years ago in *Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953)*:

> We think that ***HN2***[] the remedy a statute provides for violation of the statutory right it creates may be sought not only in any "court of competent jurisdiction" but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration . . . .

The question before us is whether the statutory right ASE seeks to enforce is "of a character inappropriate for enforcement by arbitration." This is a difficult issue, not often litigated. *Wilko v. Swan, supra*, was reversed by the Supreme Court in the leading decision on this subject. *346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*. In that case, a purchaser of securities brought an **[**12]** action under the Securities Act of 1933; he had signed a margin agreement which provided for arbitration of any controversy between the customer and the brokerage firm. The

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[6] To support appealability, ASE also points out that if it had not filed a declaratory action, Hickok might have brought an action under *9 U.S.C. § 4* to compel ASE to arbitrate with it. If the district court had ordered arbitration over ASE's objections, as it has, ASE would have had a right to appeal under *28 U.S.C. § 1291*. E.g., *Rochester Tel. Corp. v. Communication Workers of America, 340 F.2d 237 (2d Cir. 1965)* (per curiam); *Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, S.A., 243 F.2d 342, 344-45 (2d Cir. 1957)*.

question was whether plaintiff was required to submit his claim to arbitration. This court held (2-1) that he was. The Supreme Court reversed (7-2), construing the non-waiver provision in the Securities Act [7] to forbid bargaining away any rights under the Act, including choice of forum.

We have recently considered a similar problem in *Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966)*. In that case, one partner, invoking the arbitration clause in a partnership agreement, charged another partner with misappropriation of partnership funds. A key issue was whether the latter's discharge in bankruptcy barred this claim. The district court, in the exercise of its discretion, allowed this issue, along with the others in the dispute, to be submitted to arbitration. We held (2-1) that **[**13]** this was not an abuse of discretion. But see *I. O. Koven & Brother Inc. v. Local Union No. 5767, United Steelworkers of America, 381 F.2d 196, 200-05 (3rd Cir. 1967)*.

None of these decisions involved the arbitrability of an antitrust claim; a few cases, however, do consider the question. In *Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F. Supp. 159, 162-63 (S.D.N.Y. 1967)*, the court in dictum characterized as "persuasive" the view that courts should not be displaced by labor arbitrators in deciding antitrust suits. A similar view was expressed in the context of a commercial dispute in *Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 107 F. Supp. 532, 548 (S.D.N.Y. 1952)* (dictum), rev'd on other grounds, *202 F.2d 731 (2d Cir. 1953)*. See also *Standardbred Owners Ass'n v. Yonkers Raceway, Inc., 31 Misc. 2d 474, 220 N.Y.S. 2d 649 (1961)*; cf. *American President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833, 836 (S.D.N.Y. 1964)*. However, in *Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681 (S.D.N.Y. 1959)*, appeal dismissed, *274 F.2d 430 (2d Cir. 1960)*, **[**14]** the court refused to stay an arbitration under a collective bargaining agreement even though plaintiff manufacturers, among other things, claimed that the agreement violated the **[*826]** Sherman Act. [8] **[**15]** There are other decisions at the periphery of the precise issue before us. Thus, *Kingswood Management Corp. v. Salzman, 272 A.D. 328, 70 N.Y.S. 2d 692 (1947)*, held treble damage claims for rent overcharges under the Emergency Price Control Act of 1942 non-arbitrable. But in *United States of America for the Use and Benefit of Capolino Sons Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705* (2d Cir.), dismissed under Rule 60, 385 U.S. 924, *87 S. Ct. 239, 17 L. Ed. 2d 148 (1966)*, arbitration was ordered on a Miller Act claim. Cf. *Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167, 10 L. Ed. 2d 818, 83 S. Ct. 1815 (1963)*. And *Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948)*, approved arbitration of a claim under the Fair Labor Standards Act. These and other analogous opinions are cited in the decisions at various judicial levels in Wilko v. Swan and Fallick v. Kehr. [9]

Although these cases are relevant, they are not determinative. Nor are the two decisions relied on by the court below: *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967)*, and *Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959)*, cert. granted, *362 U.S. 909, 80 S. Ct. 682, 4 L. Ed. 2d 618*, dismissed under Rule 60, 364 U.S. 801, *81 S. Ct. 27, 5 L. Ed. 2d 37 (1960)*. It is true that in *Prima Paint* the Court said (*388 U.S. at 404*):

> in passing upon a *9 U.S.C. § 3* application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

But we do not read that as foreclosing the inquiry in which we are engaged any more than it did the **[**16]** Supreme Court in *Wilko v. Swan, 346 U.S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953)*. The claim in both *Prima Paint* and

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[7] § 14, *15 U.S.C. § 77n*.

[8] The defendants had stipulated, however, that if arbitration resulted in an award against plaintiffs, the award could be attacked "upon any application for its confirmation on the ground of illegality of the contract provisions." *178 F. Supp. at 690*.

[9] *Wilko v. Swan, 201 F.2d at 443-45*, and *346 U.S. at 435* nn. 20, 21; *Fallick v. Kehr, 369 F.2d at 904* and n. 11, and at 906 (Friendly, J., dissenting).

Robert Lawrence was that a contract containing an arbitration clause was void because the contract as a whole was induced by fraud. In each case it was held that fraud in the inception was a question which could be decided by arbitrators, unless the claim of fraud went specifically to the arbitration clause. On the other hand, the claim here is that the contract is void because of a federal statute. In other words, there was not present in *Prima Paint* and *Robert Lawrence* that clash of competing fundamental policies which we find in this case and in most of those referred to above: the conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a "prompt, economical and adequate solution of controversies." See *Wilko v. Swan, 346 U.S. at 438*. In that case, the Supreme Court frankly recognized a similar collision of public policies and faced up to it; we must do no less here.

HN3[] A claim under the antitrust laws is not merely **[**17]** a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. See *Waldron v. Cities Service Co., 361 F.2d 671, 673 (2d Cir. 1966)*, cert. granted, *385 U.S. 1024, 87 S. Ct. 743, 17 L. Ed. 2d 672 (1967)*. Antitrust violations can affect hundreds of thousands -- perhaps millions -- of people and inflict staggering economic damage. Thus, in the recent "electrical equipment" cases, there were over 1,900 actions, including over 25,000 separate damage claims, commenced by purchasers of equipment allegedly illegally overpriced. **[*827]** [10] The purchasers in turn sold electricity to millions of consumers at rates presumably increased by the excessive costs. [11] We do not believe that Congress intended such claims to be resolved elsewhere than in the courts. We do not suggest that all antitrust litigations attain these swollen proportions; the courts, no less than the public, are thankful that they do not. But in fashioning a rule to govern the arbitrability of antitrust claims, **[**18]** we must consider the rule's potential effect. For the same reason, it is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we think that Congress would hardly have intended that. It is true that in *Fallick v. Kehr, 369 F.2d at 905*, when a similar argument was made to us, we said that we would deal with such a case when we had it. But in that situation Congress had clearly allowed the issue of dischargeability to be determined outside of the bankruptcy court, the Supreme Court had instructed bankruptcy courts to enjoin a claim against a discharged bankrupt only if there were "unusual circumstances," the agreement to arbitrate was part of a contract that was the opposite of a contract of adhesion, the crucial issue to be arbitrated was a relatively simple one, and the partnership agreement was perfectly proper when made.

[19]** On the other hand, the claim here is that the agreement itself was an instrument of illegality; in addition, the issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest. As Judge Clark said concerning the analogous situation in *Wilko v. Swan, 201 F.2d at 445* (dissenting opinion):

> Adjudication by such arbitrators may, indeed, provide a business solution of the problem if that is the real desire; but it is surely not a way of assuring the customer that objective and sympathetic consideration of his claim which is envisaged by the Securities Act.

Appellee Hickok seems to argue that all these considerations are irrelevant because ASE does not seek damages, apparently conceding that a treble damage claim would not be arbitrable. We do not regard this distinction as significant if it is meant to persuade **[**20]** us that arbitrators rather than courts should declare whether contract provisions violate the Sherman Act. On the other hand, if Hickok is merely emphasizing that ASE's antitrust claims

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[10] Reports of the Proceedings of the Judicial Conference of the United States (Washington, D.C., March 10-11, 1966) 25 (1966).

[11] See generally *Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964)*; *Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 949-51 (S.D.N.Y. 1965)*.

are actually being asserted as a defense to an action for royalties, we agree that questions of separability are present here, and we refer to them below. However, the problem of which forum should determine those questions remains; we believe it is governed by the same considerations discussed above.

We express no general distrust of arbitrators or arbitration; our decisions reflect exactly the contrary point of view. See, e.g., *South E. Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 192-93 (2d Cir. 1966)* (appellant penalized for making frivolous attempt to overturn arbitration award); *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)* ("it is our obligation to shake off the old judicial hostility to arbitration"). Moreover, we do not deal here with an agreement to arbitrate made after a controversy has already arisen. Cf. *Wilko v. Swan, 346 U.S. at 438*. We conclude only that the pervasive public **[*828]** **[**21]** interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. In some situations Congress has allowed parties to obtain the advantages of arbitration if they "are willing to accept less certainty of legally correct adjustment," see id., but we do not think that this is one of them. In short, we conclude that the antitrust claims raised here are inappropriate for arbitration.

This does not mean that we rule out arbitration of all aspects of this dispute. It does mean that the district court erred in submitting to the arbitrators "the issue as to the validity" of the License Agreement insofar as that empowered the arbitrators to decide issues of ***antitrust law***. A plethora of those were raised by the able briefs and argument. Appellant contends that each of three separate sections of the License Agreement violates the Sherman Act. Appellees deny this, and make the following additional arguments, among others: Even if invalid, two of the sections are severable and therefore do not vitiate the rest of the agreement; at least one of the alleged claims of illegality is moot because Hickok has irrevocably **[**22]** disclaimed any intention of enforcing the section; and, finally, appellant is estopped from challenging the validity of the agreement, having retained certain patents and other benefits from it. We do not, of course, express any view on the merits of these arguments. But we do note that ASE's claims are not frivolous, and that some of the opposing contentions raise difficult and fundamental questions; e.g., can the antitrust violations be a defense to a claim for royalties already due on goods sold by ASE under the Hickok trademark? Cf. *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)*; *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 17 L. Ed. 2d 37, 87 S. Ct. 1 (1966)* (granting stay); Comment, 27 U. Chi. L. Rev. 758 (1960). [12] If such violations are not a defense, the arbitration might promptly proceed within defined limits, leaving it to the arbitrators to decide what goods were so sold. However, the district court, rather than ruling on these several contentions, held that they should all be decided by arbitrators. In that it erred; the antitrust claims pressed by appellant may not **[**23]** be submitted to arbitration. The district court should, in the first instance and with appropriate expedition, see *Fed. R. Civ. P. 57*, determine so much of this case as may be necessary in order that in the arbitration, if there is one, of the claims under the License Agreement, the arbitrators will not be called upon to determine antitrust issues. Cf. *Ring v. Spina, 148 F.2d 647 (2d Cir. 1945)*.

The district court also left for arbitration the question whether Maguire had the right to invoke the arbitration clause against ASE. ASE asserts that it made no agreement to arbitrate with Maguire and therefore **[**24]** cannot be compelled to do so. It argues that the License Agreement itself invalidates the purported assignment from Hickok to Maguire, [13] and that even if the assignment is valid, it transfers only the right to receive royalties, not the right to demand arbitration. Maguire replies that the License Agreement prohibits assignments (without ASE's consent) only of the whole contract, that even if this assignment falls within the prohibition of the agreement, the clause is only a personal covenant between **[*829]** ASE and Hickok, and does not affect Maguire's claims, that an assignment of

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[12] This question is made more difficult by the fact that in *Kelly*, allowing the defense would have permitted the buyers to retain goods without paying for them, while under the License Agreement involved here, only the less tangible benefits of using Hickok's trademarks have been received by ASE. It is for the district court to decide whether that is a distinction without a difference.

[13] Section 26(a) of the License Agreement provides:

> This Agreement and the license granted thereunder may not be assigned, transferred or encumbered by either party without the consent or approval of the other . . . .

royalties does carry with it the right to demand arbitration, and, finally, that ASE is foreclosed from relying on the anti-assignment clause because of laches, waiver and estoppel. Whether Maguire can compel ASE to arbitrate is an issue to be decided in the courts. See *John Wiley & Sons v. Livingston, 376 U.S. 543, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964)*; *Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F.2d 503 (2d Cir. 1965)*; *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440 (2d Cir. 1964)*; cf. *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A., 312 F.2d 299* **[**25]** (2d Cir.), cert. denied, *373 U.S. 949, 10 L. Ed. 2d 705, 83 S. Ct. 1679 (1963)*.

This case is quite different from those involving fraud in the inducement, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967)*; *Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959)*, cert. granted, *362 U.S. 909, 80 S. Ct. 682, 4 L. Ed. 2d 618*, dismissed under Rule 60, 364 U.S. 801, *81 S. Ct. 27, 5 L. Ed. 2d 37 (1960)*. In those cases, an agreement to arbitrate was reached by the parties; the fraud alleged went not to the agreement to arbitrate but to the substance of the contract. The arbitration clauses were held separable, and the issue of fraud in the inducement **[**26]** was sent to arbitration. That approach is not available here; it accomplishes nothing to treat the arbitration clause separately if Maguire is not a party to it. Therefore, before ordering ASE to arbitration, the district court should have first determined whether there was an agreement to arbitrate between ASE and Maguire. We express no opinion on the merits of that issue.

Finally, we note that nothing said in the course of this opinion is meant to preclude the district court, after deciding the questions now before it, from exercising its discretion in overseeing further development of these proceedings. See the three decisions of this court in *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440 (2d Cir. 1964), 362 F.2d 205 (2d Cir. 1966)*, and *387 F.2d 954 (2d Cir. 1968)*.

Remanded for further proceedings consistent with this opinion.

Checker Motors Corp. v. Chrysler Corp.

United States District Court for the Southern District of New York

March 29, 1968

No. 64 Civ. 866

Reporter

283 F. Supp. 876 *; 1968 U.S. Dist. LEXIS 12548 **; 1968 Trade Cas. (CCH) P72,392

Checker Motors Corp. , Plaintiff, v. Chrysler Corp., Chrysler Motors Corp., and Checker Taxi Co., Inc., et al. (Additional Defendant on Counterclaim)

Core Terms

taxicabs, Rebate, purchasers, dealers, sales, passenger car, manufacturer, prices, customer, taxi, indirect, summary judgment, Sherman Act, franchise, grade, appears, retail, medallions, legality, injunctive relief, Robinson-Patman Act, competitor's, advertising, seller, price discrimination, price fixing, retail price, distributors, defendants', equipped

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56(a) authorizes a claimant to move for summary judgment in his favor upon all "or any party" thereof.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN2[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Regardless of the absence of agreement as to a specific or uniform price, a wide variety of horizontal and vertical arrangements have been classified as price-fixing agreements under *15 U.S.C.S. § 1*, and therefore condemned as unlawful per se. However, an essential element is the competitor's surrender, express or implied, of some measure of pricing discretion. The evil of price-fixing agreements is that they cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.

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**

Conduct or agreements that do not restrict a competitor's pricing independence fall short of illegal price fixing under *15 U.S.C.S. § 1*.

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

HN4[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The true test of legality of a vertical price agreement under *15 U.S.C.S. § 1* 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 > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN5[] **Robinson-Patman Act, Claims**

While a rebate may be violative of the *15 U.S.C.S. § 13(a)*, some proof indicating that it may result in discriminatory prices must be adduced.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN6[] **Price Discrimination, Competitive Injuries**

Under ***antitrust law***, the application of the "indirect purchaser" doctrine in a case of price discrimination under *15 U.S.C.S. § 13(a)* depends upon showing that the manufacturer deals directly with the alleged "purchaser" and controls the terms upon which he buys.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7[] **Price Discrimination, Competitive Injuries**

The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate in a claim of price discrimination under *15 U.S.C.S. § 13(a)*. As long as he exercises control over the terms of a transaction he is held to this duty. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN8[] **Price Discrimination, Competitive Injuries**

Under ***antitrust law***, where the defendant has engaged in direct sales to the favored purchaser the direct dealing and control requirements need not be shown with respect to the disfavored "indirect purchaser" to prove a claim of price discrimination under *15 U.S.C.S. § 13(a)*. However, these requirements must still be proven when a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some of the intermediate distributors' accounts over others.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Price Discrimination, Competitive Injuries**

Cross-elasticity of demand, substitutability, physical appearance, and identity of performance are factors to be considered in determining whether goods are of "like grade and quality" for purposes of analyzing a claim of price discrimination under *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN10[] **Price Discrimination, Defenses**

The provisions of *15 U.S.C.S. § 13(a)* protect sellers competing against the grantor of a discriminatory price. The mere fact that the favored and disfavored purchasers are not in competition inter se does not preclude a Robinson-Patman violation in a primary line price discrimination case. Moreover, in a secondary line price discrimination case, a seller may not discriminate between prices charged by it for nationally advertised and private brands where the goods contained in each are of "like grade and quality." This implicitly assumes that the mere fact that one class of purchasers are more aware of market conditions and more knowledgeable of the product's qualities does not justify a price discrimination against a class that is without this information.

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HN11[] **Robinson-Patman Act, Defenses**

One of the requirements of the "good faith meeting competition" defense under *15 U.S.C.S § 13(a)*, prohibiting price discrimination, is that the seller demonstrate that his reduced price was to meet a competitor's equally low price.

Judges: [1]** Mansfield, D.J.

Opinion by: MANSFIELD

Opinion

[*878] MANSFIELD, D.J..

In this private antitrust suit for treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act (*15 U.S.C. §§ 15* and *26*), plaintiff, Checker Motors Corporation (Checker), moves for partial summary judgment against defendants Chrysler Corporation and Chrysler Motors Corporation (collectively referred to as "Chrysler" [1]), or, in the alternative, for preliminary injunctive relief. For the reasons set out in the decision, the motion is denied in all respects.

Since 1922 Checker, a New Jersey corporation with its principal place of business in Kalamazoo, Michigan, has been engaged, among other activities, in the production and sale of "purpose-built" taxicabs, i.e., automobiles designed and engineered for use as taxicabs. In producing **[*879]** such vehicles it **[**2]** has incorporated into chassis and bodies of its own manufacture engines, axles, transmissions and other parts purchased from independent suppliers. [2] Checker sells its taxicabs through sales offices in various cities of the United States,

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[1] Chrysler Corporation manufactures automobiles that are sold by it to Chrysler Motors, which in turn sells the cars to authorized dealers throughout the country.

[2] Defendants' contention that Checker is an "assembler," rather than a primary "manufacturer," of automobiles, does not appear to have any legal significance in the disposition of the present motion, it being undisputed that the parties compete for ultimate sale of their respective products to taxicab operators. Furthermore, it appears that all automobile manufacturers purchase some components from independent suppliers.

principally New York, Boston, Chicago and Detroit. Prior to 1963 New York City provided one of its major markets. [3]

[3]** Incorporated in Delaware, Chrysler is engaged in the business of manufacturing and selling automobiles, automobile accessories and parts. As one of the three major automobile colossi, Chrysler, in 1966, reported $5.6 billion in gross sales and had net earnings in the amount of $189.2 million. Chrysler's vehicles are sold in various markets, including the passenger car and taxicab markets.

Chrysler-made taxis and passenger cars are essentially the same, with a series of differences designed to satisfy, in the case of the taxicabs, the operator's need for continuous heavy duty, short-trip, stop-and-go, low fuel usage, and, in the case of the passenger car, the purchaser's desire for more comfortable riding, aesthetic appearance, quick get-away, and convenience. For example, the Chrysler 1965 Dodge Coronet model taxicab has a replaceable oil filter element, stiffer shock absorbers, springs and suspension system, special brake lining, wider wheel rims, heavier capacity battery, special lights, and special carburetor, which are features not found on the passenger car. In addition, the paint and seat-cover material of the passenger car are more stylish than those of the taxi counterpart, **[**4]** and the passenger car usually contains more chrome. The fundamental elements of both cars, however, including the frame and engine, are essentially the same.

Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers. In promoting the sale of its taxis and passenger cars to the consuming public, Chrysler, like other large automobile manufacturers, engages in extensive advertising campaigns. Although Chrysler suggests a retail price for its vehicles each dealer, upon purchasing automobiles from it, assumes the risk of loss, and independently determines the retail price of automobiles purchased by it from Chrysler for resale.

In 1962, in order to promote the sale of its taxicabs, Chrysler instituted the "Commercial Fleet Value Program" ("Rebate Plan" herein), under which, throughout the United States, purchasers of two or more taxicabs from Chrysler-authorized qualified dealers could, upon completing a form and returning it to Chrysler, receive a rebate of up to $200 per taxicab from the manufacturer. In 1966 and 1967, the plan was altered to include purchasers of a single taxicab and the rebate was set at $183 per vehicle. Chrysler **[**5]** dealers have advertised the program, although the accounting and payments have been handled by Chrysler.

The present treble damage action was commenced in 1964. Checker's complaint alleges a combination and conspiracy between Chrysler, its subsidiaries, dealers and others, beginning in 1960, to restrain trade in the manufacture and sale of taxicabs by eliminating Checker as a competitor, excluding it from the New York City and other markets, and otherwise injure its business, and to monopolize such trade and commerce. More specifically it is alleged that Chrysler, after **[*880]** being advised that Checker proposed to increase its production and sales from 7,000 to 24,000 vehicles per annum, undertook to supply Checker's requirements of components for use in Checker taxicabs, private passenger automobiles and other vehicles, and to sell Checker duplicate tools, discs and fixtures at an agreed-upon low price arrangement, inducing Checker, in reliance upon such commitments, to commence re-engineering its automobile chassis and bodies for adaptation to products manufactured by Chrysler, and to construct a large number of prototype vehicles which were subjected to extensive experimental **[**6]** testing; that in the meantime, Chrysler in bad faith delayed preparation of a formal agreement, postponed performance of its undertakings, and proceeded to solicit Checker's taxicab clientele and to disseminate reports that Checker proposed to utilize Chrysler's motor in the manufacture of Checker taxis, thereby giving Chrysler an unfair competitive advantage and causing a substantial loss of momentum in Checker's sales and a prolonged disruption of its production.

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[3] Markin Aff., April 12, 1967; Def's Ex. B to Ehrenbard Aff., Oct. 24, 1967, pp. 14-15, indicating location of sales office and taxi subsidiary in New York; *United States v. Yellow Cab Co., 80 F. Supp. 936, 940 (N.D. Ill. 1948)*, affd., *338 U.S. 338, 94 L. Ed. 150, 70 S. Ct. 177 (1949)*; Def's Ex. J; Plf's Reply Memo, p. 8.

The complaint further alleges that Chrysler sold private automobiles equipped as "taxicabs" at "unlawful, low and discriminatory prices" financed out of profits from private passenger sales, and increased its taxicab sales through the Rebate Plan

> "pursuant to which [Chrysler] and [its] co-conspirators unlawfully discriminated in prices between purchasers of defendants' passenger automobiles equipped with the so-called 'taxicab package' and purchasers of said automobiles not so equipped." (Complaint Par. 14(f)(i))

It was alleged that even in the absence of the Rebate Plan

> "the suggested retail list prices of defendants' passenger automobiles sold for use as taxicabs were and are generally lower **[**7]** than the suggested retail list prices of automobiles of the identical make and model sold to the general public for use as private passenger cars, notwithstanding the fact that the automobiles sold as taxicabs include more costly extra items known as the 'taxicab package '." (Complaint Par. 14(f)(ii))

The rebate accorded to purchasers of Chrysler's automobiles sold for use as taxicabs, it is alleged, was not supported by any cost justification, the program allegedly being motivated by

> "defendants' recognition that the greatest volume of taxicab sales usually takes place in New York City, and that domination by defendants of the New York City taxicab market, in addition to eliminating plaintiff as a substantial competitor, would be a valuable lever and selling point by which defendants could increase their share of the passenger automobile market throughout the United States. The importance attached by defendants to dominating the New York City taxicab market as a means of furthering the sales of various of its passenger automobiles is shown by the extensive national advertising campaign defendants have constructed around its New York City taxicab sales. Said advertising **[**8]** campaign falsely and fraudulently represents to the public at large that many of defendants' passenger cars sold for use as taxicabs are 'taxi-labs,' whose performance can be meaningfully compared to defendants' private passenger car performance. Such advertising misleadingly omits any mention of the special, heavy duty 'taxicab package' installed in the passenger cars equipped for use as taxicabs, which completely invalidates the comparison defendants purpose [propose] to make between their passenger cars equipped for use as taxicabs and those not so equipped." (Complaint Par. 14(f)(vii))

Chrysler's conduct is claimed to have substantially lessened competition in the line of commerce consisting of the manufacture and sale in interstate commerce of automobiles, including taxicabs. As a result of Chrysler's activities, Checker seeks $45 million in damages and an injunction permanently enjoining Chrysler, **[*881]** its servants, agents, employees and others in privity with them, from conspiring to destroy plaintiff's business by unlawful means.

On the present motion, only the legality of the Rebate Plan is in issue. Checker asserts that the arrangement as employed in New **[**9]** York City amounts to (1) a *per se* unlawful price fixing contract, combination, or conspiracy between Chrysler and its dealers in violation of *§ 1* of the Sherman Act, *15 U.S.C.A. § 1*; and *(2)* a discriminatory pricing arrangement in violation of § 2(a) of the Robinson-Patman Act, *15 U.S.C.A. § 13(a)*. As an alternative to partial summary judgment, Checker seeks a preliminary injunction against Chrysler's continuing the Rebate Plan during the pendency of this litigation.

Chrysler first contends that the motion should be denied because it is predicated on claims different from those alleged in the complaint. Although the complaint's emphasis is almost entirely on Chrysler's alleged discrimination in pricing, Paragraph 14(e) does allege that its taxicab sales have been made at "*unlawful*, low and discriminatory prices," which is probably sufficient to support a Sherman Act attack upon the Rebate Plan in this age of "notice" pleading. However, in view of this Court's denial of plaintiff's motion for substantive reasons, it becomes unnecessary to rest the decision on such a technical ground. With respect to the Robinson-Patman claim, there is no merit in defendants' contention. **[**10]** The complaint sets forth a § 2(a) price discrimination primary line injury claim with sufficient particularity to put Chrysler on notice that Checker is allegedly aggrieved by reason of the rebate given to taxi purchasers. See Complaint Par. 14(f)(i), (vii).

Equally meritless is Chrysler's contention that since the complaint was filed in 1964 it cannot be used to attack Chrysler's Rebate Plan in effect in subsequent years. Checker's complaint alleges a continuing course of illegal conduct on Chrysler's part, against which injunctive relief is sought. Complaint Pars. 16, 17.

Defendants next assert that *Rule 56, F.R.C.P.*, does not authorize a motion for partial summary judgment of the kind before the Court, because plaintiff is not entitled to split up the various wrongs asserted in a single count, and move with respect to one and not with respect to the others, i.e., the alleged unlawful activity in causing plaintiff to alter its production methods. However, ***HN1***[] *Rule 56(a)* authorizes a claimant to move for summary judgment in his favor upon all *"or any party"* thereof. In *White Motor Co. v. United States, 372 U.S. 253, 264, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*, the Supreme **[**11]** Court allowed such fragmentation by granting summary judgment with respect to the price fixing claim, and denying the motion with respect to the legality of territorial and customer limitations contained in White's franchise contracts. At least in a complex case involving a series of separate transactions, as distinguished from one involving part of a single transaction or a portion of damages claimed, plaintiff's motion for partial summary judgment ought not be dismissed on the hyper-technical basis urged by Chrysler, since plaintiff's motion is not only designed to reach a quick judgment that is in the interest of the parties, but also undertakes to prevent the needless waste of judicial resources where it appears that the particular claim under judicial scrutiny involves no genuine issue of material fact. And this is the very intent of *Rule 56*.

The § 1, Sherman Act, Claim

Having disposed of the preliminary sparring, the legality of the Rebate Plan under *§ 1* of the Sherman Act, *15 U.S.C.A. § 1*, [4] comes into focus. Plaintiff asserts that the plan is a *per se* price fixing agreement between Chrysler and its **[*882]** dealers and therefore conclusively unreasonable, **[**12]** irrespective of purpose, reasonableness or competitive effect. *United States v. Sealy, Inc., 388 U.S. 350, 355, 18 L. Ed. 2d 1238, 87 S. Ct. 1847 (1967)*; *United States v. General Motors, 384 U.S. 127, 147, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-23, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*.

HN2[] Regardless of the absence of agreement as to a specific or uniform price, a wide variety of horizontal and vertical arrangements have been classified as price-fixing agreements and therefore condemned as unlawful *per se*, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)* (agreement on maximum resale prices); *United States* ***[**13]*** *v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956)*, affd. per curiam, *352 U.S. 991, 77 S. Ct. 557, 1 L. Ed. 2d 540 (1957)* (agreement on elimination of quantity discounts); *Plymouth Dealers Assn. v. United States, 279 F.2d 128 (9th Cir. 1960)* (agreements on starting price for bargaining and trade-in allowances); *United States v. Gasoline Retailers Assn., 285 F.2d 688 (7th Cir. 1961)* (agreement not to give trading stamps); *United States v. McKesson & Robbins, Inc., 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 (1956)* (manufacturer's requirement that wholesaler maintain resale price levels determined by manufacturer). However, an essential element is the competitor's surrender, express or implied, of some measure of pricing discretion. The evil of price-fixing agreements is that they

> "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (***HN3***[] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259 (1951))*

Conduct or agreements not restricting a competitor's pricing independence, on the other hand, falls short of illegal price fixing. See Turner, The Definition of **[**14]** Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655, 687 (1962). For instance, in *Susser v. Carvel Corp., 332 F.2d 505* (2d Cir.), cert. granted, *379 U.S. 885, 85 S. Ct. 162, 13 L. Ed. 2d 91 (1964)*, cert. dismissed as improvidently granted, *381 U.S. 125, 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965)*, an ice cream manufacturer and its franchised dealers were held not to have engaged in an unlawful price fixing scheme where the manufacturer had merely recommended a retail price to the dealers, in the absence of the manufacturer's endeavoring to enforce the price structure at the retail level. In affirming the legality of the arrangement, Chief Judge Lumbard emphasized that "the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired." *332 F.2d at 510*.

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[4] "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: . . . ."

On its face Chrysler's Rebate Plan does not curtail the dealer's pricing discretion. Each dealer is free (1) to raise retail taxicab prices, thus nullifying the effect of the rebate; (2) to keep his prices constant, and thus render Chrysler taxicab price competitive vis a vis General Motors, Ford, Checker and other automobile makers who grant similar **[**15]** rebates; or (3) to lower his prices still further in competition against both Chrysler and non-Chrysler dealers alike. No evidence has been offered to the effect that the $183 rebate has even the slightest tendency to restrict in any way the dealer's independent decision and determination as to the retail sales price quoted by him to customers for Chrysler taxicabs. The most that appears from the record before us is that the plan manifests to the taxicab purchaser a desire on Chrysler's part to promote competitive sale of its taxis, at least to the extent of giving the appearance of a price advantage to the customer in the form of a $183 rebate. Possibly the practice acts as a psychological inducement to the customer that cannot be realized through a direct price reduction to the dealer in the identical amount **[*883]** which would, as a practical matter, enable the dealer in his discretion to reduce his price accordingly. Certainly the marketplace is full of similar manufacturer-originated promotional sales "gimmicks," such as "free goods" in the grocery and drug trades, coupons entitling the holder to cash or discounts, and the like, which do not run afoul of the Sherman Act **[**16]** in the absence of a showing of impropriety. The plan does not give as much practical pricing flexibility to the Chrysler dealer as would a direct $183 price reduction in the wholesale price, since the customer, rather than the dealer, is automatically entitled to the rebate upon purchase of a Chrysler taxicab, whereas if Chrysler reduced the price to its dealers by $183, bargaining between each dealer and his customer might ensue to determine how much of the reduction, if any, would be passed along to the retail customer. However, this is an illusory distinction, since the dealer has the freedom to increase his retail price to offset the $183 rebate.

Thus there is a failure to show any provision of the plan, or any facts, indicating that the plan would tend to affect the exercise of competitive pricing discretion, or to affect or tamper with the range, level, scale, or amount of the price paid for Chrysler taxicabs, such as appears in price-fixing or distribution agreements that have been struck down as unreasonable without more. *United States v. McKesson & Robbins, Inc., 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 (1956)*; *United States v. Univis Lens Co., 316 U.S. 241, 86 L.* ***[**17]*** *Ed. 1408, 62 S. Ct. 1088 (1941)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. In the absence of proof that the Rebate Plan has a tendency to restrict the dealer's pricing independence, or has some pricing effect, it amounts to nothing more than a promotional device which cannot be labelled illegal *per se*.

Having determined that it is inappropriate to condemn the plan as a *per se* unlawful price fixing arrangement on this motion for summary judgment, the question remains whether the Rebate Plan poses such a pernicious effect on competition that it must be condemned as violating the rule of reason. *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*; *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. Compare, Areeda, Antitrust Analysis P347, 348 (1967). The legality of a vertical rebate plan under *§ 1* of the Sherman Act, like that of the territorial and customer restrictions in the franchise agreement before the Supreme Court in *White Motor Co., supra*, can be determined only after an inquiry into facts peculiar to the taxicab business for the purpose of **[**18]** determining what effect, if any, the program has had, or is likely to have, upon competition and dealer price conduct, and whether under all the circumstances it must be condemned as unreasonable. As the Supreme Court stated in ***HN4***[] *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*:

> "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."

Here the moving papers fail to offer **[**19]** any proof to the effect that the Rebate Plan has had, or is likely to have, an adverse effect on competition in the sale of taxicabs.

[*884] Checker's claim that it has lost taxicab sales in New York City to Chrysler as a result of the latter's Rebate Plan appears to be supported by the following schedule of taxicab registrations:

NEW YORK CITY

TAXICAB REGISTRATIONS

Date	Checker	Ford	(Chrysler) Dodge	Chevrolet	Studebaker	(Chrysler Plymouth	Misc.	Total
Dec. 1961	3,603	4,176	1,813	729	791	495	116	11,723
June 1962	3,872	3,400	2,026	914	1,080	343	95	11,730
Dec. 1962	4,056	2,938	2,376	953	1,092	315	71	11,737
June 1963	3,795	2,831	2,921	965	981	203	51	11,747
Dec. 1963	3,405	3,093	3,634	865	546	161	45	11,749
June 1964	2,301	3,186	4,834	864	424	106	37	11,752
Dec. 1964	1,776	3,192	5,587	840	246	78	34	11,753
April 1965	1,607	3,089	5,957	821	178	69	32	11,753
Dec. 1965	1,046	3,046	6,867	691	30	48	25	11,753
Aug. 1966	885	2,937	7,261	587	20	53	28	11,771

[*885] Registration figures may be a misleading indicator of sales, however, **[**20]** for the reason that they include both new and used taxicabs in service at any given time. A more accurate source would probably be the actual sales of taxicabs during the relevant period. Sales figures made available to the Court for New York City for the period 1964-1967 are as follows:

New York City Taxicab Sales

	1964 Model		1965 Model		1966 Model		1967 Model	
	Unit	Share	Unit	Share	Unit	Share	Unit	Share
Checker	415	6.6%	200	3.1%	268	4.7%	269	4.7%
Chrysler	3,467	55.2%	4,221	66.4%	3,357	60.1%	2,648	46.6%
Ford	1,831	29.2%	1,459	23.0%	1,958	34.8%	1,646	28.9%
General Motors	375	6.0%	478	7.5%	20	0.4%	1,124	19.8%

The above figures, however, fail to reflect a sharp drop in 1964 sales of Checker cabs into New York City as compared with earlier years, allegedly as a result of Chrysler's introduction of its Rebate Plan in 1962. Notwithstanding Checker's sharply declining share of the New York registrations, however, according to its own figures its nationwide sales have not declined quite as noticeably during the relevant period:

CHECKER MOTORS CORPORATION

Annual Taxicab Sales

	United States	New York City
1960	5,943	1,385
1961	4,219	1,667
1962	5,603	1,666
1963	4,969	1,221
1964	3,967	247

CHECKER MOTORS CORPORATION

Annual Taxicab Sales

	United States	**New York City**
1965	4,050	240

[21]** Although Checker claims that the Rebate Plan has been a cause in the decline in Checker's sales, Chrysler sets out other reasons for its difficulty. First, in New York City a taxicab owner is required to have a medallion to operate a taxi vehicle. Prior to 1953 National Transportation Co. (National), a Checker subsidiary, controlled in excess of 1,600 of the total of approximately 11,000 taxicab medallions, or franchises, authorized by the City of New York. Chrysler contends that beginning in that year, under pressure from Government antitrust litigation, National began to systematically sell its medallions to various New York City taxicab fleet operators. However, as a condition to the sale of its medallions, Checker would require the medallion purchaser to replace its entire fleet for the year with its taxicabs. By 1964, Checker had parted with the last of its 1,600 medallions with a resulting loss of this weapon for maintenance of its sales of taxicabs in New York. Moreover, Chrysler points to facts indicating that Checker's president, Morris Markin, has contributed to the company's loss of New York City sales by antagonizing that city's taxicab fleet owners over the years **[**22]** through public statements in favor of higher wages for taxi drivers and against increases in cab fares.

Even if it is assumed that the plan resulted in Chrysler dealers taking away sales from Checker, it is doubtful whether this is a permissible consideration, in the absence of a showing of predatory tactics, such as sales below cost or a scheme to squeeze Checker out of the market in order to destroy its competition and have it to themselves, since the purpose of the Sherman Act is to protect competition, not competitors. *Ben Hur Coal Co. v. Wells, 242 F.2d 481, 486* **[*886]** (10th Cir.), cert. denied, *354 U.S. 910, 1 L. Ed. 2d 1427, 77 S. Ct. 1296 (1957)*. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. The inevitable result of lawful price competition, particularly in an inelastic market with a fixed ceiling on the number of units that can be sold (such as New York City, which limits taxicabs to approximately 12,000), is that some sellers are going to take away business from others, unless all sell the identical product at the same price. Thus, if Chrysler were to have reduced its wholesale prices by $183, a move the legality **[**23]** of which would probably not be successfully challengeable, the effect on plaintiffs' share of the market might well be substantially the same.

Even if we assume proof of Checker's market loss to be relevant as some evidence of injury to competition in a market where few sellers are involved, genuine issues are raised by opposing affidavits to the effect that Checker's losses are due not to Chrysler's conduct but to inferior design and workmanship in Checker cabs, purchasers' difficulties in obtaining proper service, higher operational costs to taxicab owners, the expiration of restrictions requiring purchasers of medallions (from National Transportation) to buy Checker cabs, and Markins' alleged antagonizing of New York taxicab buyers by his sponsorship of a law increasing the total number of New York City medallions and his opposition to fare increases.

Chrysler further contends that its Rebate Plan has had the effect of promoting competition among competing taxicab manufacturers rather than inhibiting such competition, and states that Ford and General Motors have put into effect subsidies, rebates, other cash inducements and depreciation plans to retail taxi purchasers that are **[**24]** the equivalent of Chrysler's plan. Against this contention is the possibility (neither suggested by Checker nor supported by any proof) that the rebate may foreclose price negotiations and haggling between Chrysler dealers and taxicab purchasers with respect to the deduction from Chrysler's suggested list price that would be made if Chrysler had granted a straight $183 price reduction to its dealer instead of an automatic rebate directly to the purchaser. While such negotiations could result in the buyer's paying a higher net price than he would with an automatic $183 rebate in those instances where dealers chose not to pass the entire reduction along to their customers, this hardly indicates that competition is adversely affected by the Rebate Plan, the effect of which appears to be to increase interbrand competition among taxicab manufacturers, including Ford and General Motors, to a greater degree than would have been the case had Chrysler simply reduced its prices to dealers.

In view of the apparent benefit to competition from the Rebate Plan, and the speculative nature of any possible detriments, Checker's motion, insofar as it attacks the Rebate Plan under *§ 1* of the Sherman **[**25]** Act, must be denied, and a determination as to the plan's legality should await trial.

The § *2(a), Robinson-Patman Act, Claim*

Checker next seeks summary judgment on the ground that the Rebate Plan was part of an unlawful primary line price discrimination between the sale of taxicabs and passenger automobiles which may substantially lessen competition in the sale of taxicabs, in violation of § 2(a) of the Robinson-Patman Act, *15 U.S.C.A. § 13(a)*. [5] Its theory is that Chrysler's **[*887]** taxicabs are in every respect either equal or superior in quality to its passenger cars, and that therefore, in the context of a price discrimination in favor of taxicabs, the two vehicles should be regarded as possessing "like grade and quality."

[26]** In response to Checker's contention that the Rebate Plan caused an unlawful "price discrimination," i.e., a price difference, *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*, between taxicab purchasers and passenger car buyers, Chrysler argues that since Checker has not come forward with any evidence as to the retail prices at which the two vehicles are sold, price discrimination in violation of § 2(a) has not been shown. ***HN5***[] While a rebate may be violative of the Robinson-Patman Act, it is elementary that some proof indicating that it may result in discriminatory prices must be adduced. *American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962)* (Clark, J.), cert. denied, *371 U.S. 824, 9 L. Ed. 2d 64, 83 S. Ct. 44 (1962)*; *Moog Industries, Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956)*, affd., *355 U.S. 411, 2 L. Ed. 2d 370, 78 S. Ct. 377 (1958)*. In the absence of any evidence as to retail prices of taxicabs and passenger cars, the Court cannot assume on this motion that except for the $183 rebate to taxicab buyers, the prices of taxicabs and passenger cars would be identical. Unlikely as it may be, it is possible that the $183 rebate results in identity **[**27]** of price to the two customer categories. Accordingly, resolution of the question must await trial, at which the prices of the two categories may be introduced.

Chrysler next contends that it could not in any event have violated the prohibitions of the Robinson-Patman Act, because the alleged price discrimination was not between different purchasers from the manufacturer, but only between purchasers from Chrysler's independently franchised dealers after the latter had purchased, paid for, and acquired ownership of the vehicles. Thus, Chrysler argues, it is not a person who discriminates in price "between different purchasers" as required by § 2(a). In reply, Checker invokes the "indirect purchaser" doctrine, *American News Co. v. FTC, 300 F.2d 104, 109* (2d Cir.), cert. denied, *371 U.S. 824, 9 L. Ed. 2d 64, 83 S. Ct. 44 (1962)*, as the basis for urging that retail purchasers of taxicabs and passenger vehicles from Chrysler's franchised dealers are "purchasers" from Chrysler, within the meaning of § 2(a).

HN6[] The application of the "indirect purchaser" doctrine to a particular case depends upon showing that the manufacturer deals directly with the alleged "purchaser" and "controls the **[**28]** terms upon which he buys." *American News Co. v. FTC, 300 F.2d at 109*; *K.S. Corp. v. Chemstrand Corp., 198 F. Supp. 310, 312-13 (S.D.N.Y.1961)*; *Purolator Prods., Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965)*, cert. denied, ***HN7***[] *389 U.S. 1045, 88 S. Ct. 758, 19 L. Ed. 2d 837 (1968)*.

> "The 'customer' or 'purchaser' requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise

[5] "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 either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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."

> the requirement of the statute could be easily avoided by the use of a 'dummy' wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors." (***HN8***[] *American News Co. v. FTC, 300 F.2d at 109-10*)

The Supreme Court has recently given added vitality to the doctrine by eliminating the direct dealing and control requirements with respect to the disfavored "indirect purchaser" where the defendant has engaged in direct sales to the favored purchaser. FTC v. Fred Meyer, **[*888]** Inc., 36 U.S. Law Week 4233, (1968). However, the *Meyer* Court did not question the *American News* test as applied to the situation in which **[**29]** "a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some the intermediate distributors' accounts over others." 36 U.S. Law Week at 4237,

In the present case Chrysler suggests the resale price at which its dealers resell taxicabs and passenger cars, and engages in advertising campaigns to promote the sale of its vehicles to the public. With respect to the rebate, Chrysler not only sets the amount of the rebate, but also unilaterally controls the terms and conditions under which it is granted, receives the completed form, and pays the rebate directly to the taxi purchaser. However, the dealer is free to negotiate the ultimate price with his customer, offsetting the $183 rebate if he desires, and in fact appears to deviate from the manufacturer's resale price in making his sales. Further, with the exception of the rebate, Chrysler has no direct personal relationship with the taxi purchaser. In *American News,* as distinguished from the situation before us, the seller not only gave rebates to the favored indirect purchaser but also fixed the prices, terms, and conditions of sale. In *Purolator Prods., Inc. **[**30]** v. FTC, 352 F.2d 874 (7th Cir. 1965)*, cert. denied, *389 U.S. 1045, 88 S. Ct. 758, 19 L. Ed. 2d 837 (1968)*, the Court, accepting and applying the test of manufacturer control of the terms of resale, upheld a finding of an "indirect purchaser" relationship based on evidence that the manufacturer (1) had at one time had the legal right to control independent warehouse distributor sales; (2) had supplied warehouse distributors with their sales agreements and suggested resale price lists; (3) had solicited the indirect purchasers (the jobbers) and urged them to maintain prices which for the most part they had done; and (4) had directly negotiated franchise agreements and changes in price with the indirect purchasers. See *Joseph A. Kaplan & Sons, Inc. v. FTC, 121 U.S. App. D.C. 1, 347 F.2d 785 (1965)*.

In this case the papers reveal a sharp issue as to whether Chrysler exercised sufficient control over the terms and conditions of its dealers' resales of passenger cars and taxicabs to warrant a determination that the dealers' customers were Chrysler's "indirect purchasers." Since the resolution of that issue hinges upon the number and quality of contacts between the manufacturer and the **[**31]** alleged indirect purchaser, it must await trial. *K.S. Corp. v. Chemstrand Corp., 198 F. Supp. 310, 313 (S.D.N.Y. 1961)*. On the other hand, Chrysler's contention that the "indirect purchaser" doctrine does not apply to a case where the indirect purchasers are consumers rather than retailers must be rejected as frivolous, being unsupported by the underlying purposes of the doctrine.

Chrysler next challenges the proposition that its taxicabs and its passenger cars are of "like grade and quality." In *Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958)*, the Second Circuit held that Canadian bacon, ham and pork shoulders were not of "like grade and quality" reasoning as follows:

> "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded. Such a holding would lead to the conclusion that all articles of food are competitive, each with the other - an obvious absurdity. Merely because various articles of food are derived from a common source (in this case, the pig), should not force the vendor of a broad line of **[**32]** such products to market or promote all simultaneously and in an identical fashion. The dietetic habits of the consuming public are not to be controlled by judicial fiat." ***HN9***[] (*258 F.2d at 371*)

However, cross-elasticity of demand, substitutability, physical appearance, and identity of performance, are factors to **[*889]** be considered in determining whether goods are of "like grade and quality." From the moving papers, a number of differences between Chrysler's passenger cars and taxicabs appear. The former contains more chrome; more attractive paint; seat covers that are aesthetically more desirable to purchasers of passenger cars; and various mechanical differences related to the type of driving normally undertaken by taxi drivers and passenger car drivers. Although it seems clear that denominating one vehicle a "taxicab" and an identical one a "passenger car" will not preclude a finding of "like grade and quality," *FTC v. Borden Co., 383 U.S. 637, 16 L. Ed. 2d 153, 86 S. Ct. 1092 (1966)*, if there are substantial physical differences in products affecting consumer use, preference or marketability, such products are not of "like grade and quality," regardless of manufacturing **[**33]** costs. *Quaker Oats Co.,* 1963-65 FTC Complaints, Orders, Stipulations P17,134 (1964). See generally, Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L.J. 294 (1965). The existence of some physical differences between Chrysler taxicabs and passenger cars, coupled with conflicting contentions as to their effect upon cross-elasticity of use, precludes application of the principle that mere differences between "standard" and "premium" brands are insufficient to render them different in grade and quality. E.g., *E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944)*. Whether the differences between Chrysler's taxicabs and passenger cars are minor and unsubstantial (as claimed by Checker) or substantial enough to affect consumer use, preference or marketability, presents a genuine issue of fact which cannot properly be resolved upon this motion for summary judgment. *United States v. Diebold, Inc., 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*; *Gordon v. Vincent Youmans, Inc., 358 F.2d 261 (2d Cir. 1965)*.

Chrysler challenges the proposition that buyers of taxicab and passenger cars are "purchasers" entitled to equal treatment within the meaning **[**34]** of § 2(a). Its theory is that the Robinson-Patman Act was never intended to place the users of passenger cars for pleasure purposes on a par with those who use their automobiles to earn their livelihood, e.g., taxicab owners. However, even if it were agreed that all passenger car owners use their vehicles solely for pleasure, this contention erroneously assumes that § 2(a) was designed to protect only competing ***HN10***[] purchasers. That section also protects sellers competing against the grantor of the discriminatory price. The mere fact that the favored and disfavored purchasers are not in competition *inter se* does not preclude a Robinson-Patman violation in a primary line case. See *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967)*; *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*. Moreover, a secondary line case, *FTC v. Borden Co., 383 U.S. 637, 16 L. Ed. 2d 153, 86 S. Ct. 1092 (1966)*, holds that a seller cannot discriminate between prices charged by it for nationally advertised and private brands where the goods contained in each are of "like grade and quality." *Borden* implicitly assumes that the **[**35]** mere fact that one class of purchasers are more aware of market conditions and more knowledgeable of the product's qualities does not justify a price discrimination against a class that is without this information. Therefore, the contention made by Chrysler must be rejected.

Chrysler alleges that its Rebate Plan falls within § 2(b)'s "good faith meeting competition" defense, *15 U.S.C. § 13(b)*, [6] because Ford and General **[*890]** Motors offer rebates equal to or in excess of $183 in the sale of their taxicabs. ***HN11***[] However, one of the requirements of this defense is that the seller demonstrate that his reduced price was to meet a competitor's equally low price. See *FTC v. Sun Oil Co., 371 U.S. 505, 514-15, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. Chrysler's plan was begun in 1962. Its affidavits and exhibits tend to show that Ford and General Motors did not commence their rebate arrangements until sometime during or after 1964. Since Chrysler, which has the burden on this issue, *FTC v. Sun Oil Co., 371 U.S. at 514*, has not demonstrated that its Rebate Plan was introduced in response to a rival's rebate scheme, it cannot assert the § 2(b) defense as a basis for summary judgment **[**36]** in its favor.

Chrysler next asserts that because its Rebate Plan was carried out on a nationwide basis and Checker is a manufacturer selling taxicabs to customers in several other cities, the entire United States, rather than New York, is the relevant market in which to appraise the injury to competition involved in this case. Without attempting to bind the trial court to a market definition that inevitably necessitates a detailed probative analysis of the underlying economic data, *FTC v. Sun Oil Co., 371 U.S. 505, 527, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*; Reines Distributors, Inc. v. Admiral Corp., 5 CCH TRADE REGULATION REPORTS, p. 84,145 (S.D.N.Y.1967); see **[**37]** *Tampa Elec.*

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[6] "*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."

Co. v. Nashville Coal Co., 365 U.S. 320, 330-33, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961), the papers submitted indicate that New York City is a separate and distinct market.

With respect to the question of whether the effect of the alleged discrimination may have been "substantially to lessen competition," the Court has already alluded (supra pp. 884-85) to the parties' conflicting contentions as to the cause of Checker's loss of sales and taxicab registrations in New York City which cannot be resolved on this motion and must await trial. For the same reasons it is unnecessary at this stage to pass upon Chrysler's contention that the alleged discrimination was not made in the course of interstate commerce as required by § 2(a) and that the case involves only intrastate sales by franchise dealers to purchasers within the state. Walling v. Jacksonville Paper Co., 317 U.S. 564, 87 L. Ed. 460, 63 S. Ct. 332 (1943); Burke v. Ford, 377 F.2d 901 (10th Cir. 1967).

Preliminary Injunctive Relief

Since the factual issues raised with respect to both the Sherman Act and Robinson-Patman Act claims on this motion raise a serious doubt as to whether Checker will ultimately prevail, **[**38]** preliminary injunctive relief must be denied. Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968). Furthermore, a review of the hardships and equities does not disclose a balance favoring injunctive relief. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953); Blaich v. National Football League, 212 F. Supp. 319, 322-24 (S.D.N.Y.1962). In addition, the antitrust laws afford plaintiff treble damage relief for any loss sustained as a result of Chrysler's unlawful conduct. Since any drop in Checker taxicab sales caused by continuation of the Rebate Plan is capable of fairly precise measurement, it will not suffer irreparable harm from the denial of relief. See *FMC v. Atlantic & Gulf/Panama Canal Zone, 241 F. Supp. 766, 780-81 (S.D.N.Y. 1965)*.

In the light of all of the above considerations, see Perry v. Perry, 88 U.S. App. D.C. 337, 190 F.2d 601, 602 (1951) (Bazelon, J.), Checker is not entitled to preliminary injunctive relief.

End of Document

Woods Exploration & Producing Co. v. Aluminum Co. of America

United States District Court for the Southern District of Texas, Houston Division

March 29, 1968

Civil Action No. 14669

Reporter

284 F. Supp. 582 *; 1968 U.S. Dist. LEXIS 10169 **; 12 Fed. R. Serv. 2d (Callaghan) 1251; 1968 Trade Cas. (CCH) P72,547; 29 Oil & Gas Rep. 470

Woods Exploration & Producing Co., Inc., et al. v. Aluminum Co. of America, et al.

Core Terms

Railroad, producers, damages, nominations, tracts, Sherman Act, conspiracy, regulation, plaintiffs', truckers, cases, forecasts, political activity, allegations, defendants', monopolize, drilled, discretionary power, court of appeals, district court, market demand, antitrust, formula, prorate, route, restraint of trade, anti trust law, conspired, purchases, campaign

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Courts > Authority to Adjudicate

HN1[] **Judicial Officers, Judges**

Whether to go into the merits of a question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge.

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Courts > Judges

HN2[] **Judicial Officers, Judges**

A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well established.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Congress

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Antitrust & Trade Law, Sherman Act**

The rule of reason test is the test for determining the applicability of the antitrust laws to a given situation. Pursuant to this test, the Sherman Act does not apply to the actions of a state. There is nothing in the language of the Sherman Act or in its history that suggests that its purpose is to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

Governments > State & Territorial Governments > Legislatures

HN4[] **State & Territorial Governments, Legislatures**

The states are free to regulate industries within their boundaries by curtailing competition or eliminating it altogether, subject only to the limitations inherent in the *commerce clause* or any restrictions imposed by federal statutes.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act does not prohibit two or more 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 > General Overview

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

Liability under the Sherman Act cannot be sustained by virtue of official action of a state agency, however inspired by the acts of an individual.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided independent state officials adequately supervise their activities.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

A private antitrust complaint is not the appropriate vehicle for state criminal laws whose enforcement is entrusted to state or local prosecutors.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > General Overview

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

HN9[] Remedies, Damages

The fact that damages are recoverable in a civil action based on state law does not mean perforce that damages are recoverable under the Sherman Act upon a similar showing. The Sherman Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Seeking lawful judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition.

Judges: [1]** Singleton, D.J.

Opinion by: SINGLETON

Opinion

[*584] Memorandum and Order

SINGLETON, D.J.

In December, 1962, plaintiffs, Woods Exploration & Producing Company, Stanley C. Woods, and Southeastern Pipe Line Company, filed the instant antitrust action against defendants, Aluminum Company of America, Crown Petroleum Corporation, and Lavaca Pipe Line Company, [1] seeking injunctive relief and treble damages for alleged violations of the Sherman and Clayton Antitrust Acts, *15 U.S.C. §§ 1*, *2*, *15*, *26 (1964)*. By their complaint, plaintiffs charged that defendants had restrained trade in the production and marketing of natural gas from the Appling Gas Field in Jackson and Calhoun Counties, Texas, and that defendants had monopolized and/or attempted to monopolize the production and marketing of gas from the field. Plaintiffs sought to recover as damages the loss of production from their wells in the field which had been occasioned by the entry of orders by the Texas Railroad

[1] Plaintiffs also named as defendants certain employees of the defendant corporations. By stipulation and through the filing of their Third Amended Complaint, however, plaintiffs have dropped these parties as defendants.

Commission setting production allowables for plaintiffs' wells at levels lower than plaintiffs thought they should have received. Plaintiffs sought to hold defendants liable for this loss on the ground that the Railroad **[**2]** Commission orders had been based, at least in part, on false nomination forecasts and reports filed by defendants with the Commission.

Defendants responded with a motion to dismiss for failure to state a claim, and, in the alternative, a motion for summary judgment. Both motions were overruled by another judge of this district, *Woods Exploration & Producing Co. v. Aluminum Company of America, 36 F.R.D. 107 (S.D. Tex. 1963)*, and in October, 1963, the Court of Appeals for the Fifth Circuit denied with the following order defendants' attempted interlocutory appeal from the order overruling their motion to dismiss.

> "Since the order sought to be reviewed is merely the denial of a motion to dismiss the complaint, leave to take interlocutory appeal should be, and it is hereby Denied, *but* **[**3]** *without prejudice to an application in the future from any appropriate order made by the District Court after completion of pretrial discovery or other pretrial procedures revealing the factual basis for the respective claims and defenses as distinguished from mere pleadings*."

[*585] In 1966, the case was transferred to this court as a docket equalization measure. Now, after the completion of extensive pretrial discovery, defendants have again moved for summary judgment. After reviewing thoroughly the numerous briefs filed by each side, as well as conducting an oral hearing on the motion, I feel compelled to disagree with the conclusion reached by my brother judge in his 1963 decision.

Before proceeding to the merits of the motion, however, I feel some comment is in order regarding plaintiffs' contention that this Court is without the power to entertain the motion - that the prior ruling by a different judge has become the law of the case. In view of the fact that I reach the merits, needless to say I disagree. The wording of the appellate court order seems to invite the current motion, and, moreover, the law does not require a judge who will ultimately handle **[**4]** a case to decline to make an independent and objective determination of issues which are properly raised. Rather, ***HN1***[] whether to go into the merits of a question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge. See *Beedy v. Washington Water Power Co., 238 F.2d 123, 127 (9th Cir. 1956)*. See also 3 Barron & Holtzoff, Federal Practice & Procedure § 1192 (Wright ed. Supp. 1966); 1B Moore, Federal Practice, Para. 0.404[4], at 452. As stated by the Court in *Ward v. Louisiana Wildlife Comm'n, 224 F. Supp. 252 (E.D. La. 1963)*,

> ***HN2***[] "A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, *the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well established . . . . The United States Supreme Court has rejected a doctrine of disability at self correction . . . ." Id. at 255*.

By amended complaint, plaintiffs have now specified various other activities of the defendants taken pursuant to **[**5]** the alleged conspiracy. In large part, these allegations relate to a course of litigation either initiated by defendants or which was brought about by defendants' successful efforts to influence the Railroad Commission in setting field orders which applied to the Appling Field. Since the same basic principles which apply to the allegations concerning the filing of false nominations apply alike to the latter allegations, they will also be considered.

After reviewing the numerous depositions and papers filed in the case, it is clear that there are disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false nominations or brought about the litigation in question as part of a conspiracy. However, even if plaintiffs' allegations in these respects are true, plaintiffs would still not be entitled to recover damages for these activities. Thus for the purposes of this motion, I accept plaintiffs' basic allegations as true. *Liberty Leasing Co., Inc. v. Hillsum Sales Corp., 380 F.2d 1013, 1014-15 (5th Cir. 1967)*.

Filing of False Nominations

A. *The Factual Context*.

Plaintiffs own, operate, or have an economic interest **[**6]** in wells drilled on small tracts located within a fifty-nine acre area lying in the heart of the Appling Gas Field. Most of plaintiffs' wells have been drilled as exceptions to the general spacing rule which restricts the drilling of wells to one well every 320 acres. [2] **[**7]** Defendants, on the other hand, **[*586]** own or have an interest in wells which have been drilled on large tracts subject to the general spacing rule. The allowable production which each well in the field is permitted to produce is set monthly by order of the Texas Railroad Commission. For the purpose of preventing waste, the Commission is charged with the task of limiting total production from the field to the reasonable market demand for gas made upon the field. *Tex. Rev. Civ. Stat. Ann. art. 6008* § 3(h) (1964). Each producing well is entitled to its fair share of the total allowable field production, *id.* § 12, an amount which has been held to be roughly equivalent to the gas in place under the tract on which the well is drilled. [3]

In the Appling Field, after first determining the total allowable for the field, the allowable for each well is determined by application of a one-third - two-third proration formula. One third of the field allowable is divided equally among the wells, and two-thirds is divided among the wells in the **[**8]** proportion to which the surface acreage on which the well is drilled bears to the combined surface acreage of all the wells in the field. The heavy weight given to the well factor by this formula has meant that producers with wells on small tracts have been permitted by the Commission to extract far more gas than that underlying their tracts, thereby draining gas from beneath the larger adjoining tracts. [4] **[**9]** The inequitable effect of the formula has been compounded, moreover, by the fact that many wells on large tracts, although producing at full capacity, have been unable to produce even the allowable assigned **[*587]** to them under the formula. As a result the amount they have been unable to produce has been

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[2] Statewide Rule 37, Tex. R.R. Comm'n Rules & Regs. 1, at 15, Oil & Gas Rep. 1320 (1962). See generally Hardwicke & Woodward, Fair Share and the Small Tract in Texas, 41 Texas L. Rev. 75 (1962); Hardwicke, Oil-Well Spacing Regulations and Protection of Property Rights in Texas, 31 Texas L. Rev. 99 (1952).

Most of plaintiffs' wells were drilled on extremely small tracts, some being located on tracts of less than 2/10 of an acre. Defendants' First Brief in Support of Summary Judgment, p. 3; Plaintiffs' First Opposition Brief, p. 2. See generally *Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex. 1964)*, reversing *368 S.W.2d 818* (Tex. Civ. App.-Austin 1963).

[3] Where the lessee or owner of a small tract has been granted a permit to drill a well as a Rule 37 exception, this means that "it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give the owner of such smaller tract only his just proportion of the oil and gas. *By this method, each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land*." *Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 944 (1935)*. See also *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N.E. 912 (1900)*. In some instances, and particularly in the Appling Field, this "ideal" allocation of gas has not been attained. See Notes 4 and 5 *infra*.

[4] The one-third - two-third formula was declared invalid by the Texas Supreme Court in *Atlantic Ref. Co. v. Railroad Comm'n., 162 Tex. 274, 346 S.W.2d 801 (1962)*, on the ground that it allowed small-tract owners to produce more than their fair share and amounted to confiscation of gas underlying the large tracts. In *Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex. 1964)*, however, the court upheld the formula insofar as it applied to the Appling Field on the ground that the large tract owners were guilty of laches in attacking it. Although the court recognized that small-tract owners had drained substantial quantities of gas from beneath the large tracts, and had recouped their costs and made a profit, and would during the life of the field drain several million dollars worth of gas from beneath tracts leased to Aluminum Company of America alone, *id. at 604*, it found other factors to be more persuasive.

> "There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business." *Ibid.*

allocated by the Commission to the small tract wells not already producing at full capacity. [5] It is in this context that the plaintiffs complained of defendants' filing false production forecasts which reduced the total field allowable.

B. *The Nomination Procedure* **[**10]** .

As previously stated, the total allowable for a field is set at what the Railroad Commission determines to be the reasonable market demand for the field's gas. No statutory provision prescribes the procedure by which market demand is to be determined, and thus the matter falls under the rule-making power of the Commission. The usual procedure which the Commission follows is set out in Statewide Rule 31. Under its provisions, market demand is ordinarily determined primarily on the basis of Producer's Forecasts filed with the Commission by operators having wells in the field. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month. The nominations are totaled and, if the Commission concludes that their total accurately reflects market demand, the total becomes the field allowable to which the 1/3 -- 2/3 formula is applied. If the Commission disagrees with the forecasts, however, it may consider other factors such as average production for the previous twelve months, or nominations filed by purchasers of gas. *Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 315 (Tex. 1966)*. In most instances **[**11]** in the Appling Field the producer's forecasts are corrected by the difference between the total of the current nominations and total actual production which was allowed for the second preceding month. [6]

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[5] *Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 316 (Tex. 1966)*.

"An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500' and 18 wells were completed therein. Seventeen of these wells were located on 7.132 acres, while the remaining well was situated on a 328 acre unit. . . . The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic 1/3 - 2/3 allocation formula, the large tract well was entitled to an allowable of 591,000 MCF. . . . The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 557,000 MCF were allocated to the [small tract] wells . . . in addition to their shares of the reservoir allowable as determined by application of the 1/3 - 2/3 formula." *Ibid.*

[6] Under this method of determining the field allowable, the following calculations would be involved.

(a) Total nominations for Second Preceding Month

110

Total allowable for non-prorated wells for Second Preceding Month

20

Total nominations for Prorated Wells for Second Preceding Month

90

Total Actual Production of Prorated Wells in Second Preceding Month

80

Difference

10

(b) Total Nominations for Current Month

110

Difference Between Total Nominations and Actual

Production in Second Preceding Month

10

Total Field Allowable for Current Month for All Wells

[*588] [12]** C. *The Liability Issue*.

Whether plaintiffs can recover for the loss of production they allegedly suffered as a result of the low allowables set by the Railroad Commission involves a now rather undeveloped area of federal ***antitrust law***. As state regulation of the economy increases, however, and particularly in the area of conservation, it can easily be predicted that many questions will arise similar to those raised in the instant case. [7]

[13]** The starting point in this and any other antitrust case not involving a matter of per se illegality is *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 51-52, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*, in which the Supreme Court announced ***HN3***[] the "rule of reason" as the test for determining the applicability of the antitrust laws to a given situation. Pursuant to this test, it has been held consistently that as a matter of statutory

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Tex. R.R. Comm'n Rules & Regs. Appendix, at 39; see Parris & Edgerton, Non-Associated Gas Proration 4 (1961). See also *Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 98-99 (5th Cir. 1966)*.

[7] In some instances, Congress has recognized that there is a basic conflict between the competitive thrust of the antitrust laws and the anticompetitive thrust of state regulatory schemes. For instance, in the area of insurance, Congress has sought to eliminate friction which might result because of simultaneous application of both laws.

> "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: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 U.S.C. §§ 1 et seq.*] 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 [*15 U.S.C. §§ 41 et seq.*], shall be applicable to the business of insurance *to the extent that such business is not regulated by State law*."

McCarran Ferguson Act, *15 U.S.C. § 1012(b) (1963)*; see *Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957)*. A comparable forthright approach to resolving similar conflicts in the oil and gas area would not be inappropriate, for there are many parallels between state regulation of both industries, state regulation of both being equally comprehensive and detailed.

The federal courts have been careful to avoid applying the Sherman Act where its application might conflict with the Federal Power Commission's regulation of the natural gas industry. *Interstate Nat. Gas Co. v. Southern California Gas Co., 102 F. Supp. 685, 103 F. Supp. 317 (S.D. Cal. 1952)*, aff'd, *209 F.2d 380 (9th Cir. 1953)*. Moreover, the activities made the subject matter of the instant suit involve Railroad Commission regulations concerning the production and gathering of natural gas from the Appling Field, and this subject Congress has chosen to exempt from federal supervision in favor of state regulation. Natural Gas Act, *15 U.S.C. § 717(b) (1963)*. Therefore, since these activities are subject to exclusive regulation by the Texas Railroad Commission, a like caution and deference should be shown when the alleged Sherman Act violation involves Railroad Commission regulations and matters subject to the Commission's exclusive jurisdiction.

interpretation the Sherman Act does not apply to the actions of a state. As stated by the court in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*:

> "[There is] 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was **[**14]** intended to restrain state action or official action directed by a state." *Id. at 350-51*.

Accordingly, ***HN4***[] the states have been left free to regulate industries within their boundaries by curtailing competition or eliminating it altogether, *Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 505 (4th Cir. 1959)*, subject only to the limitations inherent in the **[*589]** *commerce clause* or any restrictions imposed by federal statutes. However, when a private party as opposed to a state itself has been sought to be held liable for damages resulting from restraints imposed by a state, the cases reflect more than a little uncertainty on whether, and in what situations, the private party whose improper conduct is the reason the state has imposed a trade restraint is immune simply because the restraint was imposed by the state. [8]

[15]** In *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, forty-one Pennsylvania truckers and their trade association brought suit against twenty-four railroads and an association composed of the presidents of each railroad. The truckers charged that the railroads had conspired to restrain trade in and monopolize the long-distance freight business in violation of the Sherman Act. The essence of the conspiracy was that the railroads had conducted a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. The campaign proved successful, for the railroads persuaded the governor of the state to veto a "Fair Truck Bill" which would have permitted the truckers to haul heavier loads over the state's highways. Moreover, the publicity campaign had the additional effect of destroying much of the truckers' good will. The district court found that the publicity campaign was fraudulent and malicious and that its sole purpose was to destroy the truckers as competitors even though no legislation was secured. For this reason, **[**16]** it awarded substantial damages for the truckers' loss of good will. However, the district court was also of the view that restraints of trade and monopolizations resulting from valid governmental action are not actionable under the Sherman Act and thus refused to award damages for the loss of business caused by veto of the "Fair Truck Bill." *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conf., 166 F. Supp. 163, 172-73 (E.D. Pa. 1958)*. The Court of Appeals affirmed with one judge dissenting. *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 273 F.2d 218 (3rd Cir. 1959)*. Applying the "rule of reason", however, the Supreme Court reversed, holding that the truckers could as a matter of law recover no damages for injury sustained because of the efforts of the railroads to influence governmental action.

In reaching this result, the Court noted that there was an "essential dissimilarity" between the lobbying activities conducted by the railroads and the activities normally prohibited by the Act, and that to impose liability for this conduct would raise serious constitutional questions and political difficulties.

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[8] For example, in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, three cases which were finally decided in the Supreme Court, the lower courts were reversed for imposing liability. Also, there appears to be a conflict on whether joinder of the state official who uses his office to impose the restraint makes a difference on whether the private party can be held liable. *Compare* *Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964)*, *with* *Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957)*. See also *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966)*. In the instant action, there is no issue concerning the liability of the Railroad Commission or any individual member thereof.

> "We think it . . . clear that *HN5*[] the Sherman **[**17]** Act does not prohibit two or more 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*. . . [The railroads' activities] bear very little if any resemblance **[*590]** to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or *law enforcement* and the agreements traditionally condemned by *§ 1* of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. . . . "[Moreover, to impose liability] would substantially impair the power of government to take actions through its **[**18]** legislature and executive that operate to restrain trade. . . To hold that the government retains the power to act in this representative capacity and yet hold . . . that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the *Bill of Rights*, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id. 365 U.S. at 136-38*.

Plaintiffs seek to distinguish *Noerr* on the ground that it exempts only "political activity" from the scope of the Sherman Act and thus is not controlling for, they contend, the filing of false nominations is properly "business activity" and not "political activity" protected by *Noerr*. This proffered distinction, I think, places more emphasis than is warranted on the phrase "political activity" as used by the Court in *Noerr*. Plaintiffs **[**19]** contend that protected "political activity" encompasses only lobbying activities or influence peddling and does not apply to a situation such as this where the defendants and all other producers are required by Commission regulations to submit nominations under oath. There is some doubt whether this line of reasoning is accurate. In *Sterling Nelson & Sons, Inc. v. Rangen, Inc., 235 F. Supp. 393, 400 (D. Idaho 1964)*, for example, the Court held that there was no liability even though the defendant had bribed a state official to use his position to impose a trade restraint harmful to the plaintiff. In addition, it has been held in other cases that there is no liability although the conduct complained of violates a valid state penal statute [9] or even though the conduct gives rise to a civil cause of action under state law. [10] If activities of this character are not within the ambit of the antitrust laws, then it is difficult to perceive how the activities of the defendants here can be viewed differently. However, it is unnecessary to resolve the issue on a determination that the filing of false nominations is or is not political activity. The mere manipulation of labels does not **[**20]** determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental **[*591]** action even though brought about by the improper conduct of a private party.

Plaintiffs' limited construction of *Noerr* ignores the fact that the Supreme Court did not disapprove the district court's holding **[**21]** that the truckers could recover no damages for injury resulting from any valid action of the state. See *365 U.S. at 135-36*. In *Parker v. Brown, supra*, and *United States v. Rock Royal Cooperative, 307 U.S. 533, 83 L. Ed. 1446, 59 S. Ct. 993 (1938)*, the Supreme Court had previously upheld government regulatory schemes involving the production and marketing of milk and raisins even though the schemes permitted and required some participation by the producers affected. In both cases, the Court held that the regulation itself was not invalid

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[9] *E.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 483, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*; *Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961)*; *Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n 272 F. Supp. 872 (D.N.J. 1967)*.

[10] *E.g., Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945)*; *Apex Hosiery Co. v. Leader, supra* note 9, *310 U.S. at 483*; *Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (1962)*; *Parmelee Transportation Co. v. Keeshin, supra* note 9 *292 F.2d at 804*; *Sterling Nelson & Sons, Inc. v. Rangen, Inc., supra, 235 F. Supp. at 400*.

because it constituted a restraint on trade and also that the producers who were benefitted by the regulation and who were instrumental in initiating it could not be held liable in damages.

In *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, decided four years after *Noerr,* the Mineworkers' Union and several large coal producers conspired to drive smaller coal producers out of business. In furtherance of the conspiracy, they persuaded the Secretary of Labor to set a higher minimum wage for the employees of coal producers selling to the TVA and induced the officials of the TVA itself to reduce the number **[**22]** of the TVA's "spot market" purchases - many of which were exempt from the minimum wage requirements of the Walsh-Healey Act. The district court awarded substantial damages, and the court of appeals affirmed, distinguishing *Noerr* on the ground that although the conduct complained of might be lawful when standing alone, it became unlawful when shown to be a constituent part of a larger, unlawful conspiracy. *Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963)*. The Supreme Court reversed, but in doing so chose not to rest its decision alone on the ground that the activity was protected "political activity" within the meaning of *Noerr*. Rather, the Court went further and interpreted *Noerr* more broadly:

> "There is another reason for remanding this case for further proceedings in the lower courts. *It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor*. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to **[**23]** be a co-conspirator, *and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations." Id. 381 U.S. at 671*. See also *United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966)*.

Perhaps of even more significance than this statement in the opinion is the fact that the Court cited with approval the decision of the court of appeals in *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954)*, a case which is closely in point with the instant action. In *Okefenokee,* the plaintiff brought suit against Florida Light & Power Company and the City of Jacksonville, Florida, alleging that these defendants had "engaged in an unlawful combination and conspiracy to monopolize and exercise exclusive control over the territory" into which plaintiff was seeking to extend electric power lines. The only feasible route from an engineering and economic standpoint along which a new power line could be built lay along Federal Highway 17. On January 25, 1952, plaintiff staked a proposed line along the highway, and on February 26, **[**24]** 1952 it applied to the Florida State Road Department for permission to construct a line along the route. During this period, however, the defendants constructed a "spite line" **[*592]** along the same route for the sole purpose of defeating plaintiff's application for a permit. Only two persons could be served by the defendants' spite line, and indeed the only wire placed on the line by the City was a "neutral strand." In pursuance of the conspiracy, the City made a false argument before the Road Department that a line had already been constructed and that no new line should be built. As a result of these two actions, the Road Department denied plaintiff's application. Moreover, the defendants conducted a smear campaign against plaintiff, thereby causing the County Commissioners of Duval County to pass discriminatory regulations applicable only to plaintiff and designed to prohibit plaintiff from operating in Duval County. The district court dismissed the complaint for failure to state a claim. The court of appeals affirmed, reasoning that since the plaintiff had no right to use the highway route without a permit from the state nor any route along the county roads without permission **[**25]** of the Board of County Commissioners, the plaintiff had suffered no "legal injury."

I think the principle announced in *Pennington* and *Okefenokee* is controlling as to the damages plaintiffs allegedly suffered because of the allowables set by the Railroad Commission. Plaintiffs, however, have advanced two contentions as a basis for taking their action outside the scope of these precedents. First, they seek to distinguish *Okefenokee* on its facts, but this they have not successfully done. Plaintiffs contend that *Okefenokee* is distinguishable because they have been granted a permit to drill and produce gas whereas the plaintiff in *Okefenokee* was injured because of the state's refusal to grant a permit. This distinction is tenuous at best, for its thrust is to limit *Okefenokee's* application to cases involving the denial of permits by state agencies, a limitation which is inconsistent with the Court's reasoning. As stated by Judge Biggs, "implicit in this ruling is the legal conclusion that ***HN6***[] liability under the Sherman Act cannot be sustained by virtue of official action of a State agency, *however inspired by the acts of an individual*." *Noerr Motor Freight, **[**26]** Inc. v. Eastern Railroad Presidents Conf., 273 F.2d 218, 226 (3d Cir. 1959)* (dissenting opinion). Moreover, there are two crucial similarities between the two cases. In both, the injury complained of resulted directly from specific action taken by a state administrative agency on the basis of false information provided by private parties. Secondly, just as certainly as the plaintiff in *Okefenokee* had no legal right to use a particular route for the construction of a power line without the consent of the State of Florida, the plaintiffs here have no legal right to produce an amount of gas in excess of the specific allowable assigned to them by the State of Texas acting through the Railroad Commission. See *Tex. Rev. Civ. Stat. Ann. art. 6008* § 16 (1964).

Plaintiffs' second contention is that, since each producer is required by the Railroad Commission to submit production forecasts under oath so as to provide information on the basis of which the Commission sets allowables, the producers are in effect possessed of broad discretionary powers by which they set the allowables themselves and thus the case is controlled by *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 **[**27]** U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

In *Continental Ore,* the plaintiff brought suit against several American corporate defendants alleging that they had conspired to restrain trade and commerce in the production and selling of vanadium and that they had conspired to monopolize the vanadium market. Among other elements of damages, plaintiff sought to recover damages which it had suffered by being eliminated from competition in the Canadian market. After Canada's entry into World War II, the Canadian Government had taken measures to assure the maximum availability of strategic metals to private Canadian industries engaged in the war effort. The Office of Metals Controller was established and given broad powers **[*593]** to regulate the procurement of materials and to allocate them to industrial uses. The Metals Controller delegated to a Canadian corporation, a wholly owned subsidiary of one of the defendants, the discretionary power to purchase vanadium and to allocate it to Canadian industry. In pursuance of the conspiracy, the parent corporation directed its subsidiary in making vanadium purchases so that the plaintiff lost all its customers and was eliminated **[**28]** from the Canadian market. The district court refused to award damages for this injury, and the court of appeals affirmed. *Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86 (9th Cir. 1961)*. The Supreme Court, however, reversed, and with a unanimous opinion held that the parent's use of the subsidiary's discretionary power as the agent of a foreign state in order to drive a competitor out of business was actionable under the antitrust laws.

In speaking to the defendants' contention that they could not be held liable because the injury was inflicted by an agent of a foreign state, the Court stated:

> "What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. . . From the evidence which petitioners offered it appears that Continental complained to the Canadian Metals Controller that Continental had lost its Canadian business. . . *But there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint* **[**29]** *efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion Continental claims, resulted from the action of Electro Met of Canada [the subsidiary], taken within the area of its discretionary powers granted by the Metals Controller and in concert with or under direction of the respondents*." *Id. 370 U.S. at page 706*.

Unlike *Continental Ore,* however, the defendants here have been delegated no discretionary power to set gas production allowables in the Appling Field. The Texas Supreme Court made clear in *Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313 (Tex. 1966)*, that the Commission alone has the power and the duty to set allowables. The procedure followed by the Commission of requiring the producers to submit forecasts before the allowables are set is no more than a mere "administrative device." *Id. at 319*. The figures submitted by the individual producers are not binding on the Commission, and it does not have to set allowables based on their mathematical total. Thus any injury which *any* producer claims to have suffered because of the allowable assigned to him is an injury **[**30]** directly inflicted by the Railroad Commission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State.

The injury which plaintiffs complain to have suffered here because of the allowables assigned by the Railroad Commission falls under the definition of state action set forth in *Parker v. Brown, supra*, and thus does not constitute a recoverable element of damages in a federal antitrust action.

> "*It is the state which has created the machinery for establishing the prorate program*. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by a referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy*. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by **[*594]** force of agreement or combination which the Sherman Act prohibits. *The state itself exercises its* **[**31]** *. . . authority in making the regulation and in prescribing the conditions of its application." Id. 317 U.S. at 352*.

As noted by the court of appeals for the Fourth Circuit:

> "The teaching of Parker v. Brown is that ***HN7***[] the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." *Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959)*.

The scheme for setting allowables is adequately controlled by the Railroad Commission, and under state law the plaintiffs have effective remedies to protect them against any adverse effects which might flow from the filing of false nominations. The filing of false nominations itself is a violation of state penal law. [11] *Tex. Rev. Civ. Stat. Ann. art. 6036c* (Supp. 1966). Additionally, the filing of false nominations will apparently **[**32]** support a cause of action under the state's statutory [12] and common law. [13] Simply by veiling their grievance under the penumbra of a conspiracy charge, however, plaintiffs cannot convert what are in essence only violations of state law and what is primarily a matter of state concern into a federal antitrust violation. *Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (7th Cir. 1962)*; see Natural Gas Act, *15 U.S.C. § 717(c) (1963)*. See also note 7 *supra*.

[33]** The Litigation

The remaining allegations of plaintiffs' complaint which are involved in the present motion relate to efforts by defendants taken before the Railroad Commission to bring about a change in Commission rules and regulations and to litigation instituted or defended by defendants involving the validity of certain Commission rules and

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[11] However, ***HN8***[] a "private antitrust complaint is not the appropriate vehicle for state criminal laws whose enforcement is entrusted to state or local prosecutors." *Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesale Ass'n, 272 F. Supp. 872, 885 (D.N.J. 1967)*. See also cases cited in note 10 *supra*.

[12] Tex. Rev. Civ. Stat. Ann. art. 6049d § 13 (1964); see *Woods Exploration & Producing Co. v. Aluminum Company of America, 382 S.W.2d 343* (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.).

[13] See *Pan American Petroleum Corp. v. Hardy, 370 S.W.2d 904* (Tex. Civ. App. - Waco 1964, writ ref'd n.r.e.); *cf. Lone Star Gas Co. v. Murchison, 353 S.W.2d 870* (Tex. Civ. App. - Dallas 1962, writ ref'd n.r.e.). ***HN9***[] The fact that damages are recoverable in a civil action based on state law does not mean perforce that damages are recoverable under the Sherman Act upon a similar showing. As stated by the Supreme Court:

> "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. . . . Whether the respondent's conduct amounts to an actionable wrong subjecting them to liability for damages under [state law] is not our concern." *Hunt v. Crumboch, 325 U.S. 821, 826 (1945)*.

regulations. As to any efforts taken by defendants before the Commission to influence the Commission to alter old rules or promulgate new ones, it is clear that *Noerr, Pennington,* and *Okefenokee* preclude liability. Compare *Ramsey v. United Mine Workers, 265 F. Supp. 388, 422 (E.D. Tenn. 1967)*. Moreover, if the doctrines set forth by these cases are to have any meaning, plaintiffs are likewise precluded from recovering as damages any legal or court costs which they incurred in setting the rules aside. If defendants cannot be held liable in the first instance for persuading the Railroad Commission to enter a new field **[*595]** rule which later becomes the subject matter of litigation, then it necessarily follows that via the back door they cannot be held liable for any loss they incurred while an order was in effect or any costs **[**34]** which they incurred in setting it aside. *Cf. Fiumara v. Texaco, Inc., 204 F. Supp. 544 (E.D. Pa. 1962)*. This conclusion controls as to any damages which plaintiffs seek to recover because of the litigation in *Railroad Comm'n v. Woods Exploration & Producing Co., supra,* in which the Texas Supreme Court by a six to three decision struck down a Commission order setting allowables for the field at a level lower than reasonable market demand.

The remaining litigation identified by the parties in their briefs was instituted by defendants in an attempt to stop the drainage of gas from beneath their tracts because of rules prescribed by the Commission. At least one court has held that *Noerr* applies to such joint efforts taken in the courts by holding that ***HN10***[] "seeking lawful . . . judicial action does not violate the anti-trust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition." *Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606 (S.D. Ill. 1967)*. But even if *Noerr* does not extend this far, the litigation of which plaintiffs complain cannot afford a recoverable element of damages, for it is clear that the suits were **[**35]** initiated with probable cause.

In *Benz-Stoddard v. Aluminum Company of America, 368 S.W.2d 94 (Tex. 1963)*, suit was brought challenging the validity of a Railroad Commission order, which, by treating vertically-separated reservoirs separately for proration purposes, allowed small-tract owners multiple completions from a single well. There, under the challenged Commission order, a small-tract owner with a well located on a.115 acre tract had already produced more than seven times the amount of gas in place under her tract, and, if the order continued in effect, would, along with other small-tract owners, be allowed to further drain gas from beneath the larger, adjoining tracts. In the second suit, *Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex. 1964)*, suit was brought challenging the validity of the one-third -- two-thirds proration formula as it applied to the Appling Field. The purpose of this latter suit was also to stop or at least curtail the huge drainage of gas from beneath the larger tracts of defendants. See note 5 *supra*. Both these cases raised points of first impression for the Texas courts. In the first case, the defendants were successful **[**36]** in advancing their contentions in the court of civil appeals. See *Aluminum Company of America v. Benz-Stoddard, 357 S.W.2d 809* (Tex. Civ. App. - Austin). In the latter case, the defendants were successful in both the trial court and the court of civil appeals. *Railroad Comm'n v. Aluminum Company of America, 368 S.W.2d 818* (Tex. Civ. App. - Austin). The ultimate reversal in both cases by the Texas Supreme Court does not detract from the conclusion that defendants had probable cause to file the suits in question. It is not the final disposition of a case which determines whether probable cause existed at the *outset*. The judgments of the court of civil appeals show conclusively that defendants had probable cause to believe that the challenged Commission orders were invalid. Compare *Citizen's Wholesale Supply Co. v. Snyder, 201 Fed. 907 (3rd Cir. 1913)*; *Bracken's Shopping Center, Inc. v. Ruwe, supra.*

Therefore, it is ordered, adjudged, and decreed that the plaintiffs in this cause are not entitled to recover as damages any loss they might have suffered because of false production forecasts filed by defendants with the Texas Railroad Commission or any loss or expense which **[**37]** they might have suffered as a result of any litigation identified in this opinion concerning the validity of Railroad Commission rules, regulations, or orders. However, since there are other allegations in plaintiffs' complaint which, if true, would entitle them to a favorable judgment, summary judgment in favor **[*596]** of defendants is limited to the elements of damage specified above. As to these:

This is a final judgment.

Counsel for defendants will draft and submit an appropriate order after first obtaining approval from counsel for plaintiffs.

End of Document

Alabama Power Co. v. Alabama Elec. Coop.

United States Court of Appeals for the Fifth Circuit

April 2, 1968

No. 23016

Reporter

394 F.2d 672 *; 1968 U.S. App. LEXIS 7480 **; 1968 Trade Cas. (CCH) P72,398

Alabama Power Co., Appellant v. Alabama Electric Cooperative, Inc., et al., Appellees

Disposition: [1]** Affirmed.

Core Terms

anti trust law, immunity, contracts, power company, cooperatives, electric, district court, Supplier, Distributor, exemption, outer, loans, Sherman Act, borrower, energy, conspiracy, antitrust, rural, private citizen, perimeter, private utility, competitors, central station, electric power, injunction, dealings, government official, government action, Clayton Act, Agriculture

LexisNexis® Headnotes

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Energy & Utilities Law > Financing > Raising Capital > Rural Electrification Loans

HN1[] **Administrative Proceedings, Judicial Review**

Congress has never enacted or intended that loans by the Administrator of the Rural Electrification Act should be reviewable in the courts. The Rural Electrification Act itself makes no provision for judicial loan review.

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Financing > Raising Capital > Rural Electrification Loans

HN2[] **Administrative Proceedings, Judicial Review**

Congress has steadfastly refused to provide judicial review under *7 U.S.C.S. § 901* of the Rural Electrification Act (Act). This silence could be premised on the concern that the private supplier could otherwise interfere with Act loans in each instance where the Administrator finds the public suppliers proposal unreasonable.

Administrative Law > Judicial Review > Remedies > Injunctions

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > Legislation > Interpretation

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > Preclusion

Administrative Law > Judicial Review > Reviewability > Standing

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Financing > Raising Capital > Rural Electrification Loans

HN3[] **Remedies, Injunctions**

Review under the Administrative Procedure Act of 1946, *5 U.S.C.S. § 1009*, is precluded by that statute's initial exception to the right of review: Except as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. The Rural Electrification Act, *7 U.S.C.S. § 904*, commits to the discretion of the Administrator the making of loans for rural electrification, including the adequacy of the security for such loans. The statute not only fails to provide for judicial review, but when construed in the light of its purpose and of legislative history, the statute retains oversight of the Administrator's actions in the hands of Congress itself and precludes judicial review.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

It is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.

Governments > Federal Government > Claims By & Against

HN5[] **Federal Government, Claims By & Against**

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties, suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Energy & Utilities Law > Antitrust Issues > General Overview

HN6[] **Energy & Utilities Law, Antitrust Issues**

In cases where the Administrator of the Rural Electrification Act is immune from suit under the antitrust laws, the borrower is likewise immune.

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

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

HN7[] **Regulated Practices, Monopolies & Monopolization**

Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Rural Electrification Act can be made out.

Judges: Rives, Gewin and Godbold, Circuit Judges. Godbold, Circuit Judge, dissenting.

Opinion by: RIVES

Opinion

[*673] RIVES, Circuit Judge:

Alabama Power Company (hereafter Power Company) filed its complaint against Rural Electrification Administration (REA), Alabama Electric Cooperative, Inc. (AEC), Norman M. Clapp, the Administrator of REA, the Department of Agriculture and the Secretary of Agriculture. The complaint prayed for a preliminary and permanent injunction restraining the consummation or use of a $20,350,000.00 loan from REA to AEC for the purpose of financing the construction and operation of a generating plant and high voltage electric transmission and distribution lines. It prayed separately for a judgment avoiding certain 35-year all-requirements electric power contracts between AEC and fourteen electric distribution cooperatives as violative of the antitrust laws, and sought to recover from AEC treble damages, costs and attorneys' fees.

The defendants moved to dismiss and alternatively, for summary judgment. Affidavits were filed in support of and in opposition to the plaintiff's motion for preliminary injunction and the defendants' motions for **[**2]** summary judgment. The district court, in an opinion reported in 249 F. Supp. at 855, denied plaintiff's motion for preliminary injunction and granted the several motions of the defendants to dismiss the action. The district court held that the Power Company had no standing to enjoin the consummation of the REA loan. The 35-year all-requirements electric power contracts the district court held were the result of valid governmental action and, hence, not violative of the antitrust laws. Since we are in agreement with the district court, what was said in its able opinion need not be repeated and our opinion can be brief.

Power Company argues that it has standing to seek judicial review of the REA loan either as made in violation of the "central station service" limitation contained in Section 4 of the REA **[*674]** Act, [1] or as being conditioned upon a violation of the antitrust laws. [2] As to the claim of standing under the REA Act, it has been repeatedly held that increased competition which may result to a private power company does not give it sufficient standing to enjoin the making of a loan by a federal agency. [3] The answer to the claim of standing under **[**3]** the antitrust laws was

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[1] *7 U.S.C.A. § 904*.

[2] *Sections 1* and *2* of the Sherman Act and Section 3 of the Clayton Act, *15 U.S.C.A. §§ 1*, *2* and *14*.

[3] *Alabama Power Company v. Ickes, 1938, 302 U.S. 464, 82 L. Ed. 374, 58 S. Ct. 300*; *Duke Power Company v. Greenwood Co., 1938, 302 U.S. 485, 82 L. Ed. 381, 58 S. Ct. 306*; Tennessee *Electric Power Co. v. TVA, 1939, 306 U.S. 118, 83 L. Ed. 543,*

indicated in *Kansas City Power & Light Co. v. McKay, supra note 3*, and was clearly furnished in the Fifth Circuit case decided some months after the district court's decision in the instant case, *Rural Electrification Administration v. Central Louisiana Electric Co., supra* note 3. There, this Court said:

> "From the entire history of the Rural Electrification Act and its administration we are totally convinced that ***HN1***[] Congress has never enacted or intended that loans by this Agency should be reviewable in the courts. The Act itself makes no provision for judicial loan review. By the allegations of the Complaints we are informed of the thorough manner in which Congress has ridden herd on the REA. Congressional Committees caused the promulgation of REA Bulletin 111-3, which appellees now say has been violated. Certainly, the demands of Congressional Committees do not have the force of law. Congress has seen fit not to enact these particular demands into law, evidently being most content to rely on the deadly sword constantly in its own hands, that is, the sole control of the purse out of which the loans are made. Regardless of how outrageous **[**4]** or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress." 354 F.2d at 865.

The same **[**5]** thought had been earlier expressed by the D.C. Circuit in the Kansas City Power & Light Co. case, supra. See *225 F.2d at 930, 931*. As later said by the Eighth Circuit in *Rural Electrification Administration v. Northern States Power Co., 1967, 373 F.2d 686, 700*:

> "***HN2***[] Congress has steadfastly refused to provide judicial review under *7 USC § 901* of the REA Act. [26] This silence could be premised on the concern that the private supplier could otherwise interfere with REA loans in each instance where the Administrator finds the public suppliers proposal unreasonable.

[6]** **[*675]** In brief, ***HN3***[] review under the Administrative Procedure Act of 1946, *5 USCA § 1009*, is precluded by that statute's initial exception to the right of review: "Except as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." The REA Act, *7 USCA § 904*, commits to the discretion of the Administrator the making of loans for rural electrification, including the adequacy of the security for such loans. The statute not only fails to provide for judicial review, but when construed in the light of its purpose and of legislative history, the statute retains oversight of the Administrator's actions in the hands of Congress itself and precludes judicial review.

The same rationale would deny the plaintiff Power Company standing to enjoin the consummation of the loan or its claimed invalid provision for security directly under the antitrust laws. Further, ***HN4***[] it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action. [4] A different question

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59 S. Ct. 366; *Kansas City Power & Light Co. v. McKay, D.C. Cir. 1955, 96 U.S. App. D.C. 273, 225 F.2d 924*, cert. den., ***350 U.S. 884, 100 L. Ed. 780, 76 S. Ct. 137***; *Rural Electrification Administration v. Central Louisiana Electric Co., 5 Cir. 1966, 354 F.2d 859*. See also *Hardin v. Kentucky Utilities Co., 390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968)*.

[26] "See, e.g., *Schilling v. Rogers, 363 U.S. 666, at 674*. *80 S. Ct. 1288, at 1294, 4 L. Ed. 2d 1478*, where Justice Harlan said:

"'The point is that in this Act [Trading with the Enemy Act] Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation * * * [citing *Work v. United States, ex rel. Rives, 267 U.S. 175, 182, 45 S. Ct. 252, 69 L. Ed. 561]*.'

In 1962 and 1963 attempts were made to introduce bills into Congress amending the Rural Electrification Act to provide for public hearings and judicial review of orders approving loans. These bills were not reported out of committee. See Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 1st Sess., pp. 680-681. See also H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess.; Hearings before House Appropriations Committee on Department of Agriculture Appropriations for 1964, 88th Cong., 1st Sess., p. 374. "

[4] *United Mine Workers of America v. Pennington, 1965, 381 U.S. 657, 671-672, 14 L. Ed. 2d 626, 85 S. Ct. 1585*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 1961, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523*; *Parker v. Brown, 1943, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307*; *United States v. Rock Royal Co-op, 1939, 307 U.S. 533, 559-560, 59 S. Ct. 993, 83*

might be presented if the Administrator went beyond the outer perimeter of the authority **[**7]** vested in him by the statute, [5] or as expressed in Hardin v. Kentucky Utilities Co., cited supra note 3, "* * * outside the range of permissible choices contemplated by the statute." The Administrator's affidavit discloses that that condition does not arise under the circumstances of this case.

> "My policy reasons for approving the aforesaid loan were: (1) it would result in significant savings in the cost of power to AEC and the Members as compared with the cost of power purchased by AEC and the Members from the plaintiff and Gulf Power Company; and (2) the loan was necessary to protect the effectiveness and security of AEC and the Members since the plaintiff had through its activities demonstrated its intent to deprive AEC and the Members of existing and potential consumers in their service areas, and since continuance of dependence by AEC and the Members upon plaintiff as a wholesale supplier would inevitably assist and facilitate such activities on the part of the plaintiff.
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> "As authorized by section 4 of the RE Act (*7 U.S.C. 904*), the loan to AEC is to be repaid over a period of thirty-five (35) years. It has been the practice for many years of REA **[**8]** Administrators, including the affiant, to require as a condition of making generating and transmission loans pursuant to section 4 to cooperatives such as AEC, that the borrower shall obtain 35 year contracts with its members (hereinafter called 'thirty-five year, all-requirements contracts') obligating them to purchase all of their electric requirements to the extent that the borrower shall have power and energy available. The purpose of this requirement is to assure that the borrower will have a market for the power generated and transmitted by the REA-financed facilities and thus be able to repay the loan. Such a requirement is established customarily, and was imposed on AEC in this case, in the exercise of the REA administrator's power and obligation under section 4 to obtain reasonably adequate security for the loan and **[*676]** to assure its repayment within the time agreed upon between REA and AEC. As further assurance, following long-established REA practice, I also required the execution of the supplemental agreement included in Exhibit B attached to the plaintiff's complaint. As shown in paragraph 7 below, the facilities for which the loan in question was made will **[**9]** not be placed into operation before 1968 at the earliest. Based on load forecasts made before the loan was approved, AEC will have power and energy available for the total electric requirements of its members for a period of no more than 2 years thereafter. Based on the same forecasts, AEC's available power and energy in 1974 will represent no more than 83% of its members' electric requirements in that year, and such percentage will significantly decline each year thereafter. Under their contracts with AEC, the Members will be free to purchase from plaintiff and others their electric requirements in excess of the power and energy available from AEC.
>
> "AEC is owned and controlled by its members and is merely the means by which they generate and transmit electric power for themselves rather than purchasing power and transmission service from another source. Instead of having one organization performing the generating, transmitting and distributing function, AEC engages in the first two operations on behalf of its members and the latter perform the distributing operation. Because of this separation of the operations required to serve consumers the 35-year, all requirements contracts **[**10]** between AEC and the Members were necessary to meet the requirements of section 4 of the RE Act (*7 U.S.C. 904*)."

[11]** Thus in requiring AEC to obtain 35-year all-requirement contracts with its electric distribution cooperatives, the Administrator was doing nothing unusual, but was simply following customary and long-established REA practice, clearly not beyond the "outer perimeter" of his statutory authority [6] to determine the security for the loan. Anything less might well mean the acceptance of inadequate security. Under these circumstances, to require or permit the "outer perimeter" boundaries to be determined by another fact-finding body would defeat the reasons for

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L. Ed. 1446; *E.M. Wiggins Airways, Inc. v. Massachusetts Port Authority, 1 Cir. 1966, 362 F.2d 52*; *Stroud v. Benson, D.C.N.C. 1957, 155 F. Supp. 482*; *Miley v. John Hancock Mut. Life Ins. Co., D.C. Mass 1957, 148 F. Supp. 299*.

[5] See *S & S Logging Co. v. Barker, 9 Cir. 1966, 366 F.2d 617*; *Norton v. McShane, 5 Cir. 1964, 332 F.2d 855, 859*; compare *Pierson v. Ray, 1967, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213*.

[6] *7 U.S.C.A. § 904*.

the recognition of the absolute privilege. What was said by Mr. Justice Harlan in *Barr v. Matteo, 1958, 360 U.S. 564, 571, 3 L. Ed. 2d 1434, 79 S. Ct. 1335*, is illuminating:

> "***HN5***[] It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties -- suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." [7]

[12]**

Finally, a unique question presented by the Power Company must be answered. This is the first of the attacks by private companies on federal loans to competitors in which there has been a *separate* attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws. It is argued that there is nothing in the Act or in its legislative history which authorizes the Administration to grant immunity to the borrower, AEC, [8] and that at the very least **[*677]** the plaintiff has a right to pursue its antitrust suit against AEC. That position, we think is based upon too narrow a conception of the program authorized by Congress. The making of loans by the Administrator necessarily includes the existence and ability **[**13]** of borrowers to whom such loans can be made. If the security which the Administrator requires can be undercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated. To avoid frustrating the intent of Congress, it must follow that ***HN6***[] in cases where the Administrator is immune from suit under the antitrust laws, the borrower is likewise immune. [9]

[14]** The Supreme Court has repeatedly held that,

> "* * * ***HN7***[] where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. [15]

The Power Company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission in *Dairyland Power Cooperative, 37 F.P.C. 12, 35* L.W. 2385, that rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. "They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." See also, *Salt River Project Agricultural & Power District v. FPC, 129 U.S. App. D.C. 117, 391 F.2d 470*, 36 L.W. 2524 (1968).

The judgment is therefore

Affirmed.

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[7] See also Mr. Justice Harlan's long quotation from Judge Learned Hand's opinion in *Gregoire v. Biddle, 2 Cir. 1949, 177 F.2d 579, 581*, appearing at *360 U.S. at 571-572*.

[8] Or, we might add, to its member distributing cooperatives, though they have not been joined as parties defendant.

[9] In so holding, we fully appreciate that immunity from the antitrust laws is not to be lightly implied. *California v. Federal Power Commission, 1962, 369 U.S. 482, 485, 8 L. Ed. 2d 54, 82 S. Ct. 901*; *United States v. Philadelphia National Bank, 1963, 374 U.S. 321, 350, 10 L. Ed. 2d 915, 83 S. Ct. 1715*; *Carnation Company v. Pacific Westbound Conference, 1966, 383 U.S. 213, 218, 15 L. Ed. 2d 709, 86 S. Ct. 781*; *United States v. First City National Bank, 1967, 386 U.S. 361, 368, 18 L. Ed. 2d 151, 87 S. Ct. 1088*.

[15] " *United States v. Rock Royal Co-op, 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 533*; *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307*."

Eastern R. Conf. v. Noerr Motor, 1961, 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523."

Dissent by: GODBOLD

Dissent

GODBOLD, Circuit Judge, dissenting:

[15]** I must disagree with my associates.

This case presents in bold and clear form issues not heretofore judicially determined of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act [1] and national policies of aid to rural citizens without electric service. In addition there are vital factual issues which have been neither determined nor reached, since the decision below was a dismissal for lack of standing to sue.

Three issues must be discussed. Discussion of each overlaps the others, and the relationship between them has been hazy at times in the previous case history:

(1) Standing to sue under the antitrust laws of the United States. In my opinion the Power Company has standing.

(2) Implied governmental immunity from the antitrust laws of the REA Administrator, of private citizens who deal with him, and of private citizens who deal between themselves **[**16]** as incident to or in consequence of dealings with the Administrator. In my view the Administrator has no such implied immunity as a governmental officer whether acting within or without the "outer periphery of his authority." If he possesses such implied immunity he cannot pass it on to private citizens to immunize them in their dealings with him **[*678]** or to private citizens to immunize them in their dealings with each other.

(3) If the Administrator does enjoy an implied immunity the existence of which depends upon whether he was acting within the outer limits of his authority, there is a material issue of fact, not yet adjudicated, as to whether he was within such limits.

I. The 35-year exclusive dealing contracts

The provisions of the contracts which the Administrator, as a condition of approval of the loan to AEC, required be executed by AEC and the distributor cooperatives, are central to the case. The majority describe the contracts, without amplification, as "certain 35-year all-requirement-electric contracts between AEC and fourteen electric distribution cooperatives." [2]

[17]** The contracts require the distributing cooperative (Distributor) to purchase all of its electric power needs from AEC (Supplier):

> Supplier shall sell and deliver to Distributor and Distributor shall purchase and receive from Supplier all electric power and energy which Distributor shall require to the extent that Supplier shall have such power and energy available, provided, however, that Distributor shall have the right to continue to purchase electric power and energy from a source other than Supplier for all or a separable part of its system until Supplier shall be in position to supply Distributor's requirements for its system or such part thereof.

The contracts require the distributing cooperative, at such time as it may legally do so, to terminate its contracts with other power suppliers upon request of AEC made with the approval, or at the direction, of the Administrator. If

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[1] *7 U.S.C.A. § 901 et seq.*

[2] The distribution cooperatives are not parties to the suit. The Administrator claims he is not a party to the contracts. But see footnote 3, infra.

the Distributor fails to terminate an existent contract either the Supplier or the Administrator may bring suit to enforce the termination provisions.

> Distributor shall terminate, if the Supplier with the approval of the Administrator of the Rural Electrification Administration shall **[**18]** so request, any existing contract or contracts with a source other than Supplier at such time as it may legally do so, provided Supplier shall have sufficient electric power and energy available for Distributor.
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> * * *
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> The Supplier, the Distributor and the Administrator agree that if the Distributor, upon being requested to do so by the Supplier with the approval or at the direction of the Administrator, shall fail to terminate any contract with a power supplier other than the Supplier, as provided by Section 1 of the Power Contract, the Supplier or the Administrator, if he shall so select, shall have the right to enforce the obligations of the Distributor under the provisions of said Section 1 of the Contract by instituting all necessary actions at law or suits in equity, including, without limitation, suits for specific performance. [3]

[19]** The Distributor purchases its power requirement under a rate schedule, which must be reviewed at least annually by it and AEC, and revisions may be agreed upon but are ineffective unless approved by the Administrator.

Contracts are required by the Administrator to be obtained from 13 distribution cooperatives located in Alabama, which the Power Company alleges endeavor to serve approximately 50% of the geographical area of the state, and three located in Florida. The Power **[*679]** Company alleges the 35-year contracts will foreclose it from supplying nine of these cooperatives, six of whom presently receive all their power, and three that receive part of their power, from the Power Company, and as a consequence it will be foreclosed from serving at least one-third of the rural areas of Alabama. The extent of the private utility's loss of market is a disputed issue of fact, but even under the assertions of the appellees the share of the relevant market involved is, in my opinion, as a matter of law substantial. [4]

[20]** Totally without relevance is the contention of AEC that REA has made it previous loans and in connection with each has required similar 35-year contracts, but the Power Company has not before claimed them to be violations of the antitrust laws. There is no right by prescription to violate the antitrust laws. This theory that governmental action can bootstrap itself to a state of validity is expressly adopted by the majority, who conclude that in making the contracts the Administrator was not beyond the outer perimeter of his authority because he was "doing nothing unusual, but was simply following customary and long-established REA practice."

Neither the district court nor the majority in this court reach the issue of whether the contracts are proscribed by the antitrust laws. They simply decline to scrutinize them. The complaint -- and at this stage we take its allegations as true -- sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it

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[3] This paragraph is part of a "Supplemental Agreement," to which the Administrator is to be a signatory, to the 35-year contracts. It creates a question of fact and law of whether the Administrator himself becomes a party to the transactions between AEC and the distributors.

[4] AEC states the loss will be of two all-requirements customers and three partial-requirements customers. In its brief AEC concedes the Power Company will lose, at least temporarily, approximately 16% of its total wholesale sales to cooperatives and municipal systems.

Several arguments of appellees may have relevance to a factual determination of impact on the relevant market, if that not be established as a matter of law, or of the extent of restraints on commerce, but have no relevance at this juncture -- i.e., that AEC serves a smaller area and has smaller capital investment and operating revenue than Alabama Power; that based on AEC projections it will not generate enough power to serve all needs of the distributor cooperatives, and the private companies will have a chance to meet the need for the excess.

Certainly it cuts no figure at this stage, and maybe never, that REA argues the termination provisions of the contracts will not be exercised until expiration of existing wholesale contracts between distributors and Alabama Power, and if existing contracts are breached the power company will have an adequate remedy in damages.

forecloses in the relevant market a substantial share of the line of commerce affected. *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552* **[**21]** (4th Cir.), cert. denied, *340 U.S. 906, 71 S. Ct. 282, 95 L. Ed. 655 (1950)*; *Consolidated Gas, Elec. Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89* (4th Cir.), cert. denied, *343 U.S. 963, 72 S. Ct. 1056, 96 L. Ed. 1360 (1952)*. See also *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*; *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*. While I view the violation as otherwise unquestionable, if there be any question the 35-year duration lays it to rest. It is an exclusive dealing arrangement that can foreclose the Power Company for the rest of the twentieth century. *United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949)*. [5] **[**22]** Nor do I have any doubt **[*680]** that the contracts, and the effects alleged, constitute restraints violating the Sherman Act. *Consolidated Gas, supra.* [6]

Standing alone the contracts violate the antitrust laws. As part of a wider course of dealings they violate the antitrust laws and so characterize that broader spectrum as to make it a violation. The violation by the contracts is so clear that I do not pursue the allegations that the Administrator coerced the distribution cooperatives into signing them, a factual issue.

II. Immunity

The majority conclude the Administrator enjoys a governmental immunity from the Sherman and Clayton Acts for acts done within the outer periphery of his authority. Examination of this premise is inextricably entwined with consideration of the two implications drawn therefrom, that the Administrator's immunity extends to private citizens (the AEC) who deal with him and to private citizens who deal between themselves (the AEC and the distribution cooperatives) as an incident to **[**23]** or in consequence of their dealings with the Administrator.

None of the immunities can be found in the REA Act.

The majority opinion tips its hat to the principle that "immunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n., 369 U.S. 482, 485, 82 S. Ct. 901, 8 L. Ed. 2d 54, 57 (1962)*. In fact, "this canon of construction . . . reflects the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348, 83 S. Ct. 1715, 10 L. Ed. 2d 915, 936 (1963)*.

Congress can, and in numerous instances by express legislation has, subordinated the national policies reflected in the antitrust laws so as to authorize government officials to perform acts or pursue policies without regard to the antitrust laws. The exemptions or immunities thus conferred are in some instances to conduct between the official and the citizen, in others to dealings between private citizens which the official is authorized to review and if approved have limited these expressly conferred immunities to the scope defined in each instance by Congress so as to avoid pro tanto repeal **[**24]** of the antitrust laws.

Under the Agricultural Marketing Agreement Act the Secretary of Agriculture may become a party to marketing agreements with private citizens for the handling of agricultural commodities which are exempt from the antitrust laws. *7 U.S.C.A. § 608b*. In *United States v. Borden Co., 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181 (1939)*, the Supreme Court declined to broaden this specific exemption into a general exemption from § 1 of the Sherman Act of the marketing of agricultural commodities so as to immunize marketing agreements between private parties. [7] "If

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[5] See also *United States v. Pullman Co., 50 F. Supp. 123, 129 (E.D. Pa. 1943)*:

> "As a competition killer the long term contract is an effective weapon. One could hardly have a more favored service contract than an agreement for exclusive dealing . . . and a quarter century of time to elapse before one need to be concerned with new terms. Even a patentee is not so secure against the passage of time."

[6] The contract in *Consolidated* included price fixing, a per se violation of the Sherman Act. Also it foreclosed competitors from a substantial market and divided territory between competitors., *184 F.2d at 558, 559*.

Congress had desired to grant any further immunity Congress doubtless would have said so." *308 U.S. at 201, 84 L. Ed. at 192*. In the case before us the majority find an implied governmental exemption and the blanket thereof is then stretched to immunize exclusive dealing contracts between **[*681]** private parties, AEC and the distribution cooperatives.

[25]** "The typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives," (giving examples of the code machinery and presidential approval under the National Industrial Recovery Act, the ICC in transportation, the SEC over associations of brokers and dealers, the Bituminous Coal Commission over price fixing in the coal industry). *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228 n. 60, 60 S. Ct. 811, 84 L. Ed. 1129, 1170 n. 60 (1940)*. The REA Act does not lift the ban. Nor does it confer upon the Administrator authority to create or approve, or to state applicable standards to govern the creation or approval, of situations or relations in derogation of the antitrust laws.

Compare the transportation industry. The original authority of the Interstate Commerce Commission [8] exemplified an implicit public policy that competition in the transportation field was desirable, a policy subsequently expressed for a broader field in the Sherman Act of 1890. [9] Subsequently, and repeatedly, Congress has amended the Interstate Commerce Act to grant authority to the ICC, in the context of **[**26]** a pervasive regulatory scheme, to approve and permit consolidations, mergers, controls, combinations, and agreements to fix rates, all outside the usual operation of the antitrust laws. [10] The history reveals carefully-held Congressional reins over the interplay of antitrust policy and governmental action in derogation thereof. The Congressional action to create exemptions has not made the antitrust laws wholly inapplicable to the transportation industry; Congress has not authorized the ICC to ignore antitrust policies, for the Commission is under a duty, as an administrative matter, to consider effect on competitors and on the general competitive situation in the light of national transportation policy. *McLean Trucking Co. v. United States, 321 U.S. 67, 84* nn. 20 & 21, *64 S. Ct. 370, 88 L. Ed. 544, 555* nn. 20 & 21 (1944).

[27]** With respect to many regulated industries the courts have rejected the theory that governmental grant -- federal or state -- of monopolistic privileges accompanied by regulation, sometimes all-pervasive, by government bodies carries an implied exemption from the antitrust laws or deprives the courts of jurisdiction to enforce them. See *Georgia v. Pennsylvania R.R., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*, sustaining the right of an injured party, the State of Georgia, to enjoin a conspiracy of railroads to fix rates in violation of the antitrust laws, although the rates had been approved by the ICC:

> But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy.
>
> * * *
>
> It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto **[**28]** power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making.

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[7] In like manner the Secretary of Agriculture may make marketing agreements with manufacturers and handlers of anti-hog-cholera serum and hog-cholera virus, *7 U.S.C.A. § 851 et seq.*, and the agreements are specifically exempted from antitrust laws, *7 U.S.C.A. § 852*. The exemption extends no further than to the agreement itself. *American Co-op Serum Ass'n v. Anchor Serum Co., 153 F.2d 907* (7th Cir.), cert. denied, ***329 U.S. 721, 67 S. Ct. 57, 91 L. Ed. 625 (1946)***.

[8] Interstate Commerce Act of 1887, 49 U.S.C.A. § 1 et seq.

[9] *15 U.S.C.A. §§ 1-7*.

[10] See the discussion of the history in *United States v. Marshall Transport Co., 322 U.S. 31, 64 S. Ct. 899, 88 L. Ed. 1110 (1944)*.

324 U.S. at 456-57, 458-59, 65 S. Ct. at 726, 89 L. Ed. at 1062, 1063. See also, as to railroads, *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*; the shipping industry, **[*682]** *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 2d 709 (1966)*; banking, *United States v. Philadelphia Nat'l Bank, supra*; insurance, *United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*; telephone, *United States Tel. Co. v. Central Union Tel. Co., 202 F. 66 (6th Cir. 1913)*; gas and electric energy, *In re American Fuel & Power Co., 122 F.2d 223 (6th Cir. 1941)*; *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., supra*; radio and television, *United States v. Radio Corp. of America, 358 U.S. 334, 79 S. Ct. 457, 3 L. Ed. 2d 354 (1958)*; natural **[**29]** gas, *California v. Federal Power Com., 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962)*; export trade associations, *United States Alkali Export Ass'n v. United States, 325 U.S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945)*.

The Capper-Volstead Act [11] authorized agricultural producers to unite in preparing for market, and marketing, their products, and to make contracts necessary for that collaboration. The antitrust exemption thereby granted is much broader than the general provision of § 6 of the Clayton Act which excepts agricultural and horticultural cooperatives from the Sherman Act. But *Borden* held that the Capper-Volstead Act does not cover the entire field of the Sherman Act and does not authorize a combination or conspiracy with persons other than producers. See also, *Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960)*.

Case- *Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621, 36 U.S.L. Week 407 (1967)*, **[**30]** holds that the antitrust exemption granted by Congress to producer cooperatives under Capper-Volstead does not extend to give antitrust immunity to an association which has non-producer interests in its participating membership, even though the participation of the nonproducers is relatively small.

The Fishermen's Collective Marketing Act [12] authorizes fishermen to market collectively, and the Secretary of the Interior has power to issue cease and desist orders if such organizations restrain trade to the extent of unduly enhancing prices. Neither Congressional authorization of the cooperative marketing association nor the power of the Secretary exempts fishermen and their association or union from the antitrust laws. *Hinton v. Columbia River Packers Ass'n, 131 F.2d 88 (9th Cir. 1942)*.

There are various specific exemptions from antitrust laws in the labor field. Section 20 of the Clayton Act [13] **[**32]** withdrew from the general prohibitions of the **[**31]** Sherman Act specifically enumerated practices of labor unions by prohibiting injunctions. Norris-LaGuardia [14] further narrowed the jurisdiction of federal equity power in labor disputes. Thereafter in determining if trade union conduct is a violation of Sherman one must read and harmonize Sherman, § 20 of Clayton, and Norris-LaGuardia. *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*; *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed 1311 (1940)*. But Congress in granting immunity to labor organizations did not give immunity to combinations of labor with non-labor groups. *Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*. The Supreme Court, in *Allen Bradley*, found nothing in the Congressional history to indicate that it was ever suggested, considered or legislatively determined that unions, while free to engage themselves in conduct which restrains trade, were to be

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[11] *7 U.S.C.A. §§ 291-92*.

[12] *15 U.S.C.A. §§ 521-22*.

[13] *29 U.S.C.A. § 52*.

[14] *29 U.S.C.A. § 101 et seq.*

granted immunity for aiding and abetting manufacturers and traders in violating the **[*683]** Sherman Act, the availability of such an exemption being solely for Congress. [15]

[33]** The distribution cooperatives have no special status under the antitrust laws by reason of their being cooperatives. "It is significant that when Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation." *Associated Press v. United States, 326 U.S. 1, 14, 65 S. Ct. 1416, 89 L. Ed 2013 (1945)*.

The judicially-created immunities of this case are rested on § 4 of the REA Act, *7 U.S.C.A. § 904*. The Administrator squarely puts his requirement of the 35-year contracts on his power and obligation under § 4 to obtain reasonable security for the loan, that "loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine." It boggles the imagination to suggest that the myriad of government agencies having the power to lend (each based on Congressional determination that the particular lending power authorized is in the national interest) are, by reason of routine administrative control over sufficiency of collateral, vested with implied power to carve out of the national economy exempt **[**34]** enclaves in which borrowers may deal free of the antitrust laws.

The REA Act, and its Congressional history, reveal no purpose of granting any power to the Administrator to operate free of national antitrust policy. [16]

It is beyond question that the purpose of the central station service provision of *§ 904* was to give private utilities some measure of protection from competition created as a result of REA loans. [17] Protection from lawful competition of REA-financed borrowers has been held not a constitutional entitlement and a matter for relief solely in Congress. But it flies in the teeth of the Congressional intent expressed in *§ 904* -- protection of private utilities from a described area of competition **[*684]** -- to distill the same *§ 904* into an authorization **[**35]** to the Administrator to require, with impunity and immunity, action that freezes out the private utility as a competitor. By some unrevealed process of alchemy the partial shield given the private utility against the REA borrower by *§ 904* is converted into a sword in the borrower's hands.

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[15] "It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy. "

. . . .

"There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *325 U.S. at 809-10, 811, 89 L. Ed. at 1948-49*.

[16] If he had any implied power there would be an additional question of the scope of it -- i.e., can he exclude a private utility as a competitor; can he require a private citizen to make an exclusive dealing contract as a condition of a loan?

[17] See Hearings on S. 3483 Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 30, 56-57, 72-73 (1936). See also the floor debates in both the House, 80 Cong. Rec. 5295, 5307, 5308 (1936), and the Senate, 80 Cong. Rec. 3305-06 (1936). Mr. Rayburn summarized the purpose of the bill during the House debate:

> "May I say to the gentleman that we are not, in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them. . . ."

80 Cong. Rec. 5283 (1936).

The authorities relied **[**36]** on by the majority for a general principle of governmental exemption from the antitrust laws do not support so broad a pronouncement.

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), was concerned with action by the State of California in setting up a raisin marketing program. The state command vel non was held the act of the sovereign, not forbidden by the Sherman Act. [18] **[**37]** E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, [19] and Miley v. John Hancock Mut. Life Ins. Co. [20] are concerned with sovereign immunity of the state and follow Parker v. Brown.

Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), held that a violation of the Sherman Act cannot be predicated upon attempts to influence the passage or enforcement of laws. The Court distinguished between an agreement jointly to seek legislation or law enforcement and agreements traditionally condemned by the Sherman Act, and it warned against treating defendants' conduct as though it were a common-law trade restraint. Presumably the majority refer to the first sentence of the following part of the opinion:

> Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions **[**38]** rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

The limiting language of the second sentence makes quite plain that the governmental action referred to is of the particular kind before the Court. Primarily the Court was concerned with protecting the legislative process. It speaks (*365 U.S. at 136-37, 5 L. Ed. 2d at 470-71*) of associations seeking to persuade the legislative or executive to take particular action with regard to passage or enforcement of laws, of the significance in a representative democracy of the people making their wishes known to their representatives, and the constitutional issue of the right to petition.

United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), was concerned with joint efforts of private citizens to influence public officials, approaches to the Secretary of Labor by union and large companies to establish a minimum **[**39]** wage under the Walsh-Healey Act [21] which would make it impossible for **[*685]** smaller companies to compete. The plaintiff was held, under *Noerr*, not entitled to damages arising from the Secretary's Walsh-Healey determinations, not because of any governmental immunity but

[18] The court pointed out, "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade," (317 U.S. 351-52, 87 L. Ed. at 326) and, "the state in adopting and enforcing the pro rate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (*317 U.S. at 352, 87 L. Ed. at 327*).

[19] *362 F.2d 52 (1st Cir. 1966)*. There is an over-broad dictum in *Wiggins* of a general governmental immunity. There was no conspiracy in the case, only a "simple agreement or arrangement."

[20] *148 F. Supp. 299* (D. Mass.), aff'd, *242 F.2d 758 (1st Cir. 1957)*.

[21] 41 U.S.C.A. § 35 et seq.

because his action was "the act of a public official who is not claimed to be a co-conspirator." (*381 U.S. at 671, 14 L. Ed. 2d at 637*). The REA Administrator is claimed to be a conspirator. [22]

[40]** *Stroud v. Benson, 155 F. Supp. 482 (E.D.N.C. 1957)*, refers to sovereign immunity to the antitrust laws, quoting the Parker v. Brown language concerning state action (which was not involved). There was no allegation of conspiracy, only of the validity of an order of the Secretary of Agriculture, and there was no restraint of trade.

The cases do not support a proposition of general governmental immunity. If there is such a principle Congress has been proceeding for a long time under a misapprehension in providing for government officers, and those with whom they deal, exemptions which are specific in nature and varying in scope.

III. The material issues of fact

The majority acknowledge a possible application of the antitrust laws if the Administrator went beyond the outer perimeter of the authority granted him by statute.

The motions to dismiss were submitted to the district court, along with the motions for summary judgment and motion for preliminary injunction, on the pleadings, affidavits, exhibits, and briefs and argument. The district court and the majority in this court have drawn freely on the affidavits and exhibits to support their conclusions. The **[**41]** Complaint and answer alone, but in sharpened form when aided by the other pleadings and the supporting affidavits and exhibits, squarely raise a factual issue of whether the Administrator is acting within or without his outer limits. That question of fact was not determined by the district court.

In this court the majority say that to require or permit a fact-finding body to determine the outer perimeter boundaries, or "the range of permissible choices contemplated by the statute, " would defeat the reasons for recognition of the privilege of government officials against suit, relying upon *Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1958)*. I do not understand this statement. *Barr* itself, as have numerous other cases, determined outer perimeter boundaries:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint . . . .

360 U.S. at 575. See also *Norton v. McShane, 332 F.2d 855,* ***[*686]*** *862 (5th Cir. 1964)*. To couple a privilege for acts done within the perimeter **[**42]** with immunity from judicial investigation of where the perimeter lies, or where the "permissible choices" end, would expand the privilege into immunity for any act done.

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[22] The first holding of *Pennington* was that a concerted effort to influence public officials is regardless of intent not within the Sherman Act. There is no such question in the present case, but the holding is a recognition that *Noerr* is about a particular kind of governmental action.

Additional judicial recognition that *Noerr* does not establish a carte blanche governmental immunity is *Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964)*:

> "Nonetheless, Noerr does not necessarily bar relief under the present complaint. The complaint can be read as alleging that appellees' joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize 'commercial banking in particular and the financial industry in general within the State of Arizona.' Moreover, the complaint alleges that the acts of the Attorney General were those of a participating conspirator. In *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943)*, the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,' and Noerr does not hold that the Act would be inapplicable in such a situation."

339 F.2d at 566.

The privilege originated with judicial officers, but has been extended to some executive officers. It has its greatest vitality in the field of defamation, but by implication has been extended to civil torts generally. *Norton v. McShane, supra* footnote 2, *332 F.2d at 858*. The privilege seems to me to have the least force, if any force at all, in the case where the executive officer's authority -- his "permissible choices" -- and the wrong against which privilege is asserted both are created by Congressional enactment. The privilege of the officer and the Congressional authority to grant or withhold immunity from the statutory wrong then pull in opposite directions. To give effect to privilege in that situation is to grant by indirection an immunity to a statutory offense which Congress, in creating the offense, saw fit to withhold. The government officer may not thus insulate himself from Congressional intent.

While disclaiming the propriety of any fact finder's doing so the majority **[**43]** make a finding that the Administrator did not go beyond his outer perimeter or exceed his "permissible choices," basing it on customary REA practice and his affidavit reciting his "policy reasons" for approving the loan. That finding now made by the district court, is inappropriately made by an appellate court. It is not sustained by the record, which shows that whether the Administrator was within the outer limits of his authority is a serious, disputed and material issue of fact.

The complaint alleges repeatedly that the proposed loan, and the proposed use of the loan funds, violate the central station service requirement of *§ 904*. [23] The position of the defendants on these allegations is far from clear. The loan commitment letter of REA to AEC contains several conditions but none limiting use of the funds to the statutory purpose. As part of a petition to secure the state consent required by the third proviso of *§ 904* there were filed with the Department of Finance of the State of Alabama resolutions of the Board of Trustees of AEC. They call for construction and operation of "generating facilities and additional electric transmission, distribution and service lines, together **[**44]** with all necessary appurtenances, in rural areas in describing the areas, and along such routes as shall be approved by the Administrator of the Rural Electrification Administration for the purpose of furnishing electric energy to consumers not receiving central station electric service." [24] Whether routes approved by the Administrator may be in non-rural areas, and whether "consumers not receiving central electric station service" may be in non-rural areas, depend on construction of the resolutions.

[45]** A feasibility study was made for AEC by a consulting engineering firm, which on January 8, 1962 reported to AEC. [25] It makes no mention of the statutory **[*687]** standard of *§ 904*. It does not state who the "additional members" are and where located.

The Power Company asserted before the Department of Finance of Alabama its contention that *§ 904* was being violated. The Department made no finding thereon, saying tersely that AEC's proposal "serves some public need and **[**46]** is in the public interest." On limited review of the Department's action by certiorari the state circuit court quashed the order of the Finance Department as not supported by sufficient competent evidence. It found the *§ 904* purpose was not complied with. [26] On appeal the Alabama Supreme Court reversed and rendered because the

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[23] "The Administrator is authorized and empowered . . . to make loans for rural electrification . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service."

[24] This petition also says that AEC furnishes electricity to named electric cooperatives and industrial plants and that it indirectly serves electric needs of over 25,000 farm families, 9,900 residential consumers, and in excess of 7,600 industrial and other users.

[25] The report says:

"Expansion of the power supply and transmission facilities of your Cooperative is required to meet the following objectives: (a) To serve increasing electric demands of member systems. (b) To provide improved service to additional members. (c) To reduce power costs. (d) To transmit power from Southeastern Power Administration (SEPA) to member cooperatives as preference customers. As a result of engineering studies which have been made, a plan of expansion is developed which will achieve the above objectives."

[26] "It is also undisputed that this multi-million dollar expenditure of Federal funds by AEC is not designed to deliver central station electric service to persons in rural areas who are not already receiving central station service or have it available on application." Alabama Power Co. v. Alabama Elec. Co-op., Inc., No. 3519 (Ala. Cir. Ct., July 9, 1963.)

circuit court had applied the wrong standard of review. *Alabama Elec. Co-op., Inc. v. Alabama Power Co., 278 Ala. 123, 176 So.2d 483 (1964)*. It declined to pass on the central station service issue, pointing out, inter alia, that in the *Kansas City* case there had been a decision on the merits in the district court that the contract in question did not violate the central station provisions.

[47]** When the case now before us reached the district court defendants filed the affidavit of Administrator Clapp. Pertinent extracts referring to the purposes of the loan are set out in the margin. [27] This is the same affidavit from which the **[*688]** statement of "policy reasons" quoted by the majority is taken.

[48]** Possibly the affidavit is an effort to assert facts within the construction of "central station service" reached by the district court in the *Kansas City* case, *Kansas City Power & Light Co. v. McKay, 115 F. Supp. 402 (D. Ct. D.C. 1953)*, that loan agreements were within the *§ 904* requirement when providing for a successive loan (to a cooperative originally financed by REA) to meet increasing power requirements of members presently being served and to supply the demand for service from new consumers in surrounding areas denied such service except for the assistance of REA. The difficulty is that some of the Administrator's statements of fact are controverted by the complaint and by affidavits filed in the district court by the Power Company, setting out that consumers of some of the member cooperatives said by Clapp to have been supplied with electric energy for the first time through electric facilities financed by REA in fact had been in the past, and are at present, supplied with central station service by the Power Company. A Power Company affidavit says: "As a matter of fact, the major portion of the proposed expanded project of Alabama Electric Cooperative **[**49]** is to furnish electric service to persons who have been, were at the time the loan was approved and are now being supplied by central-station electric power generated in central stations of Alabama Power Company and Gulf Power Company."

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[27] "Such facilities to be constructed with the proceeds were intended to be used to supply electric power needs of describing cooperatives . . . to enable them to furnish electric energy to their member-consumers who, *being persons in rural areas not receiving central station service, were supplied with electric energy for the first time through electric facilities financed by REA*, pursuant to *7 U.S.C. 901 et seq.* . . ."

"In addition to the use of the facilities to supply the cooperatives described in the preceding paragraph concerning which plaintiff complains, such facilities were also intended to be used to serve the electric power needs of certain other Alabama and Florida electric distribution cooperatives, and of AEC, to enable them similarly to (1) furnish electric energy to their member-consumers who, *being persons in rural areas not receiving central station service, were supplied with electric energy for the first time through electric facilities financed by REA pursuant to the RE Act*; or (2) enable them to continue to furnish electric service to those of their consumers who are supplied electric energy through electric facilities acquired by AEC or a member thereof with the proceeds of loans made by REA, pursuant to the RE Act, as a necessary and incidental means of extending service to unserved persons in rural areas, and as a means of providing generating and transmission facilities to supply the needs of the consumers served by AEC and its members. All of the electric distribution cooperatives referred to above are members of AEC and are hereinafter collectively called 'Members'."

* * *

Elsewhere in his affidavit the Administrator states he approved the loan because it would effectuate the policies and purposes of the REA Act in these respects:

"(a) The loan will result in power cost savings to AEC and the Members, thus assisting them in rendering electric service to their consumers at the lowest cost consistent with sound economy and prudent management of their enterprises:

"(b) The loan will help protect the Members in their ability to make the most effective use of their REA-financed systems through continued service to all their existing member-consumers and extension of service on an area coverage basis to new retail electric loads which will arise in the service areas which the Members have developed through construction and acquisition of said systems and the extension of service therefrom;

"(c) By helping the Members make the most effective use of their REA-financed systems, the loan will enable them to further the achievement of the purposes and policies of the RE Act in Alabama by providing service to their approximately 81,000 member-consumers, and others in their service areas, who may be without central station service, under conditions which will make available the full benefits of electric service for the member-consumers and the service areas of the Members."

The district court in *Kansas City* made its findings after a three-weeks trial, expert case before us the district court made no findings. [28] From this record it is impossible to determine with any degree of assurance whether the proposed loans are within the Congressional authority granted by *§ 904*. It is impossible to tell whether the Administrator has correctly acted in accord with the statutory purpose, or has gone beyond his outer periphery, or is in an intermediate zone in which he had made an administrative decision which though erroneous is not beyond his outer limits. [29]

[50]** The factual issues drawn are not answered by case law that when the Administrator is acting within the periphery of his authority the national policy of aid to rural electrification prevents judicial review of his action.

Disposition of the case without hearing and findings of fact makes impossible another pertinent inquiry. The character and quality of acts done by the Administrator and their impact as restraints on trade and competition are relevant on several issues -- relating to immunity and standing -- whether there was Congressional intent to exempt acts of this general character and of this specific nature, and the weight to be given to the acts done in the balancing of rural electrification and antitrust policies. Valid determinations cannot be reached in this case without factual data that definitively presents just what it is that the Administrator and the private citizens have required, agreed upon and done, and the impact thereof on the relevant market. The issues cannot be resolved **[*689]** in a vacuum nor on the basis that the facts are undisputed, for they are not.

IV. Standing

On its antitrust theory the Power Company claims standing under Sections 4 **[**51]** and 16 of the Clayton Act, *15 U.S.C.A. §§ 15* & *26*, and asserts substantive violations of Section 3 of the Clayton Act, *15 U.S.C.A. § 14*, and *Sections 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1* & *2*.

In concluding that there is no standing under the antitrust laws the majority, as did the district court, treat this case as one more in the line of *Ickes,* [30] **[**52]** TVA, [31] Kansas City [32] and *Central Louisiana*. [33] Those cases do not reach the issue before us. They represent a succession of efforts by private utilities to establish standing by combining a charge that the government officer was making an unauthorized loan (or otherwise acting outside his authority) with a charge that the purpose or effect was to create competition for the plaintiff, this combination being then characterized as "unlawful competition" or "conspiracy." These efforts were rebuffed, because review of loans is for Congress and not the courts, and the private utilities have no legally protectible right to freedom from competition.

Those established principles have no application to a complaint by the private utility of actions which in themselves are monopolistic in nature and violate the antitrust laws. The actions here charged draw their characteristics of invalidity from their own nature and impact, not from efforts to create a synthesized legality. The Power Company

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[28] The state circuit court, the only body yet to make a finding on the issue of central station service (other than the one-sentence finding by this court) was reversed but on other grounds. See note 26 supra and accompanying text.

[29] The Power Company contends that one of the reasons for requiring the exclusive dealing contracts arises from the fact that the central station provisions are being violated, i.e., that the contracts are the means adopted by the Administrator to eliminate the competition which will ensue between the distributing cooperatives and the existent suppliers. Like other factual issues, this cannot be resolved on motion to dismiss.

[30] *Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374 (1938)*.

[31] Tennessee *Elec. Power Co. v. TVA, 306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939)*.

[32] *Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F.2d 924 (D.C. Cir. 1955)*, reversing *115 F. Supp. 402 (D.D.C. 1953)*, cert. denied, ***350 U.S. 884, 76 S. Ct. 137, 100 L. Ed. 780 (1955)***.

[33] *Rural Electrification Administration v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir. 1966)*, reversing *236 F. Supp. 271 (W.D. La. 1964)*, cert. denied, ***385 U.S. 815, 87 S. Ct. 34, 17 L. Ed. 2d 54*** (196).

does not complain of the "mere competition" of *Central Louisiana* or the lawful competition of *TVA* and *Kansas City* but of unlawful competition, **[**53]** exclusive dealing contracts and coercion. There is no national policy to create monopoly, or unlawful competition, or engage in coercion, in the name of competition. "Competition" is not a magic word which when uttered dispenses with consideration of what as a matter of fact is being done and what as a matter of law and national policy are the consequences.

Ickes was a suit for general equitable relief not under the antitrust laws. The Supreme Court declined to enjoin agreements and grants for municipal electric systems "on the sole and detached ground that the Administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner." The Court referred to the finding of the district court that the contracts did not require the municipalities to eliminate competition or designate the source from which they must purchase power. The Court referred numerous times to the competition as lawful, noted that there was no conspiracy and made the oft-repeated dictum, "If conspiracy or fraud or malice or coercion **[**54]** were involved a different case would be presented." [34]

TVA also was not filed under the procedural provisions of the antitrust laws but was for general equitable relief, and on the theory public power competition was illegal because it injured property rights represented by the private franchises. **[*690]** The Supreme Court pointed out that possession of the franchises did not render competition illegal and conferred no contractual or property right to be free of competition. There had been specific findings by the district court that the Tennessee Valley Authority had not conspired or coerced. [35] **[**55]** The Court made clear the distinction between unlawful conspiracy and lawful cooperation by government officials leading to lawful competition. [36]

Kansas City is inapplicable for two reasons. First, no cause of action was asserted under the antitrust laws (see *225 F.2d at 936*). The suit was for declaratory judgment based on the Rural Electrification Act [37] and the Flood Control Act of 1944, [38] neither of which is a statutory provision designed to protect competition. [39] Second, the nature and quality of the acts charged were such that as a matter of law there was no "conspiracy." *Kansas City*, as had *Ickes*, teaches that the spectrum **[**56]** of dealings between private citizens and government officials is not made a "conspiracy" by the fact alone that the official exceeds his authority. In neither case was there action which carried within itself the seeds of restraint or monopoly. [40]

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[34] In *Duke Power Co. v. Greenwood County, 302 U.S. 485, 58 S. Ct. 306, 82 L. Ed. 381 (1938)*, decided the same day, the proposed competition had been held by the district court to be lawful, and there was no finding of conspiracy.

[35] "The District Court finds that the Authority has not indulged in coercion, duress, fraud, or misrepresentation in procuring contracts with municipalities, cooperatives or other purchasers of power; has not acted with any malicious or malevolent motive; and has not conspired with municipalities or other purchasers of power. The record justifies these findings." *306 U.S. at 145, 83 L. Ed. at 553*.

[36] "Cooperation by two federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the court below held, such cooperation does not involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute." *306 U.S. at 146-47, 83 L. Ed. at 554*.

[37] *7 U.S.C.A. § 901 et seq.*

[38] 33 U.S.C.A. § 7011 et seq.; *16 U.S.C.A. § 825S et seq.*

[39] See the discussion of *Hardin v. Kentucky Utilities Co., 390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968)*, infra.

[40] This is the point which Judge Washington in *Kansas City* seeks to make in his reference to *Ickes*. It is the same point made by Judge Coleman in *Central Louisiana*, that lawful competition plus excess of statutory authority do not constitute the kind of "conspiracy" the Court had in mind in *Ickes*. 354 F.2d at 866.

Central Louisiana was a suit for temporary injunction to prevent the REA from consummating a loan. It did not involve **[**57]** standing under Sections 4 and 16 of the Clayton Act. In the district court Judge Dawkins held plaintiff had made out a prima facie case of illegal competition and coercion and granted the temporary injunction. On appeal this court reversed, holding that there was not raised anything more than "mere economic competition made possible by governmental action." It reinforced this conclusion by the further statement that "their appellees only standing for this this that the loan was illegally made and would cause illegal consequences is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right." *354 F.2d at 865*.

Central Louisiana dealt with invasion of the private utility's territory by a "mere competitor." We deal in this case with ouster of the private utility from a market by a borrower under a monopolistic contract. Whether exclusive dealing contracts standing alone violated the antitrust laws, and whether as a part of the overall dealings they violated the antitrust laws and thereby caused the overall dealings to be in violation, were matters not decided in *Central Louisiana* **[**58]** . There are references to 35-year requirement contracts (see *354 F.2d at 863*) but no such contracts had been executed (although **[*691]** it was recognized the Administrator would require them) and neither AEC nor the distributor cooperatives were parties to the suit. [41]

[59]** *Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1967)*, considers standing under the Administrative Procedure Act and under the REA Act itself. It does not reach the antitrust issue.

This brings us to the latest chapter. In *Kentucky Utilities Co. v. TVA, 375 F.2d 403 (6th Cir. 1966)*, rev'd sub nom. on other grounds, *Hardin v. Kentucky Utilities Co., 390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 787*, (1968), the private power company sought an injunction restraining TVA, its distributor (an electric cooperative), and mayors of cities concerned, who were charged with a conspiracy by which the cooperative would take over the supply of electric power to the cities in violation of *16 U.S.C.A. § 831* n - 4(a) forbidding TVA from making new contracts to supply power outside the area for which it or its distributors were the primary source of power on July 1, 1957. The district court found against the private power company on the merits but held it had standing to sue. *237 F. Supp. 502 (E.D. Tenn. 1964)*. The Court of Appeals affirmed on standing to sue, pointing out that **[**60]** the court did not ask a decree protecting it from all competition but from violation of the statute, which had been enacted to protect established utilities from intrusion by TVA into areas where such utilities already were established. Of significance on the matter of standing to sue under the antitrust laws, the court distinguished *Ickes, TVA* and *Kansas City*:

> All of them involve efforts by private utilities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue and the asserted ground for relief in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means whereby competitors of private utilities had or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved **[**61]** plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of

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[41] About as close as the court came to considering the contracts is the statement (*354 F.2d at 864*):

> "The appellees have been and are now doing business with cooperatives established and financed under the REA Act. The record shows no intention or attempt to abrogate *existing contracts* between the parties. Appellees do not have a Constitutionally guaranteed, unrestricted privilege to engage in business free of competition."

If this means that exclusive dealing contracts violate the anti trust laws only if they abrogate existing contracts between one of the parties thereto and others, then it is wrong and the quicker corrected the better. The right of the private utility is that it not be foreclosed from the market, which may or may not involve breach of an existent contract.

> competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds.

The Supreme Court affirmed on standing to sue, distinguishing "lawful competition" cases (including TVA), in which "competitive injury provided no basis for standing . . . . simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury," **[*692]** from the contrasting cases in which "the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." The power company had standing because it "is thus in the class which § 15d is designed to protect." *Kansas City* was characterized as holding that an injured competitor cannot sue to enforce statutory requirements not designed to protect competitors in **[**62]** that case not the antitrust laws but the REA Act and the Flood Control Act of 1944.

It seems to me beyond rational question that the antitrust laws were designed to include competitors as among those protected. As much is conceded by REA in its latest brief:

> We stress, however, that, if Alabama Power Co. could not bring suit, it would be solely because of an absence of a legally cognizable injury to it and not because it was the Alabama Power Co. In short, contrary to appellant's implication, we have never suggested that the principles governing its standing to sue are any different than those applicable to other parties.

Specifically, § 16 of the Clayton Act provides for the right of the private party to sue for injunctive relief against threatened loss or damage by violation of the antitrust laws.

Insofar as the antitrust laws are concerned, this court need not pause on the inquiry -- over which the parties do mighty battle in their briefs -- of attack on the loan v. attack on the requirement contracts as an incident of the loan. The Power Company has standing to attack the contracts standing alone, whether or not the Administrator is a formal party thereto, **[**63]** and to attack the broader range of activities of which the contracts are a part and in which the parties defendant are charged as participants.

I agree with my brothers that REA is an instrument chosen by Congress to bring abundant and low cost power to our rural citizens and is not just another utility. But that characterization does not answer whether it is to be given an implied immunity to deal free of ***antitrust law*** and national antitrust policy.

United States v. Olympia Provision & Baking Co.

United States District Court for the Southern District of New York

April 5, 1968

No. 62 Civil 2031

Reporter

282 F. Supp. 819 *; 1968 U.S. Dist. LEXIS 12510 **; 68 L.R.R.M. 2024; 57 Lab. Cas. (CCH) P12,674; 1968 Trade Cas. (CCH) P72,400

United States of America, Plaintiff v. Olympia Provision & Baking Company, Inc. et al., Defendants

Core Terms

distributors, manufacturers, frankfurters, customers, antitrust, employees, defendant-union, discounts, exemption, drivers, independent contractor, distributor-members, distributed, salesmen, Sherman Act, conspired, prices, routes, local member, merchandise, conditions, membership, boycott, organizations, conspiracy, increases, products, billed, trucks

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Antitrust & Trade Law, Sherman Act

The first and second sections of the Sherman Act embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. From this broadbased coverage, Congress has carved exceptions.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Exemptions & Immunities, Labor

See 15 U.S.C.S. § 17.

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 > Exemptions & Immunities > Labor > Statutory Exemptions

HN3[] Scope, Exemptions

15 U.S.C.S. § 17 of the ***antitrust law*** gives labor no grant of a blanket exemption from the Sherman Act. Labor organizations can not escape antitrust prohibitions where unions depart from normal and legitimate objects. A labor union is exempt from the operation of the federal antitrust laws provided that it acts unilaterally, in the pursuit of its own self-interests rather than in combination or conspiracy with non-labor groups and provided further that its activities be in furtherance of a subject matter of immediate and legitimate union concern, such as wages, hours and working conditions, and not in furtherance of matters which are only of indirect concern to the union, such as prices and other marketing factors.

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

Torts > Vicarious Liability > Independent Contractors > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > Vicarious Liability > Independent Contractors

HN4[] At Will Employment, Definition of Employees

To distinguish independent contractors from employees, the usual test is found in the nature and the amount of control reserved by the person for whom the work is done. Furthermore, even complete control over desired results may be insufficient to transform independent contractors into employees. An employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee. The question of whether control exists sufficient to characterize contractors as employees must be decided upon the particular facts of each case and no one fact is determinative; the totality of the circumstances must be considered.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

HN5[] Exemptions & Immunities, Labor

Only where union-imposed restraints upon the labor market directly yield immediate benefits to the legitimate interests of labor organizations, and where the relative impact upon the product market is indirect and consequential, have such activities been protected. In these cases, an implicit balancing of interests has permitted the effectuation of labor policies without doing violence to antitrust considerations. On the other hand, where union activities have been aimed directly at commercial competition (such as price fixing or boycotts) antitrust considerations have prevailed despite the labor interests sought to be protected or advanced thereby. Furthermore, agreements between unions and a non-labor organization for anti-competitive purposes need not be explicit but may be inferred from activities and surrounding circumstances when there is clear proof of union participation or authorization.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

It is elementary that price-fixing is illegal per se. Effect, rather than form, is the determining element. It also is elementary that boycotts and attempted boycotts are illegal.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

HN7[] **Legislative Controls, Implicit Delegation of Authority**

Explicit authority to a union's agents and officials need not be granted; such agency may be implied.

Judges: **[**1]** Levet, D.J.

Opinion by: LEVET

Opinion

[*820] LEVET, D.J.:

This civil antitrust action originally named two other defendants, to wit, Sabrett Food Products Corp., and Superior Frankfurter, Inc. However, the action as against said defendants was severed by order made orally in open court on **[*821]** November 8, 1967. Subsequently, a consent decree as to each of said defendants was signed and entered on December 18, 1967. Olympia Provision & Baking Co., Inc. ("Olympia") defaulted upon call of the case for trial; said default was duly ordered on November 8, 1967 and at that time said defendant waived any further notice under *Rule 55, F.R. Civ. P.* (4, 5; [1] Court's Ex. 1) The case then proceeded to trial against said defaulting defendant Olympia and against the above-mentioned union (hereinafter designated as "Local 627").

The general nature of this action is described by plaintiff as follows: **[**2]**

> "The Complaint, filed June 7, 1962, alleges that the defendants entered into a combination and conspiracy to restrain and monopolize interstate trade and commerce in violation of *Sections 1* and *2* of the Sherman Act. The substantial terms of said combination and conspiracy were that, since at least 1949, the defendants and co-conspirators combined and conspired to fix and maintain prices, terms, and conditions of sale of frankfurters, to allocate customers and to boycott distributors not members of Local 627."

The case was tried before the court without a jury.

[1] Unless otherwise designated, numbers in parentheses refer to pages in the stenographer's minutes of the trial.

After hearing the testimony of the parties, examining the exhibits, the pleadings and the proposed findings of fact and conclusions of law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Local 627 is a voluntary association with its principal office located at 27 Union Square, New York, N. Y. From 1949 to approximately 1960 it maintained offices at 799 Broadway, New York, N. Y. It is a labor organization duly chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

2. The membership of Local 627 is composed, in part, **[**3]** of persons known as distributors, who are also known as agent-distributors and agent drivers. From 1956 through 1962, Local 627 had approximately 2,000 members. Membership included approximately 300 persons employed as drivers, approximately 1,300 persons employed as salesmen-drivers or salesmen-distributors, and approximately 350 distributors, of whom less than 30 bought and resold the products of Sabrett Food Products Corp., Olympia Provision & Baking Co., Inc. and Superior Frankfurter, Inc. (1470, 1475-1476; Pl. Ex. 243, p. 47)

3. The following distributors have been members of Local 627 during all or part of the period from 1949 to 1962: Charles Alfano, Gus Avezidas, Joe Banner, M. Berger, Jordan Feinberg, Seymour Feinstein, Benjamin Goodman, Franklin B. Goodman, Ben Grupper, George Harris, Louis Kantrowitz, Charles Katcher, Ed Kaufman, John Lexis, Frank Masset, Fred Miller, Louis Pagliuca, Rocco Pagnotta, James Papalexis, Gus Pappas, John Passas, James Rinbis, William Schlesinger. (30-31; Pl. Ex. 242)

4. Morris Horn has served as Business Manager of Local 627 continuously from 1940 to 1962, having been elected to this office by the membership of Local 627 every three years; **[**4]** in 1962, when the title of this office was changed to Secretary-Treasurer, he was elected as Secretary-Treasurer and has served as such since. (Pl. Ex. 243, p. 5; 561-566) Horn, from 1940, has served as the chief executive officer of Local 627. (565-566) Rudolph Block, from 1949 to 1957, Milton Hyman, from 1949 to approximately 1962, and Isidore Jaffe, from 1949 to approximately 1962, were officers, agents or employees of Local 627. Estelle Gilman was employed by Local 627 as Office Manager from 1948 through 1962. (637-638)

5. Local 627 has, since at least 1949, operated, through trustees appointed by **[*822]** it, a separate trust fund for welfare benefits for its members, known as the Provision Salesmen & Distributors Union, Local 627, Welfare Trust Fund ("Welfare Fund"). The Board of Trustees consists of nine members, almost all of whom are members of Local 627's Executive Board. (29, 641-643, 649-651)

6. By agreement with Local 627, Sabrett, Olympia and Superior made regular and continuous payments to this Welfare Fund until at least 1962. (29-30, 36, 609, 629-630, 632-645, 878, 880-881, 928-931, 1034-1035, 1057, 1061-1062; Pl. Ex. 243, pp. 42-43; Pl. Exs. 10, 11, 12)

[5]** 7. Sabrett is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business in Jersey City, New Jersey. Sabrett, since 1949, has manufactured frankfurters in Jersey City, New Jersey, and also since 1949 has sold and distributed frankfurters in the State of New York, including the Southern District of New York.

8. Ferdinand Frankel was Vice-President of Sabrett from 1948 until approximately 1957. Julius Frankel has been an officer of Sabrett since approximately 1956. Gori L. Cafora was employed by Sabrett as Sales Manager from approximately 1944 to approximately 1964.

9. Superior is a corporation organized and existing under the laws of the State of New York and it had its principal place of business in the Bronx, New York. Superior, commencing at least in 1949, manufactured, sold and distributed frankfurters in the State of New York, including the Southern District of New York. Superior ceased to do business in about 1964, the corporation has been dissolved; its plant was demolished. (1094, 1095)

10. Harry Gilman was President of Superior since approximately 1949. Harry Staub was Secretary-Treasurer of Superior **[**6]** from 1947 until 1962.

11. Olympia is a corporation organized and existing under the laws of the State of New York, and, during the period from 1949 to approximately 1962, it had its principal place of business in the Bronx, New York. From 1949 to approximately 1962, Olympia manufactured, sold and distributed frankfurters and transacted business in the State of New York, including the Southern District of New York. Olympia is no longer under operation; it sold its plant to a division of Zion Foods about 1961 or 1962 and apparently has not since manufactured or sold frankfurters. (942-943)

12. Christ Papalexis was President of Olympia from 1946 to 1957. Gregory Papalexis was General Manager of Olympia from 1946 to 1957.

13. From 1949 to 1962, Sabrett, Olympia and Superior manufactured, sold and distributed frankfurters to house account customers which consisted primarily of refreshment stands, luncheonettes and street vendors and to distributors who resold such frankfurters to the same types of customers. (35, 44, 105-107, 180-181, 424, 426-427, 433, 541, 553, 555-556, 654-655, 659, 714, 717, 719, 793, 820-821, 853-857, 994-996, 1029-1031, 1038-1039, 1159-1161, 1168, 1206, **[**7]** 1210, 1213, 1216-1218, 1348-1358, 1384-1389; Pl. Ex. 261, pp. 6-14)

14. Sabrett, Olympia and Superior from 1949 until at least 1962 were engaged in interstate and foreign commerce in the manufacture, sale and distribution of frankfurters, and the amount of such commerce was substantial. (34, 82, 488, 543-544, 717-719, 739, 798, 847-850, 1026-1030, 1153, 1168, 1205-1219, 1348-1349)

15. Part of the frankfurters manufactured by Sabrett, Superior and Olympia were delivered in the metropolitan New York area by salesmen, also known as "house drivers." (853-857, 1032, 1212, 1213)

16. The Sabrett, Olympia and Superior salesmen delivered frankfurters by truck to customers or "stops" on their route - such customers being billed by their respective employer and known as "house accounts." The salesmen received as compensation a base salary **[*823]** and a percentage commission based on the gross selling price of the products delivered by them. (856-857, 980-981, 1032, 1191-1193)

17. Sabrett salesmen were charged out for the frankfurters they picked up daily at the Sabrett plant and were responsible for either the return of the merchandise or the moneys received from customers. Salesmen **[**8]** were not responsible for bad debts of the customers unless they had extended credit in disregard of specific instructions of their employer. (1160-1163, 1174-1175, 1181, 1188, 1368-1376)

18. During the years 1956 to 1962, Sabrett salesmen operated only in the State of New York, and they are members of the International Brotherhood of Teamsters. In New Jersey, frankfurters manufactured by Sabrett were distributed exclusively by non-union distributors. (1218-1222)

19. The Olympia and Superior salesmen were members of Local 802, International Brotherhood of Teamsters, and the terms and conditions of their employment were set forth in written collective bargaining agreements between Local 802 and their respective employer. (852-853, 1032, 1081)

20. With the exception of those non-union Sabrett distributors which operated in New Jersey, distributors for Sabrett, Olympia and Superior were members of Local 627. (922, 1031-1032, 1280-1281)

21. The distributors picked up frankfurters daily at the manufacturers' plants and, using their own or rented trucks, they delivered the frankfurters to customers on their routes. Frankfurters distributed in this manner were charged out daily, **[**9]** and the distributors were billed weekly by the manufacturers. (231-234, 707, 709, 718, 748-749, 937-938, 1033)

22. Originally, when distributors of Sabrett, Superior and Olympia frankfurters began operations as such, all drove their own trucks and performed all the labor necessary (50, 342-343); most of the operators continued to operate without employees or helpers. (18, 706-708, 740-741, 749, 1398; DU Ex. 116, p. 31)

23. In the 1950's, a few distributors initiated or acquired additional routes and, in some instances, formed partnerships or corporations which employed drivers. These distributors entered into collective bargaining contracts with Local 627 which covered their employees. (50, 57, 74-79, 367, 413-414, 422, 429, 431-432, 489-491, 518, 992-994, 1385-1386; DU Ex. 115)

24. Occasionally, distributors delivered frankfurters to certain house accounts of the manufacturers. Such distributors received as compensation a credit or commission computed on the basis of the poundage delivered; and, in the case of Sabrett, some house accounts were serviced by distributors for a flat weekly compensation. (47, 48, 69, 343, 364-366, 751, 938, 1035-1036, 1076, 1219, 1318-1319, **[**10]** 1403-1404)

25. Sabrett, Superior and Olympia accepted telephone orders from distributors' customers, communicated such orders to distributors without charge. (371, 756, 1036-1037, 1403; DU Ex. 116, pp. 32-33)

26. If a distributor was out delivering frankfurters and a customer called in with an order to be filled that day, the manufacturer, as an accommodation, would have delivery made to the customer by a house driver. The distributor was charged only for the actual merchandise, not for any cost of delivery. (1079-1080)

27. Certain Sabrett, Superior and Olympia distributors billed on company letterheads and received checks made out to the company which they gave the company in payment for merchandise distributed by them. Sabrett house drivers also had stops which they billed and for the collection of which they were responsible. (659-661, 667-668, 740, 757, 761, 1396-1397; DU Ex. 116, p. 33)

28. When a distributor was ill or incapacitated, the supplier would usually have his route serviced by a house driver as an accommodation, without cost to **[*824]** the distributor. Lists of distributors' customers were kept for this purpose. (756, 1037, 1317)

29. In at least **[**11]** one instance, Sabrett furnished a distributor with free uniforms and cleaning service. (770-771)

30. In at least one instance, Sabrett refused to deal with a distributor who owed the company money for merchandise billed to him. (837-841)

31. The distributors operated as individuals, partnerships or corporations. (51, 74-75, 175, 180, 422-423, 427, 664-665, 739, 1384)

32. The distributors purchased frankfurters from the manufacturers for resale to the distributors' own customers and for the distributors' own account and profit. (36, 44-46, 55, 59-60, 67-71, 105, 179, 182, 187-188, 206, 426-427, 429-430, 433, 659-663, 668-671, 699, 709, 716-717, 719, 740, 794-795, 1033, 1251, 1321, 1392-1393, 1395-1398, 1416-1417, 1548; Pl. Ex. 261, pp. 8-9)

33. The distributors purchased products, such as mustard and condiments from sources other than the frankfurter manufacturers for resale to their own customers for their own account and profit. (72, 181, 230, 433-434, 717)

34. The distributors declared income from the conduct of their businesses and paid federal, state and local taxes thereon as self-employed individuals or as partnerships or corporations. (52, 64, 189, 547-548, 663, **[**12]** 671-672, 739; Pl. Exs. 244, 245)

35. The distributors did not receive a wage or salary from the manufacturers with whom they dealt nor were any taxes withheld by the manufacturers on their behalf. (35-36, 1164-1166)

36. The distributors purchased frankfurters from more than one manufacturer and occasionally changed manufacturers. (164, 180-181, 376-377, 880, 1018-1019, 1323-1324, 1352-1358, 1390, 1396; Pl. Ex. 261, pp. 12-13)

37. The distributors owned or leased the trucks used in the conduct of their businesses and paid all expenses in connection with the maintenance and operation thereof. (44, 56, 70, 76, 106, 180-181, 188, 428-429, 659, 672, 713, 794, 1034, 1410)

38. The distributors established their own prices with their own customers. (68-70, 208-209, 231, 236-237, 518-519, 1321-1323) They also established the terms and conditions of sale with their own customers and suffered almost all bad-debt losses incurred in such sales to their own customers. (49-50, 68, 183, 695, 708, 742, 796, 1416)

39. The distributors determined their own hours and days of work, consistent with the needs and demands of their own customers. (37, 58-59, 80-81, 187, 235-236, 518, 695, 741, **[**13]** 797, 1033-1034, 1399)

40. The distributors purchased and sold their customer routes, which included substantial goodwill. (50-51, 79, 106, 177-178, 186, 657-658, 713, 716, 1386, 1409-1410, 1412)

41. As an accommodation to the distributors, the suppliers allowed return of defective or unsold frankfurters for credit. In practice, however, much unsold merchandise was retained by the distributors in their refrigerated trucks for future sales. (371, 708-709, 768, 1078, 1380-1381, 1395-1396, 1417-1420; DU Ex. 116, p. 34)

42. Except for the fact that Sabrett reserved for itself, as a matter of policy, the right to observe the operations of a distributor and approve the qualifications of a distributor who might succeed to the route of an existing distributor, the distributors were not under the dominion, direction or control of their suppliers in the conduct of their business operations. (36, 58-59, 80-81, 105, 189, 421, 695, 702-703, 709, 741, 755-756, 797, 821, 1033-1034, 1307-1308, 1314, 1323-1324, 1333-1334, 1347, 1377-1379)

43. The distributors are not employees of the frankfurter manufacturers. They are independent businessmen who contracted with their customer accounts **[**14]** to supply goods.

44. In or about 1946, membership in Local 627 was sought by the distributors, **[*825]** whose primary goal was to attain larger profits. The distributors were not solicited by the union (574-578), and at that time there were no other frankfurter distributors in Local 627. (583-584)

45. During the period between 1940 and 1946, the union leadership had no information whatever that any operation of the frankfurter distributors was affecting the welfare of the other members of Local 627. (584)

46. The frankfurter manufacturers' use of distributors, during the period immediately preceding the time the distributors joined Local 627, had no adverse effect upon the wages and working conditions of their employee-drivers, or in any way represented an attempt to evade the union wage scales of such employees.

47. Some degree of competition for customer accounts existed between distributors who purchased frankfurters primarily from one manufacturer and those who purchased from other manufacturers. In addition, the distributors occasionally gained and lost customer accounts to and from manufacturers, other than their own, who serviced customers through salaried house **[**15]** drivers. (190-194, 199, 202-211, 236-238, 302-306, 317, 385-390, 409, 538-543, 553-556, 750, 772-778, 1399)

48. At times, for convenience and efficiency, the manufacturers turned over routes and customer accounts to distributors (43, 334-337, 355-356, 361, 750, 793-794, 820-821, 1256-1257, 1315-1316, 1350-1352, 1387-1394); and occasionally, customers of the distributors were turned over to the manufacturers for servicing as house accounts. (767, 1308-1314)

49. The frankfurter manufacturers never attempted to set their employee-drivers and distributors against one another for the purpose of affecting the wages or working conditions of either group at any time during the period in question.

50. Wages of the house drivers employed by frankfurter manufacturers were periodically increased during the period between 1946 and 1962 (415, 1036-1037, 1082, 1222; DU Ex. 115); but such wage increases were not related in any manner whatever to the activities of Local 627 on behalf of the distributors.

51. The proof is clear that there was no legitimate labor objective served through the membership of the distributors in Local 627.

52. Commencing in 1949, when the distributors sought **[**16]** and received admission to membership in Local 627, the distributors conspired among themselves and with Morris Horn of the union to secure from the manufacturers increases in the discounts allowed. Between 1949 and 1956 the minimum discount to the Sabrett, Superior and Olympia distributors was increased, in many instances, to at least 5 cents per pound. (38, 134, 165, 251-259, 260-262, 274, 461, 510-513, 560, 808, 819-820, 874, 881-882, 1040-1042, 1046, 1129-1132, 1143-1144, 1445-1449; Pl. Ex. 243, pp. 62-63; Pl. Ex. 261, pp. 47-48)

53. In or about August 1956, the distributors together with Morris Horn conspired and successfully obtained a further minimum discount from the manufacturers, which raised the minimum discount for all distributors to 8 cents per pound. (37-38, 165-167, 174, 262-268, 271-277, 394-395, 452-456, 459-463, 466, 477-479, 486, 493, 551-552, 614-625, 724-730, 732-735, 737, 798-803, 803-809, 819-820, 843-844, 881-911, 959-963, 1067, 1101, 1506-1508; Pl. Exs. 3, 4, 16, 17, 189, 190, 192, 193, 220; Pl. Ex. 243, pp. 33-34, 53-57)

54. In connection with the increased discount concession which was extracted in 1956, Local 627, represented by Horn, conspired with **[**17]** Sabrett, Superior and Olympia, whereby it was agreed that each manufacturer would increase its list selling price by 5 cents per pound. Subsequently, in furtherance of this conspiracy, the list selling prices of such manufacturers were so increased. (277-279, 719-736, 808-809, 819-820, 890-911, 961-962; Pl. Exs. 4, 16, 17, 24; Pl. Ex. 261, pp. 48-60)

[*826] 55. During the period from 1949 to 1962, Local 627 and its distributor-members doing business with Sabrett, Olympia and Superior conspired and attempted to obtain an agreement with such manufacturers pursuant to which the manufacturers would boycott and refuse to deal with non-union distributors. Their efforts in this endeavor were largely successful. (30-31, 36-38, 95, 108-109, 425, 606-607, 672-680, 719, 720, 795, 855-856, 868, 871, 874, 922-928, 948-949, 1002-1008, 1011-1012, 1029-1032, 1159-1160, 1210-1211, 1280-283, 1476, 1496-1497, 1546-1547; Pl. Exs. 10, 11, 12, 242; Pl. Ex. 243, pp. 47-48, 62; Pl. Ex. 261, pp. 11-13, 18-19)

56. At all relevant times Local 627 had knowledge of and acquiesced in the acts of its members and agents, and participated in the conspiracy herein. (134, 138-141, 149-152, 165-167, 169-172, **[**18]** 174, 252-259, 262-265, 275-277, 290-294, 296-298, 300-302, 318-324, 388, 407-409, 448, 452-456, 464, 467-471, 477-479, 481-482, 510-513, 535-538, 561-567, 624, 639-643, 723-730, 732, 798-802, 808-815, 825, 843-844, 862-871, 873-876, 878, 880-911, 922-931, 935-936, 946-947, 955-956, 959-963, 970-973, 1002-1008, 1018-1022, 1049-1062, 1132-1133, 1137, 1143-1144, 1278-1280, 1282, 1337-1341, 1367, 1383, 1414-1416, 1445-1459, 1461, 1463, 1465, 1474-1476, 1492-1496, 1502-1504, 1506-1508; Pl. Ex. 243, pp. 3-5, 21-30, 33-34, 42-44, 49-54, 56-57, 62, 71-73; Pl. Ex. 261, pp. 19-21, 34-35, 38-44, 48-54, 60-63, 165, 175, 177, 179-180; Pl. Exs. 3, 5, 10, 11, 12)

57. Plaintiff has not shown by a fair preponderance of the credible evidence that any agreement among the various distributors or among the distributors, Local 627 and the manufacturers existed to the effect that customers could be allocated among the various parties in return for promises not to compete.

Discussion

A. The Labor Exemption

In general, ***HN1***[] the first and second sections of the Sherman Act embrace "* * * every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard **[**19]** to the garb in which such acts were clothed." *United States v. American Tobacco Co., 221 U.S. 106, 181, 55 L. Ed. 663, 31 S. Ct. 632 (1911)*. From this broadbased coverage, Congress has carved exceptions. *15 USC § 17* states, in substance:

> ***HN2***[] "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor * * * organizations, * * * or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof * * *."

As early as 1921, however, it was recognized that ***HN3***[] this section of the ***antitrust law*** gave labor no grant of a blanket exemption from the Sherman Act. In *Duplex Printing Press v. Deering, 254 U.S. 443, 65 L. Ed. 349, 41 S. Ct. 172 (1921)*, the Supreme Court ruled that labor organizations could not escape antitrust prohibitions "* * * where [unions] depart from * * * normal and legitimate objects * * *." *254 U.S. at 469*. See also *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. Recently, in an extensive and scholarly opinion, which takes into account the manifold developments **[**20]** affecting the nature and extent of labor's antitrust exemption since its inception, Judge Wilson summarized that:

> "* * * a labor union is exempt from the operation of the federal antitrust laws provided that it acts unilaterally, in the pursuit of its own self-interests rather than in combination or conspiracy with non-labor groups and provided further that its activities be in furtherance of a subject matter of immediate and legitimate union concern, such as wages, hours and working conditions, and not in furtherance of matters which are only **[*827]** of indirect concern to the union, such as prices and other marketing factors." *Ramsey v. United Mine Workers of America, 265 F. Supp. 388, 398 (E.D. Tenn. 1967)*.

Thus, at the outset, the applicability of labor's antitrust exemption to Local 627's activities on behalf of its distributor members is at issue, and, based upon the clear proof adduced, I conclude that the defendant's acts are not exempt.

The distributors represented by Local 627 are independent businessmen who contracted both with their own customers and with the manufacturers to purchase and supply merchandise. The distributors are not employees of the manufacturers.

[21]** ***HN4***[] To distinguish independent contractors from employees, the "usual test * * * is found in the nature and the amount of control reserved by the person for whom the work is done." *Taylor v. Local No. 7, International Union of Journeymen Horseshoers, 353 F.2d 593, 596 (4th Cir. 1965)*, cert. denied, *384 U.S. 969, 16 L. Ed. 2d 681, 86 S. Ct. 1859 (1966)*; see also *Singer Manufacturing Co. v. Rahn, 132 U.S. 518, 33 L. Ed. 440, 10 S. Ct. 175 (1889)*. Furthermore, even complete control over desired results may be insufficient to transform independent contractors into employees.

> "* * * an employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee." *NLRB v. Steinberg, 182 F.2d 850, 856-857 (5th Cir. 1950)*.

The question of whether control exists sufficient to characterize contractors as employees must be decided upon the particular facts of each case and no one fact is determinative; "the totality of the circumstances must be considered. " *Taylor **[**22]** v. Local No. 7, supra at 596*; *NLRB v. A. S. Abell Co., 327 F.2d 1, 5 (4th Cir. 1964)*.

By reason of the facts appearing in Findings 21 through 43, the proof is clear that the distributor-members of Local 627 are properly characterized as independent contractors rather than employees of the manufacturers. Those instances in which the manufacturers may have given some aid to the distributors or exerted some control over distributors' actions do not overcome the effect of the overwhelming evidence which illustrates the distributors' independent status.

That the distributor-members of Local 627 were independent contractors rather than employees does not, standing alone, remove the actions of the defendant-union from the protective shield of labor's antitrust exemption. See, e.g., *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 85 L. Ed. 63, 61 S. Ct. 122 (1940)*. However, since a fundamental conflict exists between the policies which underlie labor and antitrust legislation, the activities of labor organizations on behalf of those of their members who have the status of independent contractors must be closely scrutinized before antitrust exemption **[**23]** may properly be allowed.

HN5[] Only where union-imposed restraints upon the labor market directly yield immediate benefits to the legitimate interests of labor organizations, and where the relative impact upon the product market is indirect and consequential, have such activities been protected. In these cases, an implicit balancing of interests has permitted the effectuation of labor policies without doing violence to antitrust considerations. See *Pevely Dairy Co. v. Milk Wagon Drivers, 174 F. Supp. 229 (E.D. Mo. 1959)*, appeal dismissed, *283 F.2d 519 (8th Cir. 1960)*; *Local 24, Intl. Bhd. of Teamsters v. Oliver, 358 U.S. 283, 3 L. Ed. 2d 312, 79 S. Ct. 297 (1959)*; *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., supra*; cf. *Local 189 v. Jewel **[*828]** Tea Co., Inc., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*.

On the other hand, where union activities have been aimed directly at commercial competition (such as price fixing or boycotts) antitrust considerations have prevailed despite the labor interests sought to be protected or advanced thereby. See *Los Angeles Meat Drivers v. U.S., 371 U.S. 94, 9 L. Ed. 2d 150, 83 S. Ct. 162 (1962)*; *Columbia River Packers v. **[**24]** Hinton, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520 (1942)*; cf. *United Mine Workers v. Pennington, supra.*

Furthermore, agreements between unions and a non-labor organization for anti-competitive purposes need not be explicit but may be inferred from activities and surrounding circumstances when there is clear proof of union participation or authorization. *United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227 (S.D.N.Y. 1960)*; *United States v. Milk Drivers Union, 153 F. Supp. 803 (D. Minn. 1957)*.

In the present case, defendant-union's activities on behalf of its distributor-members were not in furtherance of any legitimate labor interests or objectives. The distributors, acting as independent contractors, sought admission to Local 627 for their own purposes, and the sole interest served by the union was that of this group of independent businessmen. (Findings of Fact 44 through 51) Absent the justification of a legitimate labor objective, defendant-union's activities which were aimed directly at commercial competition are not immune from antitrust liability.

B. Antitrust Violations

HN6[↑] It is elementary that price-fixing is illegal per se, *United States v. General Motors **[**25]** Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*. Effect, rather than form, is the determining element. *United States v. Socony-Vacuum Oil Co., Inc., supra*; *Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960)*.

The uniform minimum discounts and the increases of same which defendant union secured for its distributor-members (Findings of Fact 52, 53) constituted illegal price fixing under the circumstances herein. Such discounts fixed the price paid the manufacturers by the distributors and this, in turn, bore directly upon the ultimate prices paid by consumers. Indeed, the increases in distributor discounts were followed quickly by increased retail prices. (Finding of Fact 54) Further, the evidence is clear that Horn, acting as an agent of defendant-union, conspired with the manufacturers and participated in a scheme whereby it was agreed that retail prices would be uniformly increased to compensate for increases negotiated for the distributors' discounts. (Finding **[**26]** of Fact 54)

It also is elementary that boycotts and attempted boycotts are illegal. *United States v. General Motors Corp., supra*; *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *Fashion Originators Guild of America v. F.T.C., 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*. Thus, defendant-union's largely successful attempts to enforce agreements with the manufacturers to the effect that only members in good standing of Local 627 should be allowed to distribute frankfurters are illegal under the circumstances herein. (See Finding of Fact 55)

Defendant-union had knowledge of, acquiesced and participated in all illegal acts of its members, employees and agents. (Finding of Fact 56) ***HN7***[↑] Explicit authority to the union's agents and officials need not be granted; such agency **[*829]** may be implied. 2 C.J.S. Agency § 23, pp. 1045-1050.

In conclusion, the proof is clear that antitrust liability must attach to defendant-union for the reasons stated.

Conclusions of Law

1. The court has jurisdiction of this cause and of the defendants herein under the provisions of the Act of July 2, 1890, commonly known as the Sherman Act (*15 USC* ***[**27]*** *§§ 1*, *2*).

2. The distributors herein are independent contractors.

3. The activities of defendant-union on behalf of its distributor-members served no legitimate labor objective.

4. The activities of defendant-union on behalf of its distributor-members are not exempt from the antitrust prohibitions of the Sherman Act (*15 USC §§ 1* and *2*).

5. Beginning at least as early as 1949 and continuing thereafter until at least 1962, Sabrett, Olympia, Superior, Local 627 and the distributor-members thereof who dealt with Sabrett, Olympia and Superior combined and conspired to restrain and monopolize the manufacture, sale and distribution of frankfurters by means of price fixing and boycott agreements in violation of *Sections 1* and *2* of the Sherman Act.

6. Local 627 had knowledge of and acquiesced in all of the aforementioned acts of its officers, agents, employees and members and participated in the agreements and understandings entered into herein.

7. Plaintiff is entitled to equitable relief enjoining defendant Local 627 and the defaulting defendant Olympia from violations of *Sections 1* and *2* of the Sherman Act and such additional relief as may be appropriate in accord with the determination **[**28]** herein, together with costs.

Settle judgment on notice.

United States v. Tidewater Marine Service, Inc.

United States District Court for the Eastern District of Louisiana, New Orleans Division

April 12, 1968

Civil Action No. 68-97, Section B

Reporter

284 F. Supp. 324 *; 1968 U.S. Dist. LEXIS 10187 **; 1968 Trade Cas. (CCH) P72,447

United States of America v. Tidewater Marine Service, Inc., Twenty Grand Marine Service, Inc., Tidex, Inc., and Pan Marine Service, Inc.

Core Terms

boats, charter, merger, offshore, firms, Coast, transportation, crew, vessels, marine, market share, defendants', cargo, customers, oil company, relevant market, offshore oil, competitors, commerce, drilling, waters, personnel, craft, oil, transportation industry, anticompetitive, geographical, coastal, figures, substantially lessen

LexisNexis® Headnotes

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Oil & Petroleum Products > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

In a suit under Clayton Act § 7, *15 U.S.C.S. § 18*, it is essential that the government establish the line of commerce or relevant product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Regulated Practices, Market Definition**

Courts should consider a number of practical indicia in determining whether a particular submarket exists within the outer boundaries of a broad product market. The boundaries of 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 > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Regulated Practices, Market Definition**

Any definition of line of commerce that ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Regulated Practices, Market Definition**

To ignore a vital functional distinction in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Regulated Practices, Market Definition**

There will always be a certain amount of market overlap or limited functional substitution; a slight overlap case is clearly within tolerable limits consistent with the existence of an economically significant submarket.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN7[] Antitrust & Trade Law, Clayton Act

Competition is the key to determining the relevant market. The relevant market will include those products or services which may be in competition and will exclude those which do not compete.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Regulated Practices, Market Definition

Crew boats simply do not, for financial reasons, and cannot, for physical reasons, compete to any significant degree for cargo transportation with supply and utility boats. Nor can the chartering of offshore service craft be deemed a cluster of services.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN9[] Antitrust & Trade Law, Clayton Act

Under Clayton Act § 7, *15 U.S.C.S. § 18*, it is sufficient if the merger may substantially lessen competition "in any section of the country." Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in every Clayton Act § 7 case, which is whether a merger may substantially lessen competition anywhere in the United States.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

In determining a relevant geographic market, there must be an "economically significant" area. The focus is on competition; the question being "Where?" and not "What?" The relevant geographical market is that area where the effect of the merger on competition will be direct and immediate. This depends upon the geographic structure of supplier-customer relations. Therefore, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN11[] **Antitrust & Trade Law, Clayton Act**

The very hurried nature of an investigation in haphazard fashion does in and of itself somewhat belie the reliability of a government survey.

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

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Remedies

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

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

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN13[] **Monopolies & Monopolization, Attempts to Monopolize**

In measuring the anticompetitive effect of a merger, the court must examine its effect on the competitors as well as the customers of the merged companies.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN14[] **Monopolies & Monopolization, Attempts to Monopolize**

The core question of a merger's probable effect on competition must be examined in light of all the pertinent economic factors of the particular market.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

The mere existence of a valid business purpose for a merger, with possible limited exceptions, will not rescue the merger from Clayton Act § 7, *15 U.S.C.S. § 18*, if it has a probable anticompetitive effect. However, where the court finds no anticompetitive effects, the existence of a valid business purpose for the merger allays the inherent suspicion cast upon mergers by the Clayton Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN16[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A horizontal merger is not per se a violation of Clayton Act § 7, *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN17[] **Market Definition, Relevant Market**

In determining whether the elimination of competition between the merged firms violates Clayton Act § 7, *15 U.S.C.S. § 18*, the court does not operate in a vacuum. The court must determine whether the elimination of competition between the merged firms will substantially lessen competition in the relevant market. The court is guided in this determination by its examination of the pertinent economic factors of that market.

Judges: [1]** Heebe, District Judge.

Opinion by: HEEBE

Opinion

[*326] HEEBE, District Judge:

This cause came on for hearing on January 26, 1968, on the plaintiff's motion for a preliminary injunction. We denied the motion on February 9, 1968, for reasons fully explained herein.

Reasons

The United States instituted this suit to enjoin a proposed merger between Tidewater Marine Service, Inc. (Tidewater) and Twenty Grand Marine Service, Inc. (Twenty Grand) under an agreement entered into between these companies on August 25, 1967, on the grounds that the proposed merger may substantially lessen competition or tend **[*327]** to create a monopoly in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*. The same relief is sought for the same reason against the proposed acquisition by Tidex, Inc. (Tidex) of all the outstanding shares of stock of Pan Marine Service, Inc. (Pan Marine), affiliated corporations of Tidewater and Twenty Grand respectively, which plan to effectuate the proposed stock acquisition when the Tidewater-Twenty Grand merger is consummated.

Tidewater is primarily engaged in the business of providing supply and utility boats, crew boats, tugboats, and other marine equipment **[**2]** to oil companies, drilling contractors, and others engaged in the offshore exploration, recovery and production of petroleum products, and to companies engaged in oceanographic research. The vessels chartered by Tidewater include large supply boats used to carry drill pipe, drilling mud, diesel fuel, drilling water, and miscellaneous equipment from shore to offshore drilling rigs which are located up to 100 miles off the Gulf Coast; launches for transporting personnel and food to offshore platforms; tugboats used to tow barges and drilling platforms; and barges for transporting oil and other products. Approximately 75% of Tidewater's boats are service craft used to carry personnel and supplies; tugboats and barges constitute the bulk of the remaining 25%. Tidewater operates off both the Gulf Coast and West Coast of the United States (including Alaska) as well as in and around Canada, Mexico, Nigeria, Trinidad, Venezuela, Africa, the Persian Gulf, the Gulf of Suez and the North Sea. Approximately 68% of its revenues are derived from its operations in the coastal waters of the United States.

While the bulk of Tidewater's business consists of chartering offshore service craft to **[**3]** transport personnel and supplies, Twenty Grand secures only approximately 30% of its revenues from the chartering business and only slightly less than 30% of its vessels are engaged in this activity. The remainder of Twenty Grand's revenues are acquired from offshore towing (about 40%) and inland operations (about 30%). Twenty Grand operates its charter business principally in the coastal waters of the United States, but like Tidewater, although not nearly as extensively, also conducts some business in foreign waters.

Practically all of the boats chartered or leased by Tidewater and Twenty Grand for operation in the coastal waters of the United States are chartered under bareboat charter. This is a charter whereby the chartering firm leases the vessel without crew or supplies to a customer, and the customer mans, maintains and operates the vessel either directly or through an operator for the duration of the charter. In almost all cases Tidewater's customers enter into a contract with Tidex or one of its subsidiaries whereby Tidex or the subsidiary mans, operates and maintains the vessel for the chartering party. [1] Similarly, Pan Marine is usually the operating company for boats **[**4]** chartered by Twenty Grand.

The government alleges that the proposed merger between Tidewater and Twenty Grand and the acquisition of Pan Marine's stock by Tidex may substantially lessen competition or tend to create a monopoly in the chartering and operation of offshore tugboats as well as supply and utility boats used to transport cargo and equipment in connection with petroleum operations offshore the United **[**5]** States, offshore the Gulf Coast of the United States and offshore the Pacific Coast of the United States in violation of Section 7 of the Clayton Act in that it **[*328]** will (1) eliminate actual and potential competition between Tidewater and Twenty Grand and between Tidex and Pan Marine, and (2) further increase industry-wide concentration. On this basis the government seeks to enjoin the proposed merger and stock acquisition.

I. Relevant Product Market

Section 7 of the Clayton Act provides in pertinent part:

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[1] The reason for this, as stated by the government, is that when the owner of an offshore vessel operates it for another person, the owner is deemed to be engaged in the business of carrying passengers or freight for hire and is thereby subjected to certain Coast Guard regulations which increase the cost of operating the vessels. The applicability of the regulations may be avoided by the use of the bareboat charter and a manning company, thus decreasing costs. However, this assertion was never developed by the government, and we have no reason to believe that it would affect the outcome of this case.

> *HN1*[] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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." *HN2*[] *15 U.S.C. § 18*.

It is essential that the government establish the "line of commerce" or "relevant product market." *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593,* ***[**6]*** *1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957)*. We are presently concerned only with the phase of defendants' operations which involves chartering service craft to transport men and supplies to the offshore oil industry. [2] The government contends that the relevant line of commerce consists of furnishing offshore supply and utility vessels used to transport cargo and equipment. The defendants, on the other hand, maintain that it consists of supplying offshore service craft to carry both personnel and cargo. Inasmuch as the government contends that the transportation of cargo is the relevant product market, the optimum approach would have been to determine the amount of cargo that was transported to offshore facilities and the competitive position of defendants relative to that total. However, for obvious reasons this was impractical, and the government sought instead to measure the alleged line of commerce by the number of supply and utility boats engaged in the business. The approach of counsel for all parties herein was thus directed to the boats themselves rather than transportation *per se* as the line of commerce. We will also adopt this approach because it affirmatively appears **[**7]** from the evidence herein that the transportation of cargo via boats other than supply and utility boats is so slight as to be relatively insignificant when compared to the amount of cargo transported by supply and utility boats. Thus, supply and utility boats are not merely a unit of measurement but may themselves be considered, for practical purposes, as the line of commerce as the following factors indicate.

[8]** There are three basic types of service craft used to provide offshore transportation - supply boats, utility boats, and crew boats. While the three basic types are recognized throughout the marine transportation and offshore oil industries, they may be referred to by different names; for example, supply boats may be called cargo boats, utility boats may be called standby boats or production boats or work boats or supply-personnel boats, and crew boats may be called personnel carriers or launches. [3]

Each type of boat is intended to perform a different function, and thus there **[*329]** are significant differences in their design and construction, the most striking differences being between supply boats and crew boats. Crew boats are designed to carry a large number of passengers at high speeds. Considering that as many as fifty men may be transported at any one time, there is considerable cost involved in transporting personnel, especially for an operation which is some distance **[**9]** offshore, because the companies operating offshore oil facilities have to pay the workers, who work in shifts of so many days, while they are traveling to and from shore. Thus, speed is essential. In addition to transporting crew shifts, crew boats are continuously used to transport miscellaneous personnel in emergency and other situations where speed is also at a premium. Consequently, crew boats are generally high-powered vessels with planing hulls constructed of lightweight aluminum for maximum speed approaching 30 m.p.h. They are also constructed with passenger comfort in mind; for example, the seats are often the reclining type. Crew boats are also capable of carrying small amounts of cargo, such as groceries and small tools, varying in weight but seldom exceeding five tons.

Supply boats, on the other hand, are designed for transporting large quantities of cargo ranging up to 600 tons in weight. Thus, they are generally steel hulled vessels built for maximum stability under all conditions. They are usually capable of making only 10-12 knots. Supply boats sometimes carry passengers when it would be more

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[2] The government's complaint, alleging that Twenty Grand owns "16 large offshore, ocean-going tugboats" and that Tidewater owns "29 tugs," claims that the merger of the defendants' towing operations would also violate § 7. However, the government has failed to offer any evidence whatsoever regarding this claim. In its brief at footnote 2 on pages 8-9, the government, candidly admitting that it was unable to go forward on this claim, virtually abandoned it. Likewise, the government has completely failed to offer any evidence relevant to its broad allegations concerning the agreement between Tidex and Pan Marine. Consequently, we may exclude all of these allegations from our present consideration of this case.

[3] See footnote 7, infra.

convenient to do so or when inclement conditions prohibit a crew boat **[**10]** from making the journey. Utility boats are designed with facilities to accommodate as many as 40 passengers, although the number is usually smaller. But because utility boats are also designed to carry large amounts of cargo, generally slightly less than one-half as much as supply boats, they are also displacement hull vessels, and thus, like supply boats, are slow.

The boats servicing the offshore oil industry range in length from 40 to 165 feet; the farther offshore a boat must range, the larger it must be. Smaller inland craft are incapable for both safety and practical reasons from venturing very far offshore. Supply boats are generally longer than crew boats, with utility boats a medium length, although in any one given instance a crew boat may exceed a supply boat in length. Naturally, the cargo or passenger carrying capacity of a vessel will be determined by its size.

Supply boats cost more to construct than crew boats. The cost of supply boats generally ranges from $200,000 to over $700,000, depending on the length, quality, equipment, cost of labor, etc. The cost of crew boats generally ranges from $75,000 to over $300,000, depending on the same factors. However, **[**11]** if a crew boat and a supply boat are the same length, it usually costs more to construct the crew boat. Further, while the life expectancies of the vessels vary, it appears that crew boats last only about one-half as long as supply boats. Because of these factors, it costs more to charter crew boats than to charter supply boats. Crew boats, however, generally require only a two- or three-man crew whereas supply boats require a four- to six-man crew.

Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962), authoritatively delineated ***HN3***[] a number of practical indicia to be considered in determining whether a particular submarket exists within the outer boundaries of a broad product market. [4]

> "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 **[*330]** customers, distinct prices, sensitivity to price changes, and specialized vendors." At 325.

It is generally agreed by those in the industry that the overall business of providing boats **[**12]** for the offshore oil industry is the same and requires the same skills and know-how whether the boats be used to transport men or materials. Thus, one who charters crew boats is just as capable of chartering supply and utility boats, and vice versa. This is repeatedly emphasized by the defendants. However, to attach significance to this would be to ignore the very terms of the Act itself which refers to *any* line of commerce, as well as the resulting admonition in *Brown Shoe* that the focus must be on "economic entity." As stated in *United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958)* at 592: ***HN4***[] "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."

In this case the peculiar **[**13]** use or function of the boats, which is recognized throughout the industries involved, is the crucial factor, and it highlights the existence of separate economic entities. ***HN5***[] To ignore the vital functional distinction herein "in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business." *United States v. ALCOA, 377 U.S. 271, 276, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)*. Cf. *Erie Sand & Gravel Co. v. Federal Trade Commission, 291 F.2d 279 (3rd Cir. 1961)*. Crew boats are designed for high speed transportation of personnel and are constructed accordingly. The rapid movement of men is their task first and foremost, and it is only incidentally that they move cargo, and then only in comparatively negligible amounts. Supply and utility boats, on the other hand, are geared for the dependable movement of huge quantities of cargo, and transport men only when the circumstances necessitate. To adopt an analogy first drawn by William E. Bright, former President of Tidex and now Vice President of Tidewater, crew boats may be considered as taxicabs, utility boats as pick up trucks or carryalls, and supply boats as heavy duty trucks. When **[**14]** a customer wants to transport men, he will not seek bids on supply or utility boats - he wants crew boats. Likewise, when the customer wants to transport cargo, he will seek bids on supply or utility boats and not crew boats. These

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[4] The practical indicia clearly enunciated in *Brown Shoe* were based upon criteria well established by lower courts. See Bock, Mergers and Markets (3rd ed. 1964) pp. 96-111, (2nd ed. 1962) pp. 56-68, and cases cited therein.

facts, coupled with the fact that crew boats cost considerably more to charter than supply or utility boats, demonstrate the lack of sensitivity to the price of crew boats vis-a-vis the price of supply or utility boats. The customer will acquire the type of boat needed to meet his transportation requirements with little regard to the price or availability of the other types of boats.

The fact that, to a certain extent, one type of boat may perform the function of another type of boat does not alter our view of this case because this interchangeability is very limited. ***HN6***[] There will always be a certain amount of market overlap or limited functional substitution; but the slight overlap in this case is clearly within tolerable limits consistent with the existence of an economically significant submarket. See *United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *United States v. ALCOA, supra*; *United States v. Philadelphia* ***[**15]*** *Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*; *United States v. E. I. du Pont de Nemours & Co., supra*; *United States v. Kimberly-Clark Corp., 264 F. Supp. 439 (N.D. Cal. 1967)*; *United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965)*. As noted above, crew boats are generally incapable of carrying over five tons of cargo, and they rarely carry even that much. Such cargo transportation is certainly *de minimis* when compared to the several hundred tons of cargo carried by the supply and utility boats. Likewise, even though supply boats and, to a greater extent, utility boats are capable of carrying personnel, they seldom do because they are so slow and the wage meter is ticking all the way out to the rig. Thus, supply **[*331]** and utility boats do not compete with crew boats for the transportation of personnel even though they may be physically capable of personnel transportation. However, even if they did compete for personnel transportation, this fact would be irrelevant in this case inasmuch as the line of commerce urged by the government is the transportation of supplies and equipment. Thus, we must look to the type of boats capable of transporting **[**16]** supplies and equipment. It matters not that such boats may also perform other functions. See *United States v. Grinnell Corp., supra*; *United States v. Pennzoil Co., supra.*

This places the spotlight on the crucial and singular issue here which is whether crew boats compete with supply and utility boats. It is clear that ***HN7***[] competition is the key to determining the relevant market. *United States v. Grinnell Corp., supra*; *United States v. Continental Can Co., 378 U.S. 441, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*; *United States v. Philadelphia Nat'l Bank, supra*; *Brown Shoe Co. v. United States, supra*; *United States v. Pennzoil Co., supra*; *United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965)*. The relevant market will include those products or services which may be in competition and will exclude those which do not compete. Here the fact is inescapable that ***HN8***[] crew boats simply do not, for financial reasons, and cannot, for physical reasons, compete to any significant degree for cargo transportation with supply and utility boats.

Nor can the chartering of offshore service craft be deemed a "cluster of services." Cf. *United States v. Philadelphia Nat'l Bank,* ***[**17]*** *supra*; *United States v. Grinnell Corp., supra*, an analogous case. In Philadelphia Nat'l Bank the court found that "commercial banking is a market '*sufficiently inclusive* to be meaningful in terms of trade realities' ", *374 U.S. at 357, 83 S. Ct. 1715, 10 L. Ed. 2d 915*, because the banking services provided by commercial banks were free or insulated from effective competition with the products and services of other financial institutions. Similarly, the accredited central station property protection service in *Grinnell* was found to be a "single basic service" because there could be no effective competition with the substitutes as they were unacceptable or unrealistic alternatives. In both of these cases, therefore, the Supreme Court found that the broad product market, composed of various component services, was such an integrated whole or total package, so to speak, that it was free from effective competition with businesses which furnished less than the total of component services.

In our case, however, many firms, for one reason or another, and often merely because of personal wishes, engage in the business of chartering supply and utility boats to the exclusion of crew **[**18]** boats and vice versa. Yet it is clear that Tidewater and Twenty Grand are in active competition with such firms particularly in view of the fact that the offshore oil companies generally acquire vessels on a boat-by-boat basis according to their needs and without regard to any total package service. Obviously, then, in this case there is no "single basic service."

For these reasons we think it is commercially realistic to consider the transportation of supplies and equipment as a separate economic entity, and we accept the government's delineation of the relevant product market as supply and utility boats.

II. Relevant Geographical Market

Offshore oil operations are conducted in the coastal waters of the United States only off the Gulf Coast and the West Coast (including Alaska). Consequently, the marine transportation industry is limited to these two areas. It is apparently unprofitable to shuttle boats back and forth between the West Coast and the Gulf Coast, and for this reason a boat which commences operation in one of these two areas almost always stays in that area.

[*332] The government claims that the anticompetitive effect of the proposed merger must be tested **[**19]** in three geographical areas - offshore the United States as a whole, offshore the West Coast, and offshore the Gulf Coast. The defendants claim that our consideration is limited to the Gulf Coast.

Without belaboring the point, ***HN9***[] it is sufficient if the merger may substantially lessen competition "in any section of the country." "Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in . . . every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." *United States v. Pabst Brewing Co., 384 U.S. 546, 549-550, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)*.

However, ***HN10***[] there must be an "economically significant" area. *Brown Shoe Co. v. United States, supra.* Again, the focus is on competition; this time the question being "Where?" and not "What?" The relevant geographical market is that area "where . . . the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia National Bank, 374 U.S. 321, 357, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. "This depends upon 'the geographic structure of supplier-customer relations. '" Ibid. "Therefore . **[**20]** . . the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*'. . ." *Id. at 359*. While we have no doubt whatsoever that both the Gulf Coast and West Coast areas are proper geographical markets in which to test the effect of the proposed merger, we are unable to accept the government's assertion that the coastal water of the entire nation is a proper geographical market, the reason being simply that the boats in one area are not available for operation or competition in the other. Under *Philadelphia National Bank* this bare practical factor precludes considering the national market as a relevant market. We do not feel that the sweeping language in *Pabst* scuttled the guidelines set out in *Philadelphia National Bank*. Consequently, commercial realities limit the relevant geographical markets to offshore the Gulf Coast and offshore the West Coast.

In so holding, we reject the defendants' contention that the West Coast is not a relevant geographical market, which contention is based on the fact that Twenty Grand operates **[**21]** its West Coast chartering business through Twenty Grand Pacific, a corporation 50% owned by Twenty Grand and 50% owned by an individual named Kenneth Elmes. The very terms of § 7 defeat this argument since the Act proscribes the acquisition "directly or *indirectly* [of] the whole or *any part of the stock*" of another corporation if the effect may substantially lessen competition in any section of the country. Thus, the fact that Twenty Grand Pacific is only 50% owned by Twenty Grand is irrelevant inasmuch as Tidewater will acquire 50% ownership of Twenty Grand Pacific through the acquisition of Twenty Grand's stock. [5] This being so, the West Coast is a proper geographical market in which to measure the anticompetitive effect of this merger.

[22]** As we note in Part III below, the government has failed to offer statistical data relating to the Gulf Coast and West Coast; the only statistics which are **[*333]** supported by evidence are directed to the total of both markets without any breakdown between the two. However, this does not preclude our consideration of this evidence because if the government's allegations as to the national totals are correct - that the combined market share of Tidewater and Twenty Grand is 31% - it follows that the market share in both component markets is 31%, or that the market share is greater than 31% in one market and less in the other.

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[5] The fact that Elmes and Twenty Grand have engaged in some negotiations designed to effect the purchase by Elmes of Twenty Grand's ownership in Twenty Grand Pacific is also irrelevant and does not preclude our consideration of the West Coast as a relevant market. There is no certainty or even probability that Elmes will buy out Twenty Grand. Such negotiations directed to possible future developments do not alter the present effect of the Tidewater-Twenty Grand merger upon competition.

We now turn to the crucial question of whether the merger may substantially lessen competition.

III. Effect on Competition

The complaint alleges that Tidewater is the largest company in the country engaged in the business of furnishing marine transportation to the offshore petroleum industry and that Twenty Grand is the second largest. The government also alleges that approximately 400 supply and utility boats are available for charter in the United States coastal waters and that Tidewater owns approximately 19% (76, including two under construction) and **[**23]** Twenty Grand 12% (47) of all such vessels, and that together they own approximately 31% of the national total. The complaint further states that in 1967 approximately 350 supply and utility boats were chartered for operation off the United States coasts and that Tidewater accounted for about 16% (55) of all such vessels and that Twenty Grand accounted for approximately 10% (34). It is further alleged that of the 350 supply and utility boats allegedly chartered for operation in the United States coastal waters in 1967, about 300 were operated in the Gulf of Mexico. Tidewater allegedly accounted for approximately 13% (41) of the supply and utility boats operated in the Gulf of Mexico in 1967 and Twenty Grand accounted for approximately 9% (27) of all such vessels. Of the approximately 41 supply and utility boats allegedly chartered for operation offshore the United States Pacific Coast in 1967, the government claims that Tidewater accounted for about 35% (14) of all such vessels and Twenty Grand approximately 15% (7) of these vessels. The government claims that the merger of these alleged market shares constitutes a *prima facie* violation of § 7, and hence that it need not prove **[**24]** any particular anticompetitive effects at this stage.

The figures and percentages proffered by the United States were obtained as a result of a survey conducted by the government attorneys, which survey was necessitated by the lack of complete data on the offshore marine transportation industry. The government acquired a list of firms believed to be engaged in the offshore marine transportation industry from the defendants which the defendants later supplemented with additional names. The government also acquired a list of insured boats and barges from the Chevron Oil Company, as well as a list of companies from the "Oil and Gas and Marine Guide," an industry publication. When the firms on these various lists were contacted by the Antitrust Division staff, they were asked to supply the names of other firms which might be in competition with the defendants. These latter firms, when contacted, were requested to do the same thing, and so on in chain letter fashion.

In this manner the names of 429 companies were obtained, 29 of which were subsidiaries or affiliates of others, and thus stricken. Of the remaining 400, 48 companies could not be located, 5 could not be contacted, 6 **[**25]** had gone out of business, and 1 declined to respond. The government asserts that only 86 of the other 340 firms are in competition with Tidewater and Twenty Grand because 254 either own no offshore supply or utility boats or do not charter their vessels for hire.

The interviews were conducted almost exclusively by telephone. In each case, the person interviewed was either the owner or a knowledgeable executive officer. Basically, the government inquired simply as to how many boats the company owned, and the size and type (supply, **[*334]** utility, crew, tug, barge, etc.) of each. The data acquired by this telephone interview was partially confirmed by letter. The government mailed 333 confirmation letters to the above 400 firms, and received 242 responses. Of the 242 replies, 4 companies indicated that they owned a total of 7 supply and utility boats less than the government had attributed to them. This was somewhat offset, however, by the response of three other firms stating that they owned a total of 3 more supply boats than the telephone survey had indicated.

The results of the government survey were tabulated, prior to the receipt of the confirmation letters, in rough **[**26]** fashion and filed as exhibits in the record. One such tabulation (Exhibit 2B) seems to indicate the total number of supply and utility boats available for charter from American firms in 1967, including those vessels actually operating in foreign waters but which are registered in the United States, and thus not prohibited by law from operating in United States coastal waters. See 46 U.S.C. § 883. Exhibit 2B indicates that the number of such boats totals 396, and that Tidewater owns 76 and Twenty Grand owns 47. It also ranks the companies, purportedly numbering 13, owning five or more such vessels in order of size, indicating the number of boats each owns which ranges from 19 to 5 excluding Tidewater and Twenty Grand together with each company's percentage of the total, which ranges from 4 3/4% to 1 1/4%. The percentages owned by Tidewater and Twenty Grand per Exhibit 2B are 19% and 11 3/4%, respectively. The other tabulation (Exhibit 2C) simply seems to assert the estimated number of supply and utility boast actually chartered for operation in United States coastal waters by Tidewater and Twenty Grand in 1967 compared to the total for all other companies combined. It reflects **[**27]** Tidewater and Twenty Grand as having chartered 87 vessels which is actually 25.6% (not 22% as indicated on the exhibit) of the purported total of 340. The only data offered by the government to support these tabulations were a copy of the interview form, a listing of the 429 firms contacted with the number and type of boats owned by each, and the 242 confirmation responses. [6]

[28]** The defendants do not dispute the number of supply and utility vessels attributed to their ownership in Exhibit 2B. A severe difference of opinion does exist, however, respecting the total number of supply and utility boats available for charter in United States coastal waters as reflected in Exhibit 2B. Before turning to consider the defendants' contentions, we pause to consider the government's evidence which we set forth in detail above. The government has **[*335]** offered no evidence to support its allegations as to the breakdown of the national totals into the component Gulf Coast and West Coast areas which are the only relevant markets. While the list of the 429 firms contacted by the government yields the address of those companies, it does not indicate where the boats are operated, nor by our own calculation does the number of boats owned by firms with West Coast addresses correspond to the figures attributed to the West Coast in the government's allegations. The interview form does not indicate that this material was gathered in the interview. Likewise, the tabulations themselves fail to designate the total number of supply and utility boats chartered or available **[**29]** for charter in either of the relevant markets in 1967. Thus, there is a lack of evidence supporting the government's allegations as to the defendants' market shares of the Gulf Coast and the West Coast. The government's evidence reflects industry-wide data for only the entire nation which is not a relevant geographical market. The government, in fact, apparently realizes this because, while it argued the case as a *prima facie* violation of the statute primarily in reliance upon the alleged market shares, it concentrated on the alleged 31% of the national total and merely glossed over the alleged 50% of the West Coast market with only an occasional reference to the 22% share claimed in the Gulf of Mexico. Inasmuch as the government relied on the alleged market shares to establish a *prima facie* violation, it would be most illogical to virtually ignore the alleged West Coast market share unless that claim did, indeed, lack evidentiary support.

While we certainly do not in any way wish to criticize government counsel, whose motives are clearly above reproach, we are unable to accept as completely reliable the figures asserted by the government. Despite the diligent efforts **[**30]** of government counsel to conduct a thorough and unbiased survey, ***HN11***[] the very hurried nature of the investigation in haphazard fashion does in and of itself somewhat belie the reliability of the government survey. Cf. *United States v. National Steel Corp., 251 F. Supp. 693 (S.D. Tex. 1965)*. Our finding in this respect is strengthened by the fact that most of the government's statistical allegations were unsupported by any evidence whatsoever and the fact that only the scantiest evidence supported the other statistical allegations. [7] **[**32]** In an attempt to bolster the reliability of its figures, the government offered the affidavit of Commander John

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[6] This underlying evidence offers support, albeit scanty, only for the government's allegations as to the boats *available* for charter off the United States coasts which includes boats of United States Registry operating in foreign waters. It offers no support whatsoever for the tabulated allegations as to the total number of boats which *actually operate* in United States coastal waters. The former is directed to potential competition while the latter is directed to actual competition. The government did not draw any distinction between the two nor did it offer any evidence as to the likelihood or feasibility of vessels operating in foreign waters returning to domestic competition. Without such a showing the only proper yardstick with which to measure competition is the number of boats which actually operate offshore the United States. See, e.g., *United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967)*. It does seem highly unlikely that the government would be able to show that there is a reasonable probability of such potential competition becoming real in view of the fact, noted above, that boats on the West Coast do not compete with boats on the Gulf Coast due to the prohibitive expense of commuting back and forth which would appear even more prohibitive for boats operating in foreign waters. However, we need not further burden this already lengthy opinion by additional discussion of this point, other than to point it out, especially since it loses its otherwise important significance when we assume, infra, the facts as to market shares to be as favorable as possible to the government.

[7] An additional reason causing us to suspect the reliability of the government's figures is the fact that, although, as noted above, we agree with the government's concept of the relevant product market as we there defined the boats constituting that market,

F. O'Connell, whose duties as a marine inspector in the Coast Guard in New Orleans occasioned him to make a survey of the offshore marine transportation industry. Our calculations indicate that he would conclude that there are about 227 supply and utility boats operating offshore in the New Orleans area. [8] However, we refuse **[*336]** to attribute any probative value to the figures asserted by Commander O'Connell because the primary concern of his investigation was apparently to ascertain the number of marine casualties and, by his own admission, **[**31]** many of his figures were based solely on his guesswork, and for the further reason that his figures represent the number of boats inspected in New Orleans and operating in New Orleans area only. At least five other Coast Guard stations on the Gulf Coast were required to make the same survey for their own respective areas, and the government has failed to produce the results of these surveys. Thus, O'Connell's survey would indicate, if anything, that there are substantially more supply and utility boats operating in the Gulf of Mexico than the government admits. Finally, the evidence offered by the defendants confirms our suspicions with regard to the market shares claimed by the government.

While the defendants critically attacked the intrinsic value of the government survey, their most poignant argument, amply supported by evidence, is that the government's figures inaccurately portray the universe, or total number, of supply and utility boats.

The defendants offered the results of a survey conducted by Frank John Deutschmann, Vice President of Tidewater, which was limited to boats actually operating off the Gulf Coast. Although Deutschmann was requested by Tidewater counsel to make the survey, he did not know what figures would aid Tidewater's counsel, and the procedures to be followed were left entirely to his choice. He rejected the method employed by the government because he felt through his experience in the industry that there were no reasonably accurate or complete lists of boat owners. He chose instead **[**33]** to conduct the survey based on the records required to be kept by the Customs Houses in the Gulf Coast area. From these records he compiled a list of vessels which were documented in oil exploitation and geophysical operations, or known to be so engaged. Boats determined from other independent means not to be engaged in oil exploitation offshore the Gulf Coast were later deleted from this list; and the list was subsequently supplemented by a number of newly documented vessels as determined from an authoritative government publication. From this survey the defendants concluded that approximately 1,253 vessels were engaged in service to the offshore oil and gas industry in the Gulf of Mexico. Defendants seek to bolster the accuracy of their figures by reference to a recent report of the Department of Transportation concerning Continental Shelf Safety which indicated that about 1,500 vessels connected with the offshore oil industry were operating in the Gulf of Mexico. We are unable to ascribe any probative value to the Department of Transportation report, however, because the report failed to disclose what type of boats constituted the 1,500 total which may have included barges, **[**34]** tugboats and the like.

The 1,253 boats indicated by the defendants' survey included crew boats as well as supply and utility boats. However, Deutschmann testified that of the total 1,253, 493 were determined to be supply or utility boats. While the defendants failed to show the percentage of supply and utility boats owned by Tidewater and Twenty Grand, which may have been due to their misconception of the relevant market as including crew boats as well as supply and

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which was largely based on the "Bright Lecture," it appears from the evidence herein that a borderline area exists between crew boats and utility boats in which it is difficult to distinguish one from the other. This indicates that there is a lack of universal agreement in the industry as to what constitutes a crew boat and what constitutes a utility boat. This area where the greatest difference of opinion exists apparently involves large high-powered boats with planing hulls. It is uncertain from the government's evidence whether the information obtained as a result of the telephone survey was based on the definition of supply and utility boats which the government advanced and which we adopted. It is imperative that the persons responding to the survey correctly understood what the government meant by its terms. Yet, it may well be that many of those persons contacted by the government stated that they owned "utility" boats which, by definition, were "crew" boats.

[8] Pursuant to the information contained in O'Connell's affidavit, we took 7% of the figures in 2(a) and 2(c) of the exhibit attached to his affidavit and added to that figure the number indicated in 2(d) and 2(f). In making this calculation, we obviously excluded 2(e).

utility boats, they did offer evidence indicating that Tidewater and Twenty Grand owned a combined total of only 7.8% of the total 1,253 supply, utility and crew boats which they claim actually operate in the Gulf of Mexico. [9]

[35]** **[*337]** In further support of its claim that the government used an improper universe, the defendants listed, over and above the 86 firms which the government claims compete with Tidewater and Twenty Grand, 90 persons or firms (Exhibit A) who are engaged in the chartering business and who have a total of 107 additional supply and utility boats available for charter off the Gulf Coast. This information was obtained by contacting some of the persons or firms on the government's list of 429 names which the government was unable to locate or contact, as well as some of those firms which the government stated did not own any supply or utility boats. [10]

[36]** In addition, the defendants' evidence revealed that there are a significantly larger number of supply and utility boats available for charter from the firms on the list of 429 which the government stated did have supply and utility boats. [11]

In summary, **[**37]** then, the only claims of each side respecting market shares which have any evidentiary support at all are the government's claim that 396 supply and utility boats were available for charter in the United States during 1967 and that the combined total owned by Tidewater and Twenty Grand is 31% as well as the government's claim, weakly supported by only Exhibit 2C, that the supply and utility boats actually chartered for operation in United States coastal waters during 1967 numbered 340, of which Tidewater and Twenty Grand accounted for 87, or 25.6%, and the defendants' claim that there are a total of 1,253 supply, utility and crew boats actually operating off the Gulf Coast alone and that the combined ownership of these vessels by Tidewater and Twenty Grand is 7.8%, and that of the total 1,253 vessels, 493 are supply and utility boats. We simply have no way of resolving this factual dispute in light of the evidence which is unconvincing on either side, and can only state that the correct combined ownership by Tidewater and Twenty Grand of supply and utility vessels lies somewhere between 31% and 10% in both the United States as a **[*338]** whole, which is not a relevant market, and **[**38]** the Gulf Coast, which is a relevant market. We are completely in the dark as to the defendants' market share of the West Coast. However, in light of additional evidence introduced by the defendants, it is unnecessary for us to resolve this case solely on the basis that the government has failed to meet its burden of proof in establishing the defendants' market shares.

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[9] However, by no means does this give rise to an inference that Tidewater and Twenty Grand own only 7.8% of the supply and utility boats actually chartered in the Gulf of Mexico. Nor have the defendants advanced this argument. In fact, by Tidewater's own admission, it alone has 48 supply and utility boats operating in the Gulf of Mexico, which is over 9.7% of the total 493 claimed by the defendants for the Gulf of Mexico.

[10] The government's attempt to soften the damaging effect of this evidence failed. The government pointed out, through the testimony of Deutschmann, that defendants' Exhibit A contains the names of persons and firms who actually own the boats and that only about 10% of these owners are actually engaged in chartering the boats. The remainder of the owners do not charter their own boats but provide their boats to firms which do charter them. The government then declared that its Exhibit 2B is based on the number of boats a firm has available for charter rather than the number the firm actually owns because this more accurately reveals the true competitive situation. Thus, the government concluded, the additional 90 owners and 107 boats advanced by the defendants are irrelevant since these owners and boats are already encompassed in the government's tabulation (except for the 10% who do charter boats for themselves). However, the defendants proved that the government's tabulation failed to accurately reflect the number of boats which firms do have available for charter (see footnote 11 and accompanying text), and thus we can only conclude that the government's tabulation must have been based largely on ownership. This conclusion is fortified by an examination of the interview form and the confirmation letter used in the government survey, both of which refer to "ownership." Thus, the defendants' Exhibit A possesses considerable significance.

[11] The defendants' evidence in this respect was produced by notarized affidavits of the owners or officers of some of the firms. The affidavits are not in conflict with the confirmation letters received by the government from these persons because the government's letters referred to "ownership" by the particular corporation, whereas the defendants focused on boats available to the particular corporation and thus included boats owned by subsidiary and affiliated corporations. However, even if they were contradictory, we would accept as true the information contained in the affidavits which, unlike the confirmation letters, was filed under oath. These affidavits clearly show that the government's Exhibit 2B is misleading as to the true competitive situation.

As noted above, the government's efforts in this case were directed solely to establishing the defendants' market shares. Relying mainly on *Philadelphia National Bank,* it claims that the combined market share of Tidewater and Twenty Grand and the elimination of competition between them constitute a *prima facie* violation of § 7. In that case the Court stated:

> "Specifically, we think that ***HN12***[] a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined *in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*. . . . The merger of appellees will result **[**39]** in a single bank's controlling at least 30% of the commercial banking business . . . . Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." *374 U.S. at 363-364*.

Even if we take the present case in the light most favorable to the government and were to *assume* that Tidewater and Twenty Grand together own 31% of the relevant market, we would be faced with the same market share as in *Philadelphia National Bank,* yet we would be unable to draw the conclusion the Court there did because the defendants herein have introduced, in the language of the Supreme Court, "evidence clearly showing that the merger is not likely to have [any] anticompetitive effects."

HN13[] In measuring the anticompetitive effect of a merger, we must examine its effect on the competitors as well as the customers of the merged companies. *United States v. Bethlehem Steel Corp., 168 F. Supp. at 588*, cited with approval in *United States v. Philadelphia Nat'l Bank, 374 U.S. at 367, n. 43*. We examine first the defendants' competitors in the offshore marine transportation industry.

The offshore marine **[**40]** transportation industry is predominantly composed of small firms. Over one hundred, and possibly several hundred, small firms exist which have less than five supply and utility boats available for charter. In addition to this vast number of small competitors, a number of larger chartering firms engage in competition with Tidewater and Twenty Grand. Based on the government's Exhibit 2B, as supplemented by the defendants' Exhibit A and other evidence introduced by the defendants, we find that at least 14 firms, excluding Tidewater and Twenty Grand, have between at least 23 and 5 supply and utility boats available for charter. The market shares of these firms, based on the government's figures as to the national universe, ranges from over 1% to over 5%. In addition to the stiff competition from these chartering firms, large and small, Tidewater and Twenty Grand also face competition with drilling contractors and mud companies for the offshore transportation of supplies and equipment. Drilling contractors generally operate the offshore oil rig for the oil companies. Many drilling contractors have expanded into a total offshore service and now provide the craft, including supply **[**41]** and utility boats, needed to service these facilities. However, even though they operate the offshore oil rig, they still must bid for the charter contract against the offshore chartering firms such as Tidewater and Twenty Grand. These drilling contractors, who own a substantial number of supply and utility boats, have revenues ranging up **[*339]** to 340 million dollars and are financially much larger than Tidewater and Twenty Grand who had revenues of 23 and 10 million dollars respectively last year. Also, a number of mud companies provide boats for the transportation of "mud" to the offshore drilling operations. They are thus competing with the chartering firms who attempt to acquire mud transportation contracts. Furthermore, the mud companies charter their supply boats, when they are idle, for transporting other supplies and material.

The competition among all these firms in securing charter contracts for the transportation of supplies and equipment is extremely vigorous. The offshore oil companies generally charter boats on a boat-by-boat basis. The bidding is open to all businesses with boats for hire. The charter contract, which varies in length from weeks to years, **[**42]** is simply awarded to the lowest bidder. When the oil companies endeavor to charter a boat, they are not concerned with how many boats a particular firm may have; nor are they impressed by a charterer's "name"; they are only interested in the best price and the best service. In fact, the oil companies appear to take deliberate steps to avoid a marriage with any one firm, preferring instead to spread their contracts among many firms. The evidence further indicates that the size of a company has no significant bearing on the price at which it is able to offer its boats. This is probably attributable to the fact that a significant portion of the costs involved would seem to be variable costs, plus the fact that the savings in financing costs which accrues to larger firms would appear to be offset by their heavier fixed costs in administrative expenses and the like.

Perhaps the most salient economic factor herein is the ease of entry into the offshore marine transportation industry. There are virtually no barriers whatsoever to entry. Financing is readily available, and anyone with a knowledge of boats or the oil industry, which knowledge abounds in this area, can enter the business **[**43]** with a capital investment as low as $5,000.00. Most firms which are now of considerable size started in just this fashion with only one boat. Tidewater, for example, commenced operations with a $30,000.00 investment in one boat in 1955 before financing in this industry was easily available, and has achieved its present size solely through internal growth. A further example of the ease of entry is the fact that many persons enter the business by acquiring a charter contract to commence several months in the future before they even have a boat. They are then able to finance the construction of a boat on the strength of the charter contract.

These factors, uncontested by the government, more than amply demonstrate that this merger will have no adverse effect on the defendants' competitors. In terms of sheer numbers, the small firms are overwhelming. At present they manage to breed, survive, and prosper. The older firms are growing and new ones are constantly entering the business, swelling the ranks of competition. If Tidewater, which now allegedly owns 76 supply and utility boats, has been unable to stem this rising tide of competition, we fail to see how the merged firm with **[**44]** a total of 123 boats could have a damaging effect. To the one-boat firm, a 123-boat firm could be no more oppressive than a 76-boat firm. The reason for this is evident from the unique nature of the market itself which places all competitors, from the very large to the very small, on an equal basis, suffering no handicap. There are no underdogs. It is clear that the competitive climate is extremely healthy.

Our conclusion in this respect is further substantiated by a number of affidavits from small firms which definitively state that the merger will have no adverse effect on their business or ability to compete. [12] This sentiment is very **[*340]** impressive, prevailing as it does among the small competitors who have the most interest at stake in preventing the merger. It becomes even more impressive in view of the fact that one of the questions on the interview form used for the survey conducted by the government was whether the merger would affect the business of the firm interviewed; yet the government was unable to introduce even one statement from a competitor indicating that the merger would have an adverse effect on his business. [13] In fact, a number of small competitors **[**45]** stated that the small firm has a competitive advantage in this business in that they are able to give their customers more personalized service. Thus, it is clear from the very nature of this market with its rugged, individualistic competitors that the merger of Tidewater and Twenty Grand will not adversely affect the defendants' competitors, large or small.

[46]** Likewise, an examination of the defendants' customers reveals that there will be no adverse effect upon them. The customers of the offshore marine transportation industry mainly consist of the huge oil companies such as Standard Oil of New Jersey, Shell Oil Company, Texaco, Gulf Oil Corporation, Mobil Oil Corporation, Continental Oil Company, Sinclair Oil Corporation, Tenneco, etc. These corporate giants, with their vast financial empires, number among the largest corporations in the United States; many rank among the biggest in the world. Their annual sales are measured in the billions of dollars. Even the "small" oil companies far outstrip Tidewater and Twenty Grand in size. Each offshore rig requires an investment by an oil company of millions of dollars, and daily operating expenses total several thousand dollars. Thus, another startling fact in this case is that the "seller" here is virtually microscopic compared to the "buyer." The simple truth is that the oil companies wield all the economic power in the offshore world. Regardless of how big Tidewater and Twenty Grand may foreseeably become, they

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[12] These affidavits are distinguishable from the competitors' testimony in *Philadelphia Nat'l Bank, 374 U.S. at 366, 367, n. 43*, which was largely discarded by the Supreme Court. The testimony in that case concerned the competitors' opinions as to the vigor of future competition after the merger. The affidavits here, however, are directed to the effect of the merger on the affiants' own businesses. Here, unlike *Philadelphia Nat'l Bank,* the competitors are speaking on that which they are most qualified to speak. Further, also unlike *Philadelphia Nat'l Bank,* the competitors here gave concrete reasons to support their statements.

[13] The government apparently sensed the futility of such questioning for it candidly admitted on page 4, footnote 1, of the Sheppard affidavit that it quit asking this question as the survey progressed.

must remain subservient to the wishes of their customers. In fact, the **[**47]** oil companies are quite capable of operating their own supply and utility boats. When offshore exploration for oil originated in the late 1940's, the oil companies supplied all the service craft. However, as the offshore marine transportation industry developed in the 1950's, they preferred to charter rather than invest in the boats, thus freeing more capital for the more lucrative investment in oil operations. But they continue to acquire and operate a number of their own supply and utility boats and have indicated that they would supply all of their own boats if they became dissatisfied with either the price or the service of the boats they charter. Clearly then, the combination of Tidewater and Twenty Grand will not enable the merged firm to act detrimentally to the welfare of their customers. [14]

[48]** **[*341]** The government appears to recognize these salient economic factors for, in the last analysis, it simply contends that there are certain economies of size and that these economies should be enjoyed by more than just one firm. We have already pointed out, however, that there are a number of other sizeable firms in this industry. These firms enjoy and will continue to enjoy the economies which accrue to larger business concerns. In fact, the drilling contractors in competition with the defendants are several times the size of the defendants, and thus in a better position to effect economies of size than Tidewater and Twenty Grand. The only specific economies of scale relied upon by the government are better financing arrangements and research and development projects. [15] As far as cheaper financing is concerned, the government's basic premise is correct - a large, established, financially sound firm can obtain financing at a lower cost. As we have already noted, however, this advantage would appear to be offset by their larger administrative expenses. Further, this advantage is already enjoyed, not only by Tidewater and Twenty Grand, but by a number of other larger **[**49]** firms as well, and we fail to see how a further increase in size will further increase the financing benefits already experienced by the defendants. The merger with respect to offering additional research and development possibilities appears beneficial rather than detrimental in that it would inure to the benefit of the industry as a whole. Additionally, the drilling contractors have a far greater financial capacity for engaging in research and development than the defendants. Thus, when stripped to the bone, the twin underpinnings of the government's contention as to the economies of size fail to sustain its position. But even more basically, we do not feel that economies of size alone can be any basis for invoking the antitrust laws. Quite the contrary, for the business quest for economy and efficiency is a mainstay of competition. It is when this quest is eliminated and stagnation sets in that competition suffers. Economies of size, acquired through a merger, will justify the application of the antitrust laws only when it offers the merged firm significant competitive advantages so that a probability of a substantial lessening of competition ensues. To hold otherwise would **[**50]** espouse a warped view of the fundamental policy of ***antitrust law***; mergers should not be condemned because they are beneficial to the merging parties, but because they are harmful to customers and competitors, or to competition as a whole. In this case, even if the merger were to afford economies of size to the defendants to the exclusion of other firms, the anticompetitive result is clearly absent.

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[14] If we assume, *arguendo,* that Tidewater and Twenty Grand did not have to fear being supplanted by their numerous competitors and could engage in oppressive practices forcing the oil companies to construct their own boats rather than charter, then it may be that this fact, that is, forcing the customers to invest in boats when it is more profitable for them to charter, would be a serious anticompetitive effect. Such a suggestion, however, answers itself for the defendants' own economic interest will prevent them from doing that which would destroy their own business.

[15] Parenthetically, we might note that advertising, which flourishes with size, is not a "major competitive weapon" in this industry as it was in *Federal Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967)*. We should also note, though, that a few government affidavits obtained from competitors of Tidewater and Twenty Grand stated that size does benefit a chartering firm in one respect in that it enables the large firm to replace a vessel which becomes disabled with another one. However, we do not know how often boats break down on the job and are unable to assess the significance, if any, of this factor. Further, it would not seem feasible to take a boat off of one job to replace a disabled boat on another job, nor would it appear profitable to maintain an idle fleet of boats in order to replace those which do break down. Finally, this factor, if true, appears without significance from the fact that the larger firms are already endowed with this "advantage," yet it has not dampened the flourishing competition from the small firms. Since this factor has not noticeably influenced the customers' choice in this market, the "advantage" it affords, if any, lacks any anticompetitive effect.

[51]** Bigness alone is not the evil. The Clayton Act's purpose is to thwart mergers which tend to stifle competition. For these reasons market shares, while undeniably important, do not tell the whole story. The law is geared to economics, not mathematics. ***HN14***[] The core question **[*342]** of the merger's probable effect on competition must be examined in light of all the pertinent economic factors of the particular market. *United States v. Continental Can Co., 378 U.S. 441, 458, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 322, 8 L. Ed. 2d 510, 82 S. Ct. 1502, n. 38 (1962)*. The examination of the economic structure of the market involved here completely demolishes any presumption of a *prima facie* violation of § 7 which may arise from the defendants' market share which we assumed to be 31% merely for the purposes of this opinion. From that examination of the defendants' competitors and customers, it is clear that the merger of Tidewater and Twenty Grand will not adversely affect either group. Nor have we been able to discern any public interest differing from the interests of these two groups which would be adversely affected. Due to the **[**52]** nature of the market, the merged firm will lack the oligopolistic power to set the pricing policy for the industry or engage in other anticompetitive practices. The government's argument that the merger will prevent pressure for lower prices, higher quality service, and innovations to improve efficiency is without merit. The oil companies award the charter contract on the basis of price and service. They certainly have the economic wherewithal to maintain the pressure for lower prices and better service. Nor is it as if they stood this vigil unaided, for an untold number of individualistic competitors, unimpressed by the defendants' size, stand by ready to pick up the defendants' contracts should they step out of line. The ease with which a boat may be financed and the speed with which it may be constructed insures this probability. These facts also serve to illustrate the lack of merit to the contention that the merger will block innovations to improve efficiency. In short, we are convinced, from the evidence before us, that the merger of Tidewater and Twenty Grand will not substantially lessen present competition in the furnishing of supply and utility boats. It would, of **[**53]** course, be utterly foolish to contend that the merger would tend to create a monopoly.

Our conclusion is the same when we turn, as we must, to its probable effect on future competition. There is absolutely nothing to indicate a contrary result. All the evidence as to the future is prophetic of significant increases in offshore oil exploration and production, which is beckoning even greater numbers of entrants into the marine transportation industry. The construction of new service craft is continuing at a furious pace. In fact, Tidewater's share of the total number of service craft has recently declined slightly, indicating that the industry as a whole is expanding faster than Tidewater. This has probably been the trend ever since the initiation of the industry as Tidewater appears to have been the pioneer firm in the industry. In view of these facts, we are simply unable to foresee any probability that future competition will be substantially lessened.

The reason for the merger certainly does not detract from our conclusion in any way. The avowed purpose of this merger is to enable Tidewater to crack the international towing market. Tidewater has no ocean-going tugboats. **[**54]** It does, however, have considerable experience with foreign countries in furnishing service craft for oil rigs located in foreign waters. Twenty Grand, on the other hand, has large tugboats capable of ocean towing. It, however, lacks Tidewater's significant international experience. Thus, the defendants feel that the combination of Tidewater's international experience with Twenty Grand's ocean towing capacity will enable them to overcome the existing barriers to entry into the apparently burgeoning business of ocean towing of rigs - a market which is completely dominated by foreign firms with no real American competition. We realize, of course, that ***HN15***[] the mere existence of a valid business purpose for the merger, with possible limited exceptions inapplicable here, will not rescue the **[*343]** merger from the Clayton Act if it has a probable anticompetitive effect. *United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965)*; *United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963)*, aff'd, *320 F.2d 509* (3rd Cir.). However, we do feel that where, as here, we find no anticompetitive effects, then the existence of a valid business purpose for the merger allays the **[**55]** inherent suspicion cast upon mergers by the Clayton Act.

One final consideration remains. The government has contended that the mere elimination of competition between Tidewater and Twenty Grand will substantially lessen competition in the relevant market. We do not agree. ***HN16***[] A horizontal merger such as this is not *per se* a violation of § 7. *Lunkenheimer Co. v. Condec Corp., 268 F. Supp. 667 (S.D.N.Y. 1967)*. If it were, no such merger would be allowed. In *Brown Shoe* the Court stated:

> "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. *The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market*." *370 U.S. at 335*.

[56]**

Consequently, ***HN17***[] in determining whether the elimination of competition between the merged firms violates § 7, we do not operate in a vacuum. We must determine whether it will substantially lessen competition in the relevant market. We are guided in this determination by our examination of the pertinent economic factors of that market. [16] From our examination **[*344]** above, it is clear that this market lacks the characteristics of those markets in which the elimination of competition between the merged firms has been found to be fatal. There is no history of prior mergers in this market or by these defendants. This is not an oligopolistic market in which a few firms set the industry standards in pricing and other practices. It is not an overly concentrated market. It does not appear probable that this merger will lead to other mergers, resulting in an unduly concentrated market. The reason for this is due to the esoteric purpose for this merger and the fact that size offers no significant advantages in the marine transportation industry. In light of these factors, the mere elimination of competition between Tidewater and Twenty Grand does not violate § 7. The market **[**57]** structure prohibits a contrary conclusion.

[58]** In summary, then, the government simply did not establish a basis for the issuance of a preliminary injunction. The government failed to carry its burden regarding the defendants' market shares, due to defects in the government's own proof as well as the rebuttal evidence introduced by the defendants. Further, if we assume the market shares to be as the government contends, the uncontroverted evidence produced by the defendants as to the economic factors of this market convinces us that even if the defendants do control 31% of a relevant market, there is no probability that the merger will substantially lessen competition. For these reasons, the government failed to show a reasonable probability of success upon the merits, and we therefore denied the motion for a preliminary injunction.

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[16] One court, however, apparently takes a different view. *United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 955 (S.D.N.Y. 1965)*. Relying on *United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 12 L. Ed. 2d 1, 84 S. Ct. 1033 (1964)*, the court there held that the elimination of substantial competition between the merged banks did in and of itself, and without regard to the pertinent economic factors of the relevant market, constitute a violation of § 7 of the Clayton Act. We do not agree with that view. The *Lexington* case involved the Sherman Act, and we are unwilling to extend that holding to the Clayton Act, especially when four of the justices in that case refused to ascribe to the majority holding. In addition, the *Lexington* case, as with all antitrust cases, turned on its own particular facts. See *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Ware. Co., 341 F.2d 287 (6th Cir. 1965)*. In that case it was clear from the *market structure* that the consolidation would seriously impede the ability of the remaining banks to compete. We feel justified in our opinion in view of the number of decisions applying § 7 of the Clayton Act subsequent to the *Lexington* case in none of which did the Supreme Court even mention the *Lexington* case. These decisions, the benefit of many of which was unavailable to the court in *Manufacturers Hanover,* leave undisturbed the principle quoted in *Brown Shoe, supra*, and, in fact, reaffirm that decision. Those decisions are: *Federal Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967)*; *United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 18 L. Ed. 2d 151, 87 S. Ct. 1088 (1967)* (this case did cite the *Lexington* case at 367 but for a totally unrelated principle); *United States v. Pabst Brewing Co., 384 U.S. 546, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)*; *United States v. Von's Grocery, 384 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*; *Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592, 14 L. Ed. 2d 95, 85 S. Ct. 1220 (1965)*; *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 12 L. Ed. 2d 775, 84 S. Ct. 1710 (1964)*; *United States v. Continental Can Co., 378 U.S. 441, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*; *United States v. ALCOA, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)*.

Aimcee Wholesale Corp. v. Tomar Products, Inc.

Court of Appeals of New York

January 17, 1968, Argued ; April 18, 1968, Decided

No Number in Original

Reporter

21 N.Y.2d 621 *; 237 N.E.2d 223 **; 289 N.Y.S.2d 968 ***; 1968 N.Y. LEXIS 1418 ****; 1968 Trade Cas. (CCH) P72,428

In the Matter of the Arbitration between Aimcee Wholesale Corporation, Appellant, and Tomar Products, Inc., Respondent

Prior History: **[****1]** *Matter of Aimcee Wholesale Corp. (Tomar Prods.), 26 A D 2d 915*.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 3, 1966, which unanimously affirmed an order of the Supreme Court at Special Term (Joseph A. Brust, J.), entered in New York County, denying a motion for a stay of arbitration.

Disposition: Order reversed, with costs, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

Core Terms

arbitration, antitrust, Donnelly Act, antitrust claim, anti trust law, violations, courts, commercial arbitration, public policy, parties, arbitration clause, common-law

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > Business Torts > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN1[] **Public Enforcement, State Civil Actions**

By terms, the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, declares every contract, agreement or conspiracy whereby a monopoly is or may be established or which in any way enervates free competition to be against public policy, illegal and void. Penal sanctions are provided in *N.Y. Gen. Bus. Law § 341*. Because of the importance of the policy and the clandestine nature of the violations, the attorney general is empowered to investigate alleged violations and to seek injunctive relief. In addition, civil actions to recover damages by injured parties are authorized.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN2[] **Regulated Practices, Private Actions**

The enforcement of New York's antitrust policy should not be left within the purview of commercial arbitration.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Governments > Courts > Authority to Adjudicate

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN3[] **Alternative Dispute Resolution, Judicial Review**

Arbitrators are not bound by rules of law and their decisions are essentially final. Certainly the awards may not be set aside for misapplication of the law. But, even if the court reviews the merits of the arbitrators' decision in antitrust cases, errors may not even appear in the record, which need not be kept. More important, arbitrators are not obliged to give reasons for their rulings or awards. Thus the court may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

It is evident that a judicially controlled system of awarding civil damages for violations of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, is a necessary and vital part of the statutory scheme.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Insurance Law > Claim, Contract & Practice Issues > Arbitration

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Governments > Courts > Authority to Adjudicate

HN5[] **Contract Conditions & Provisions, Arbitration Clauses**

The broadest of arbitration agreements cannot oust the courts from their role in the enforcement of major state policies, especially those embodied in statutory form.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN6[] **Regulated Practices, Private Actions**

Where antitrust considerations are imbedded in the issues in dispute, they ought not to be resolved by privately appointed arbitrators, and New York courts cannot abdicate their control over antitrust policy. By removing antitrust claims from the scope of arbitration, the court does not intend to demean the arbitration process. If anything, its proper role in settling the practical business problems of the everyday business world will be enhanced.

Headnotes/Summary

Headnotes

Arbitration -- matters arbitrable -- alleged violation of Donnelly Act (*General Business Law, § 340*, subd. 1) may not be subject of arbitration.

Appellant bought merchandise from respondent, the contract containing an arbitration clause to the effect that "Any controversy or claim arising out of or relating to this contract or the breach thereof" would be submitted to arbitration. Appellant sought arbitration of a claim based upon allegations that merchandise shipped was defective and that certain advertising allowances had not been paid. Respondent agreed to arbitration and served an answer in which it set up a counterclaim asserting **[****2]** that appellant had unlawfully exacted a discriminatory price reduction in violation of the Robinson-Patman Act (*U.S. Code, tit. 15, § 13*) and of the Donnelly Act (*General Business Law, § 340*, *subd. 1*). Thereafter, appellant moved for an order staying arbitration of this counterclaim. Respondent consented to the stay with respect to the alleged violation of Federal law, but resisted the stay as to the Donnelly Act claim. The motion for a stay should have been granted. The enforcement of our State's antitrust policy cannot be left to commercial arbitration. Arbitration is not a fit instrument for the determination of antitrust controversies which are of such extreme importance to all of the people of this State.

Counsel: *Marshall C. Berger, Ira M. Millstein* and *Irving Scher* for appellant. I. The effect of the decisions below is to abdicate court control over State statutory public policy. (*Matter of Colletti* [*Mesh*], *23 A D 2d 245, 17 N Y 2d 460*; *Matter of Bay Iron Works* [*Eisenstein*], *17 A D 2d 804*; *Durst v. Abrash, 22 A D 2d 39, 17 N Y 2d 445*; *Wilko v. Swan, 346 U.S. 427*; *Matter of Knickerbocker Agency* [*Holz*], *4 N Y 2d 245*; **[****3]** *Matter of Kingswood Mgt. Corp*. [*Salzman*], *272 App. Div. 328*; *Matter of Exercycle Corp*. [*Maratta*], *9 N Y 2d 329*; *Matter of Standardbred Owners Assn*. [*Yonkers Raceway*], *31 Misc 2d 474*.) II. The lower courts' decisions conflict with the purposes and enforcement policy of the *Donnelly Act. (Manhattan Stor. & Warehouse Co. v. Movers & Warehousemen's Assn. of Greater N. Y., 289 N. Y. 82*; *Kalmanash v. Smith, 291 N. Y. 142*; *Consumer-Farmer Milk Coop. v. Milk Drivers & Dairy Employees Local No. 584, 13 Misc 2d 590*.) III. Antitrust affirmative defenses and counterclaims in contract actions have traditionally been looked upon with disfavor by the courts and are contrary to the principal purpose for arbitration. (*Kelly v. Kosuga, 358 U.S. 516*; *Loew's Inc. v. Radio Hawaii, 20 Misc 2d 587*; *Fleischmann Distilling Corp. v. Frontier Liq. Corp., 18 Misc 2d 903*; *Matter of Mole* [*Queen Ins. Co. of America*], *14 A D 2d 1*; *Sporn v. Hudson Tr. Lines, 265 App. Div. 360*.) IV. Tomar's Donnelly Act claim, in effect, is an assertion that the entire agreement between the parties is void. (*Automatic Canteen Co.* ***[****4]*** *of America v. Federal Trade Comm., 346 U.S. 61*; *Matter of Kramer & Uchitelle* [*Eddington Fabrics Corp*.], *288 N. Y. 467*.)

Daniel F. Fitzgerald, Jr., for respondent. I. Having affirmed the arbitration agreement by initiating arbitration proceedings, petitioner-appellant may not now raise issues of illegality. (*Matter of Exercycle Corp*. [*Maratta*], *9 N Y 2d 329*; *Cole v. Mostel, 27 A D 2d 721*; *Matter of Wrap-Vertiser Corp*. [*Plotnick*], *3 N Y 2d 17*; *Matter of National Cash Register Co*. [*Wilson*], *8 N Y 2d 377*; *Matter of De Laurentiis* [*Cinematografica*], *9 N Y 2d 503*; *Wilko v. Swan,* 346 U.S. 427; Moran v. Paine, Webber, Jackson & Curtis, 422 Pa. 66; Reader v. Hirsch & Co., 197 F. Supp. 111; *Matter of Staklinski* [*Pyramid Elec. Co*.], 6 A D 2d 565, 6 N Y 2d 159.) II. Arbitration of a Donnelly Act claim offends no announced public policy of this State. (*Matter of Standardbred Owners Assn*. [*Yonkers Raceway*], 31 Misc 2d 474; Brooklyn Distilling Co. v. Standard Distilling & Distr. Co., 120 App. Div. 237, 193 N. Y. 551; Cummings v. Union Blue Stone Co., 164 N. Y. 401; **[****5]** *Matter of Exercycle Corp*. [*Maratta*], 9 N Y 2d 329; Manhattan Stor. & Warehouse Co. v. Movers & Warehousemen's Assn. of Greater N. Y., 289 N. Y. 82; Saucy Susan Prods. v. Allied Old English, 200 F. Supp. 724; *Matter of Ruppert* [*Egelhofer*], 3 N Y 2d 576; *Matter of Health Arms* [*Kemler*], 207 Misc. 849; *Matter of Grayson-Robinson Stores* [*Iris Constr. Corp*.], 8 N Y 2d 133; Alexander's Dept. Stores v. Orbach's, 266 App. Div. 535.) III. The Donnelly Act claim is not asserted as a defense to, or avoidance of, contractual liability, but as a proper and related affirmative claim. (Kelly v. Kosuga, 358 U.S. 516; Refrigeration Sales Co. v. York Corp., 32 Misc 2d 231, 18 A D 2d 1140; Sporn v. Hudson Tr. Lines, 265 App. Div. 360; *Renault, Inc. v. Auto Imports, 15 A D 2d 905*.)

Judges: Chief Judge Fuld and Judges Burke, Scileppi, Bergan and Jasen concur with Judge Keating; Judge Breitel taking no part.

Opinion by: KEATING

Opinion

[*623] [223] [***969]** In February of 1964, appellant, Aimcee Wholesale Corporation, bought some $ 100,000 in merchandise from respondent, Tomar Products, Inc. The contract, **[****6]** a form purchase order, contained a broad arbitration clause to the effect that "Any controversy or claim arising out of or relating to this **[*624]** contract or the breach thereof" would be submitted to arbitration.

In August of 1965, Aimcee sought arbitration of a claim for $ 26,870.61 based upon allegations that the merchandise shipped was defective and that certain advertising allowances had not been paid. At about that time, Aimcee had been sued by Tomar in the Supreme Court, Monroe County, based upon an alleged breach of the same agreement. Aimcee also demanded that this claim be submitted to arbitration.

Tomar agreed to arbitration and served an answer in which it set up as a first counterclaim the cause of action then pending in the courts.

A second counterclaim, however, was also interposed asserting that Aimcee had unlawfully **[**224]** exacted a discriminatory price reduction in violation of the Robinson-Patman Act (U. S. Code, tit. 15, § 13) and of the Donnelly Act (General Business Law, § 340, subd. 1). Tomar asked $ 15,000 in treble damages. [*]

[**7]** Thereafter, Aimcee moved for an order staying arbitration of this second counterclaim. Tomer consented to the stay with respect to the alleged violation of Federal law, but resisted the stay as to the Donnelly Act claim.

Special Term denied Aimcee's application, contending that the antitrust claim was related to the contract and was, therefore, arbitrable.

The Appellate Division unanimously affirmed (*26 A D 2d 915*) but went off on a different ground. It agreed that Tomar or Aimcee could resist arbitration on the ground that the contract including the arbitration clause was infected with illegality but, the court said, since Aimcee did not deny that there was a valid agreement to arbitrate, it could not object to any particular claim arising out of the parties' contractual dealings (*supra, p. 916*).

Leave to appeal was granted by this court. We conclude that there should be a reversal here and that the motion for a stay should have been granted. The enforcement of our State's antitrust policy cannot be left to commercial

[*] New York law has no provision for treble damages in antitrust claims.

arbitration, which serves a vital and constructive role in the business world, but is not a fit instrument for the determination of antitrust controversies **[****8]** which are of such extreme importance to all of the people of this State.

[*625] [*970]** It will be assumed that the broad language of the arbitration clause embraces even antitrust claims although it is nothing less than a fiction to assume that the parties contemplated or even conceived of the possibility that the form arbitration clause on Aimcee's purchase order constituted an authorization for an arbitrator to decide whether or not Aimcee had violated the ***antitrust law*** of the State of New York (*General Business Law, art. 22*).

The Appellate Division's analysis that a party desiring arbitration cannot at the same time seek to limit the scope of an arbitration is unsatisfactory. The opinion concedes that if Tomar had resisted Aimcee's demand for arbitration, alleging that the agreement was so tainted by illegality that the agreement to arbitrate was nullified, Tomar could have had a trial before the court on that issue (*Durst v. Abrash, 22 A D 2d 39*, affd. *17 N Y 2d 445*). We do not view the problem here so narrowly. The fundamental issue here is the appropriateness of arbitration for the consideration of antitrust problems. This question persists no matter in **[****9]** what procedural context the issue arises in arbitration. Our decision cannot properly turn on the happenstance of who initiates the litigation or arbitration.

New York's ***antitrust law*** represents a public policy of the first magnitude. ***HN1***[] By its very terms, subdivision 1 of *section 340 of the General Business Law* declares every contract, agreement or conspiracy whereby a monopoly is or may be established or which in any way enervates free competition to be "against public policy, illegal and void." Penal sanctions are provided for in *section 341 of the General Business Law*. Both because of the importance of the policy and the clandestine nature of the violations, the Attorney-General is empowered to investigate alleged violations and to seek injunctive relief (*General Business Law, § 342*). In addition, civil actions to recover damages by injured parties are authorized (*General Business Law, § 340*, *subd. 5*). There is thus a complete panoply of sanctions and civil relief.

It is also significant that, because of the public interest involved in Donnelly Act **[**225]** suits, in 1959 a statutory requirement was added that the Attorney-General be given notice of all civil actions brought **[****10]** by private parties under article 22 (*General Business Law, § 340*, *subd. 5*; L. 1959, ch. 226).

[*626] The importance of our State's antitrust policy is reflected in our decision in *Manhattan Stor. & Warehouse Co.* v. *Movers Assn*. (*289 N. Y. 82* [1942]). We there held that our courts would not adjudicate on a stipulated set of facts whether a particular agreement violated the State's ***antitrust law*** since to do so **[***971]** might result in a decision on a question of law of widespread significance on the basis of erroneous facts and without the participation of the representatives of the public interest. The sensitivity of the court to the possibility of feigned controversies on an issue of such pervasive importance was but a reflection of the strength of the public policy codified in the Donnelly Act.

The importance of antitrust laws in our nation's economic system was stated most forcefully by the Supreme Court in *Northern Pac. Ry. Co.* v. *United States* (356 U.S. 1, 4-5): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the **[****11]** unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States.'"

Section 340 of our General Business Law, the language of which is almost a copy of section 1 of the Sherman Act, represents an equally strong public policy in favor of free competition for New York.

We come then to our principal conclusion here, which is that ***HN2***[] the enforcement of our State's antitrust policy should not be left within the purview of commercial arbitration.

HN3[] Arbitrators are not bound by rules of law and their decisions are essentially final. Certainly the awards may not be set aside for misapplication of the law (*CPLR 7511*). Even if our courts were to review the merits of the arbitrators' decision in antitrust cases, **[****12]** errors may not even appear in the record which need not be kept in any case. More important, arbitrators are not obliged to give reasons for their rulings or awards. Thus our **[*627]** courts may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law. Furthermore, there is no way to assure consistency of interpretation or application. The same conduct could be condemned or condoned by different arbitrators.

If the arbitrators here should decide wrongly that the goods were or were not defective, the injustice done is essentially only to the parties concerned. If, however, they should proceed to decide erroneously that there was or was not a violation of the Donnelly Act, the injury extends to the people of the State as a whole. To illustrate, if Tomar is correct **[***972]** in its claim that the rebate here violates the Donnelly Act, and the arbitration panel should deny the claim, then in effect the arbitrators have permitted Aimcee to receive an unjustifiable price reduction which weakens the position of Aimcee's competitors. Conversely, if Tomar is incorrect in its contention, but the arbitrators **[****13]** should rule in its favor, then the award may be passed on to the consumer in the form of higher prices.

Thus the issue which the arbitrators will be called upon to decide transcends the **[**226]** private interests of the parties. It is not simply that arbitrators can impose unnecessarily restrictive or lenient standards. The evil is that, if the enforcement of antitrust policies is left in the hands of arbitrators, erroneous decisions will have adverse consequences for the public in general, and the guardians of the public interest, the courts, will have no say in the results reached. To paraphrase the court's language in the *Manhattan Stor. & Warehouse* case, the parties will obtain a decision here on a matter of moment to the public at large, although the State is not a party to the proceedings, and no party to the proceedings is authorized to defend the interests of the public (*289 N. Y. 82, 89)*.

In this connection, it is pertinent to ponder what application will be given to the statutory requirement that notice of all Donnelly Act claims shall be given to the Attorney-General if these claims are permitted to go to arbitration. There is no reason to assume that the Attorney-General **[****14]** will be less interested in any alleged violations that are submitted for arbitration. Yet, it is inconceivable that the Attorney-General would seek to vindicate the public interest before a private arbitration panel.

[*628] ***HN4***[] It is, therefore, evident that a judicially controlled system of awarding civil damages for violations of the Donnelly Act is a necessary and vital part of the statutory scheme.

Thus, the decision below is not in accord with the fundamental assumptions of *Matter of Exercycle Corp*. (*Maratta) (9 N Y 2d 329* [1961]) which the Appellate Division cited in support of its position. Underpinning *Matter of Exercycle* is the thought that the ordinary rules of common-law illegality involve defenses to which parties to a business agreement should not be bound. "No statute or public policy, as reflected in a legislative act, is here involved * * * and, absent one or the other, it has long been firmly established that arbitrators may disregard the strict and traditional rules of law" (*supra, p. 335*).

Antitrust claims cannot be co-opted into the category of common-law rules voiding contracts for lack of consideration or mutuality and **[***973]** treated **[****15]** in a similar manner. When one contrasts the provisions of *article 22 of the General Business Law* with the lack of any powerful statutory scheme for voiding contracts which violate common-law rules of illegality, the inappropriateness of arbitration for antitrust claims becomes apparent. For example, the common-law requirement of consideration has been weakened by statutory modification because we now consider the traditional rules harsh. (See *General Obligations Law, § 5-1109*.) On the other hand, the common-law rule against restraints of trade has been reinforced by statute, bringing within the orbit of proscribed conduct acts which in an earlier day would have been thought perfectly proper and acceptable.

The realities of the commercial arbitration process bolster the conclusion that commercial arbitration is not a proper mechanism for a determination as to whether the price rebate here was discriminatory and violated the Donnelly Act. Arbitrators are often businessmen chosen usually for their familiarity with the practices of a particular industry or for their expertise with the real issues in dispute, which are almost always unrelated to antitrust claims. This problem is **[****16]** aggravated by the fact that the enforcement of the State's antitrust policy has often been a by-product of Federal enforcement. Thus, even if we were to assume that we have knowledgeable arbitrators, who would willingly and earnestly seek to follow judicial precedent, we cannot ignore the fact that many of the most important **[*629]** issues in ***antitrust law***, including specifically those in this case, have never been resolved definitively under New York law. This is shown by the fact that it has never been determined whether price **[**227]** discrimination would violate the Donnelly Act.

Moreover, we cannot overlook the fact that many undeserving litigants are awarded damages in antitrust cases. Arbitrators are more likely to give more consideration to equitable notions such as waiver, estoppel and *in pari delicto*. Every time this is done, however, the deterrent effect of the law on antitrust violations is severely diminished.

The comment of the late Judge Clark in his dissenting opinion in *Wilko v. Swan (201 F. 2d 439, 445* [2d Cir.]), whose position was ultimately sustained by the *Supreme Court (346 U. S. 427*), pointing out the dangers of permitting commercial **[****17]** arbitration to extend its reach into areas of grave public policy, is most relevant here: "Commercial arbitration has been highly successful in bringing a businessman's adjudication to business questions. But it would be vastly unfortunate if it became usable as a device to blunt or break social legislation."

Thus, it must be recognized that through the use of economic power and contracts of adhesion, containing broad arbitration clauses, antitrust **[***974]** violators may be able to insulate their transgressions of the ***antitrust law*** from judicial scrutiny. The opportunity for abuse is apparent. Under various guises, an industry, while nominally assuring obedience to the State's ***antitrust law***, may in reality be establishing and enforcing entirely unacceptable practices.

We have often held that ***HN5***[] the broadest of arbitration agreements cannot oust our courts from their role in the enforcement of major State policies, especially those embodied in statutory form (*Durst v. Abrash, 22 A D 2d 39*, affd. *17 N Y 2d 445*, *supra* [usury laws]; *Matter of Knickerbocker Agency* [*Holz*], *4 N Y 2d 245* [liquidation of defunct insurance companies]; *Matter of Kingswood Mgt.* **[****18]** *Corp*. [*Salzman*], *272 App. Div. 328* [claim under Federal Emergency Price Control Act of 1942]; see, also, *Wilko v. Swan, 346 U.S. 427*, *supra* [claim under Securities Act of 1933]; *Koven & Brother* v. *Local Union No. 5767, United Steelworkers of America, 381 F. 2d 196* [3d Cir.] [scope of discharge in bankruptcy]; contra, *Fallick v. Kehr, 369 F. 2d 899* [2d Cir.] [scope of discharge in bankruptcy]; **[*630]** 8 Weinstein-Korn-Miller, N. Y. Civ. Prac., pars. 7501.15-7501.19). Recently, the Second Circuit in *American Safety Equip. Corp.* v. *Maguire Co*. (*391 F. 2d 821*) came to a conclusion similar to ours involving arbitration of a Federal antitrust claim (see, also, *Silvercup Bakers v. Fink Baking Corp., 273 F. Supp. 159, 162-163* [S. D. N. Y.] [dictum]).

All these reasons compel us to determine that ***HN6***[] where antitrust considerations are imbedded in the issues in dispute, they ought not to be resolved by privately appointed arbitrators, and our courts cannot abdicate their control over antitrust policy. By removing antitrust claims from the scope of arbitration, we do not intend to demean the arbitration process. If anything, **[****19]** its proper role in settling the practical business problems of the everyday business world will be enhanced.

The order of the Appellate Division should be reversed and the appellant's application for a stay of arbitration of respondent's claim under *article 22 of the General Business Law* should be granted, with costs.

Order reversed, with costs, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

LexisNexis®

Original Tractor Cab Co. v. United States

United States District Court for the Southern District of Indiana, Indianapolis Division

April 26, 1968

No. IP 67-C-307

Reporter

286 F. Supp. 281 *; 1968 U.S. Dist. LEXIS 12406 **; 68-1 U.S. Tax Cas. (CCH) P9374; 21 A.F.T.R.2d (RIA) 1340

Original Tractor Cab Co., Inc., Plaintiff v. United States of America, Defendant

Core Terms

attorney's fees, damages, trebled, patent infringement, anti trust law, Clayton Act, antitrust violation

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

HN1[] **Costs & Attorney Fees, Clayton Act**

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, and the cost of suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Clayton Act > General Overview

Tax Law > ... > Tax Accounting > Accrual Method > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

I.R.C. § 1306 (1954) provides: If an amount representing damages is received or accrued during a taxable year as a result of an award in, or settlement of, a civil action brought under § 4 of the Clayton Act, for injuries sustained by the taxpayer in his business or property by reason of anything forbidden in the antitrust laws, then the tax attributable to the inclusion of such amount in gross income for the taxable year shall not be greater than the aggregate of the increases in taxes which would have resulted if such amount had been included in gross income in equal installments for each month during the period in which such injuries were sustained by the taxpayer.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Tax Law > ... > Tax Accounting > Accrual Method > General Overview

HN3[] **Costs & Attorney Fees, Clayton Act**

Treas. Reg. § 1.1306a-1(b)(1) provides: For purposes of *I.R.C. § 1306*, the term "damages" means an amount awarded pursuant to a judgment as the result of a civil action instituted under § 4 of the Clayton Act for injuries sustained by the taxpayer in his business or property by reason of anything forbidden in the antitrust laws. The term "damages" includes treble damages awarded under § 4 of the Act, but it does not include attorneys' fees, interest, or costs.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Patent Law > Infringement Actions > General Overview

Patent Law > Remedies > General Overview

Patent Law > ... > Damages > Collateral Assessments > General Overview

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Patent Law > Remedies > Damages > Increased Damages

Patent Law > Remedies > Damages > Patentholder Losses

Tax Law > ... > Tax Accounting > Accrual Method > General Overview

HN4[] **Costs & Attorney Fees, Clayton Act**

The exclusion of attorneys' fees in Treas. Reg. § 1.1306-1(b)(1) refers to non-trebled "reasonable attorney's fees" recoverable under § 4 of the Clayton Act, but not to attorneys' fees incurred in the defense of a patent infringement action which are trebled as an element of "compensatory damages." The latter type of attorneys' fees are in the same class as damages for loss of business such as finance expenses, advertising costs, and loss of potential sales, and were, therefore, trebled. The regulation clearly provides that the term "damages" includes treble damages awarded under § 4 of the Act. The court must conclude that the statement in the regulation that the term "damages" does not include attorneys' fees," therefore, refers to the non-trebled attorney's fee incurred in the prosecution of the antitrust action under § 4 of the Act.

Judges: [1]** Holder, District Judge.

Opinion by: HOLDER

Opinion

[*281] Findings of Fact and Conclusions of Law

HOLDER, District Judge:

The captioned case was tried under the issues of the complaint filed July 19, 1967, as amended December 4, 1967, and the answer thereto filed on September 25, 1967, as amended on December 4, 1967. Opening arguments, trial, final arguments, and arguments on briefs having been waived, the matter was submitted to the Court on the stipulation of the parties and the post-trial briefs, and the admissions contained in said pleadings, stipulations, and/or briefs. The Court being advised in the matter does now submit its:

Findings of Fact

1. On April 14, 1950, Clyde E. Clapper brought suit in the United States District Court for the Southern District of Indiana, Civil Number 2255, against the Original Tractor Cab Co., Inc. (hereinafter called "Original") for an alleged patent infringement. Original counterclaimed for misuse of patents and violations of the antitrust laws. Original also filed cross-claims against the licensees of Clapper. 2. In December, 1954, Original and the licensees entered into an agreement whereby Original received $110,000.00 as settlement of **[**2]** its claims against the licensees. 3. In January, 1958, the United States District Court for the Southern District of Indiana, Indianapolis Division, found that the Clapper patent was invalid and that Clapper had violated the antitrust laws. The Court determined that Original was damaged in the amount of $27,611.35. This sum was **[*282]** trebled under Section 4 of the Clayton Act to $82,834.05. The Court credited the $82,834.05 against the $110,000.00 that Original had received on the prior settlement. The Court also awarded $28,244.31 to Original as its attorneys' fees in the patent infringement cause of action. *Clapper v. Original Tractor Cab Co., Inc., 165 F. Supp. 565* (S.D. Ind., 1958). 4. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court except that it found that the attorneys' fees in the patent infringement litigation should have been included as an element of damages in the antitrust cause of action and thereby trebled under the *Clayton Act. Clapper v. Original Tractor Cab Co., Inc., 270 F.2d 616* (7th Cir., 1959), cert. denied *361 U.S. 967, 4 L. Ed. 2d 547, 80 S. Ct. 588 (1960)*. Thus, the judgment awarded **[**3]** to Original included $27,611.35 (damages from loss of business) X 3 plus $28,244.31 (attorneys' fees in the patent infringement cause of action) X 3 for a total of $167,566.98. Original was then required to subtract the $110,000.00 it received from the licensees from this sum for a difference of $57,566.98.

5. Original received said $57,566.98 in 1960. In its 1960 Corporate Income Tax Return, Original allocated said $57,566.98 to the years in which the antitrust violations occurred. 6. On October 29, 1965, the Commissioner of Internal Revenue assessed a deficiency against Original in the amount of $14,132.84 tax and $3,919.05 interest. 7. On November 3, 1965, Original paid the total deficiency plus interest in the amount of $18,051.89. 8. Original filed a claim for refund on or about November 19, 1965, with the District Director of Internal Revenue at Indianapolis, Indiana, in the amount of $14,132.84 plus statutory interest. 9. On July 11, 1966, Original executed a waiver of

statutory notice of disallowance and filed a suit for refund on July 19, 1967, in this Court to recover $18,051.89 plus interest.

10. The issue in this case is whether the plaintiff: (1) should include **[**4]** said sum of $57,566.98 in its income for 1960 when said sum was received; or (2) should allocate said sum of $57,566.98 to the years in which the antitrust violations occurred pursuant to the provisions of *Section 1306 of the Internal Revenue Code of 1954*. 11. The plaintiff argues that said $57,566.98 should be allocated to the years in which the antitrust violations occurred because the $57,566.98 represents damages received as a result of an award in a civil action brought under Section 4 of the Clayton Act within the meaning of *Section 1306 of the Internal Revenue Code of 1954*. 12. The defendant argues that said $57,566.98 is included in the plaintiff's income for 1960 because said sum represents attorneys' fees or amounts received directly from an award of attorneys' fees and the allocation provisions of *Section 1306 of the Internal Revenue Code of 1954* do not apply to amounts received for attorneys' fees or to amounts received directly from an award of attorneys' fees.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of this action. 2. The plaintiff has proved by preponderance of the evidence all of the essential elements and facts **[**5]** of the amended complaint. 3. The plaintiff was awarded compensatory damages by this Court under its Amended Order dated June 10, 1960, as the result of a direction by the United States Court of Appeals for the Seventh Circuit under date of September 30, 1959, which compensatory damages were trebled in accordance with Section 4 of the Clayton Act. Against this threefold amount a credit of $110,000.00 was credited as an amount previously paid by the co-conspirators. The net amount received, viz. $57,566.98, represents an award for violation of the ***antitrust law*** under Section 4 of the Clayton Act and, as such, may be reallocated pro rata over the period of violation pursuant to *Section 1306 of the Internal Revenue Code of 1954*. ***HN1***[] 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 **[*283]** damages by him sustained, and the cost of suit, including a reasonable attorney's fee.". Original Tractor Cab Co., Inc. recovered $25,000.00 as reasonable attorneys' fees for the prosecution of its counterclaim for antitrust violations **[**6]** under this section. Plaintiff did not reallocate this amount, but properly included it in its income for the year 1960. The part of the award which plaintiff argues can be allocated under *Section 1306 of the Internal Revenue Code* is the $28,244.31 expense for attorneys' fees incurred in the defense of the patent infringement action brought against it by Clyde E. Clapper. The Seventh Circuit (*Clapper v. Original Tractor Cab Company, 270 F.2d 616 (1959))* held that this amount "should be included in the compensatory damages sustained by Defendants as a result of the antitrust violation". This amount was, therefore, trebled along with damages for loss of business "as an element of damages in the antitrust action".

HN2[] *Section 1306 of the Internal Revenue Code of 1954*, as it was in force in 1960, provided:

> "If an amount representing damages is received or accrued during a taxable year as a result of an award in, or settlement of, a civil action brought under section 4 of the Act * * *, for injuries sustained by the taxpayer in his business or property by reason of anything forbidden in the antitrust laws, then the tax attributable to the inclusion of such amount in gross income for **[**7]** the taxable year shall not be greater than the aggregate of the increases in taxes which would have resulted if such amount had been included in gross income in equal installments for each month during the period in which such injuries were sustained by the taxpayer."

HN3[] Section 1.1306a-1(b)(1) of the Treasury Regulations (Title 26 C.F.R. Section 1.1306a-1) provides:

> "For purposes of *section 1306* and this section the term 'damages' means an amount awarded pursuant to a judgment * * * as the result of a civil action instituted under section 4 of the Act * * * for injuries sustained by the taxpayer in his business or property by reason of anything forbidden in the antitrust laws. The term 'damages' includes treble damages awarded under section 4 of the Act but it does not include attorneys' fees, interest, or costs."

It appears to the Court that *HN4*[] the exclusion of attorneys' fees in the regulation refers to non-trebled "reasonable attorney's fees" recoverable under Section 4 of the Clayton Act, but not to attorneys' fees incurred in the defense of a patent infringement action which are trebled as an element of "compensatory damages". The latter type of attorneys' fees were regarded **[**8]** by the Court to be in the same class as damages for loss of business such as finance expenses, advertising costs, and loss of potential sales, and were, therefore, trebled. The regulation clearly provides that "the term 'damages' includes treble damages awarded under Section 4 of the Act". The Court must conclude that the statement in the regulation that "the term 'damages' * * * does not include attorneys' fees", therefore, refers to the non-trebled attorney's fee incurred in the prosecution of the antitrust action under Section 4 of the Act. 4. The law is with the plaintiff and against the defendant in all of the issues of the essential elements and facts of the pleadings based upon the facts as found by this Court in its Findings of Facts. 5. The Clerk is directed to enter judgment in accordance with these findings and conclusions; that the Federal Income Tax for the year 1960 be recalculated upon the basis of these findings and conclusions; that the plaintiff's recovery of defendant is refund of such taxes with the interest which they have over-paid, together with interest thereon at the rate of 6% per annum until repaid in accordance with the law; and that the costs of this **[**9]** action be assessed against the defendant.

End of Document

National Dairy Products Corp. v. Federal Trade Com.

United States Court of Appeals for the Seventh Circuit

May 14, 1968

No. 15896

Reporter

395 F.2d 517 *; 1968 U.S. App. LEXIS 6956 **; 1968 Trade Cas. (CCH) P72,445

National Dairy Products Corp. v. Federal Trade Commission

Subsequent History: **[**1]** *Cert. Denied, 393 U.S. 977, 89 S. Ct. 444, 21 L. Ed. 2d 438 (1968)*.

Core Terms

discount, customers, milk, chain, purchasers, prices, averaging, certiorari denied, competitors, list price, Foods, meeting competition, ice cream, dairies, selling, cost saving, Clayton Act, aggregating, wholesale, retail, price discrimination, discriminatory, allowance, condemned, delivery, products, seller, volume, competitive injury, dairy product

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN1[] **Robinson-Patman Act, Claims**

The competitive effects clause of § 2(a) of the Clayton Act, *15 U.S.C.S. § 13(a)*, does not require showing that injury has actually occurred, but merely that the effect of the discrimination may be substantially to lessen competition. Any substantial, sustained differential between competing resellers is prima facie injurious. "Mini-injury" is the test.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN2[] **Price Discrimination, Competitive Injuries**

Injury from discriminatory pricing may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN3[] **Price Discrimination, Competitive Injuries**

Unless minuscule, the portion of the market that might be affected by the charging of discriminatory prices is immaterial.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN4[] **Price Discrimination, Competitive Injuries**

Competitive injury is not negated by the pricing policies of a company's competitors.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN5[] **Robinson-Patman Act, Defenses**

Even though a business' discounts violate § 2(a) of the Clayton Act, the business has a good defense by showing that its lower price was made in good faith to meet an equally low price of a competitor.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN6[] **Defenses, Cost Justification Defense**

Section 2(b) of the Clayton Act, *15 U.S.C.S. § 13(b)*, may be satisfied unless the seller is meeting prices that he knows to be illegal or that are of such a nature as are inherently illegal.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN7[] Price Discrimination, Defenses

The requirement that a seller must show it had reason to believe that it was meeting lawful lower prices has been abandoned by the Federal Trade Commission.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN8[] Robinson-Patman Act, Defenses

The cost savings proviso permits differentials making only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the delivery methods or quantities in which commodities are sold or delivered to purchasers.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Business & Corporate Law > Unincorporated Associations

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] Price Discrimination, Defenses

A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of musts in the use of the average cost of customer groupings under the proviso of § 2(a) of the Clayton Act is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] Price Discrimination, Defenses

When a store, by virtue of being averaged with a larger store, receives a discount it has not earned, it gains an unfair competitive advantage of the sort which the amended Clayton Act was designed to prevent. An averaging system, when it permits some stores to receive a significantly larger discount than they could earn individually, has an anticompetitive effect comparable to that of practices long condemned by the Clayton Act. Thus, a territorial price discrimination violates the Clayton Act because a seller's high prices in one area subsidize its low prices in another.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] Price Discrimination, Competitive Injuries

A basing point system in which the seller absorbs freight charges to some customers and adds "phantom" freight charges to others constitutes discriminatory pricing because they are related to factors other than actual costs of production or delivery.

Antitrust & Trade Law > Clayton Act > General Overview

HN12[] Antitrust & Trade Law, Clayton Act

The retail stores of an association can be classified as purchasers from the manufacturer even if they technically purchase from the association where such a classification would further the purposes of the Clayton Act, as amended.

Judges: Hastings, Chief Judge, Major, Senior Circuit Judge, and Cummings, Circuit Judge.

Opinion by: CUMMINGS

Opinion

[*520] CUMMINGS, Circuit Judge:

This case arises on the petition of National Dairy Products Corporation ("National") to set aside an order of the Federal Trade Commission applicable to its Sealtest Foods Division.

National is a Delaware corporation with its principal office and place of business in New York City. It is engaged in the business of purchasing, manufacturing, processing, distributing and selling dairy and other products throughout the United States. It is the nation's largest dairy product distributor. Its Sealtest Division has general supervision over National's food, milk and ice cream divisions and subsidiaries. The Sealtest divisions sell a diversified line of food products, including milk and ice cream. In 1956, National's net sales were approximately $1,352,878,000, increasing to $1,790,834,000 in 1961.

At the close of 1957, the Federal Trade Commission issued a complaint charging that National had violated Sections 2(a) and (d) of the Clayton Act, **[**2]** as amended by the Robinson-Patman Act (*15 U.S.C. §§ 13(a)* and *13(d)*), in the course of sales of milk and other dairy products through its Sealtest Foods Division. In July 1963, a hearing examiner held that National had violated both statutory provisions and accordingly recommended a **[*521]** cease and desist order after rejecting National's defenses of cost justification and good-faith meeting of competition.

National appealed to the Commission from the Section 2(a) portion of the examiner's order. The Commission granted the appeal in part in a 2-1 decision culminating in the following order:

> " IT IS ORDERED that respondent National Dairy Products Corporation, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of any of the items in the product line of its Sealtest Foods Division, including but not limited to fluid milk, dairy products, ice cream and other food products, in commerce, as 'commerce' is defined in the Clayton Act, do forthwith cease and desist from:

> "1. Discriminating, directly or indirectly, **[**3]** in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price." [1]

In addition to arguing that the Commission's findings and conclusions are unsupported by substantial evidence, National asserts that the Commission majority misinterpreted the clauses in Sections 2(a) and (b) of the Clayton Act dealing with cost justification, good-faith meeting of competition and competitive effects. Commissioner Elman's dissent, **[**4]** on which National relies, deals only with the standards to be applied to the defense of meeting competition under Section 2(b) of the Act. The Commission's order was based on National's discriminatory pricing in the following areas: (1) Jackson-Lansing-Battle Creek, Michigan; (2) Toledo, Ohio -- Monroe, Michigan; (3) Memphis, and (4) New Orleans. As to the first area, the Commission held that the evidence was insufficient to find that National's sales were in interstate commerce, so that only the other three areas are presently involved. In this opinion, each area and the legal issues pertaining thereto will be covered separately.

Toledo-Monroe Area

Here in 1958 National granted 13 customers a fluid milk discount of 12%, 8 customers 10%, and one customer 7%. These 22 discounts were in excess of those received by National's other retail store customers. One hundred fifty-eight of them received no discounts and 112 received discounts ranging from 2% to 6%.

Although rejecting the examiner's finding of primary line injury, the Commission sustained his finding of potential secondary line injury to retail grocers selling Sealtest milk. **[**5]** ***HN1***[] The competitive effects clause of the statute of course does not require showing that injury has actually occurred, but merely that the effect of the discrimination "may be substantially to lessen competition" (*15 U.S.C. § 13(a)*). As here, any substantial, sustained differential between competing resellers is *prima facie* injurious. "Mini-injury" is the test. Rowe, "Section 2(a) of the Robinson-Patman Act New Dimensions in the Competitive Injury Concept," 37 ABA ***Antitrust Law*** Journal 14, 16 (1968).

Only six independent grocery stores received more than a 6% discount from National, whereas most of its chain and group store customers were receiving a 12% discount. These high discounts enabled them to sell Sealtest milk at a price lower than the price paid to National for such milk by all but six of its **[*522]** independent store customers. The evidence clearly shows that National's discounts resulted "in price differentials between competing purchasers sufficient in amount to influence their resale prices" of milk. Under *Federal Trade Commission v. Morton Salt Company, 334 U.S. 37, 47, 92 L. Ed. 1196, 68 S. Ct. 822*, **[**6]** this showing is adequate to support the Commission's finding that the effect of National's price discriminations might be substantially to injure competition among retail stores in the Toledo-Monroe area.

In *E. Edelmann & Company v. Federal Trade Commission, 239 F.2d 152, 154 (7th Cir. 1956)*, certiorari denied, *355 U.S. 941, 2 L. Ed. 2d 422, 78 S. Ct. 426*, we held the competitive effects clause of Section 2(a) of the Clayton Act satisfied in the following circumstances:

> "We therefore turn to the record which shows substantial discriminations in price; that the purchasers of petitioner's products sold in a market where competition was keen; that these purchasers operated on small profit margins; that many of the purchasers found it expedient to enter into group buying arrangements for the purpose of aggregating their purchases and thereby obtaining higher discounts than they would otherwise receive as ordinary jobbers in contrast to the warehouse distributor."

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[1] A second portion of the order concerned National's violation of Section 2(d). National did not appeal to the Commission from that portion of the order, but in this Court, National objected to the entire order on the ground that it was supported by only two of the Commission's five members. In view of *Federal Trade Commission v. Flotill Products, 389 U.S. 179, 19 L. Ed. 2d 398, 88 S. Ct. 401*, this point has been abandoned.

Since all these factors were present here, the Commission's finding of probable competitive injury must stand. This is true even if there had been direct testimony by non favored **[**7]** customers that the price discriminations had not injured their businesses. *Foremost Dairies, Inc. v. Federal Trade Commission, 348 F.2d 674, 680 (5th Cir. 1965)*, certiorari denied, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435*. As there pointed out, ***HN2***[] injury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers.

As in *United Biscuit Company of America v. Federal Trade Commission, 350 F.2d 615, 621 (7th Cir. 1965)*, certiorari denied, *383 U.S. 926, 15 L. Ed. 2d 845, 86 S. Ct. 930*, the Commission did not apply a *per se* test in finding that the competitive effect of National's pricing practices would be substantial. Instead, it relied on the following factors and testimony of independent store owners (TRADE REGULATION REPORTS (1965-1967 Transfer Binder) para. 17,656, pp. 22,917-22,918) (1966)):

> "They received either no discount or a discount of 2 or 3 percent on their **[**8]** purchases of Sealtest milk. Their retail prices to the public generally were from 41 cents to 43 cents a half gallon. The generally prevailing retail price of Sealtest milk at the chain stores was 37 cents. At regular intervals, either on weekends or each month, the chains offered Sealtest milk at three half gallons for one dollar.
>
> "The independent store owners named chain stores selling Sealtest milk as their competitors. All of them stated that they had lost business as a result of the chain stores' prices, one of them characterizing the effect of such pricing as 'devastating' on his sales volume. Other owners testified that their customers were not willing to pay the price their stores charged for milk and would drive a substantial distance to take advantage of low milk prices. One Toledo grocer, in answer to a question as to whether his store was in competition with other stores selling Sealtest milk stated: 'We can't be in competition with them [at] the price we pay for it. We do try to run a special occasionally at a loss to ourselves to try to be competitive.' A Kroger store, receiving a 12 per cent discount, is located four blocks from his store."

This evidence **[**9]** satisfies the *Morton Salt* and *United Biscuit* tests. ***HN3***[] Furthermore, unless minuscule, the portion **[*523]** of the market that might be affected by the charging of these discriminatory prices is immaterial. *Whitaker Cable Corp. v. Federal Trade Commission, 239 F.2d 253, 255-256 (7th Cir. 1956)*, certiorari denied, *353 U.S. 938, 1 L. Ed. 2d 761, 77 S. Ct. 813*. ***HN4***[] Nor is competitive injury negated by the pricing policies of National's competitors. *Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746, 751, 753-754, 65 S. Ct. 971, 89 L. Ed. 1338*; Whitaker Cable Corp. v. Federal Trade Commission, ibid, at pp. 254-256; *Foremost Dairies, Inc. v. Federal Trade Commission, 348 F.2d 674, 679 (5th Cir. 1965)*, certiorari denied, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435*. We also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher **[**10]** discounts. The Robinson-Patman Act does not force them to sacrifice their independence. One of the reasons for its enactment was to protect the independents from the chains and other large buying groups. *Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544, 4 L. Ed. 2d 1385, 80 S. Ct. 1267*; Rowe, Price Discrimination Under the Robinson-Patman Act (1962), pp. 11-23.

HN5[] Even though National's discounts violated Section 2(a) of the Act, National would have a good defense by showing that its lower price "was made in good faith to meet an equally low price of a competitor" (*15 U.S.C. § 13(b)*). As to its 22 customers receiving more than the customary discounts, National asserts that discounts to 19 were granted in good faith to meet offers of competitors. The principal reason given by the Commission for rejecting the good-faith meeting of competition defense was as follows (op. cit. p. 22,922):

> "Respondent has failed to demonstrate any reason to believe that the wholesale list prices of competitors whose prices it claims to have met **[**11]** were the same as its own. Not only has respondent failed to make this showing, but the evidence clearly and convincingly discloses that the wholesale list prices of certain of these competitors were higher than respondent's."

The Commission apparently considered that National had not made the requisite showing because National did not prove that its competitors' list prices were the same or lower, but that requirement is inconsistent with *Federal Trade Commission v. A.E. Staley Manufacturing Co., 324 U.S. 746, 65 S. Ct. 971, 89 L. Ed. 1338*; *Callaway Mills Co. v. Federal Trade Commission, 362 F.2d 435, 443-444 (5th Cir. 1966)*, and *Forster Manufacturing Co. v. Federal Trade Commission, 335 F.2d 47, 55-56 (1st Cir. 1964)*, certiorari denied, *380 U.S. 906, 85 S. Ct. 887, 13 L. Ed. 2d 794*. We agree with Commissioner Elman's dissenting view that such a burden of proof is too strict and unreasonable and is not imposed by Section 2(b); but even if there were such a burden, National has met it.

Actually the evidence showed that Page's list price for half gallons was 2 cents below National's; Driggs' half gallon prices were **[**12]** the same; Meadowgold's, Trilby Farm's and Cherry Grove's prices were the same or less; while Wilson Dairy, Independent Dairies and United Dairies had lower Monroe prices than National. The only relevant list price missing from the record is Babcock's, and the majority opinion concluded that Babcock's list was higher than National's. The majority speculated that Babcock must have had a higher list price than Sealtest because Babcock's discount schedule had lower point requirements. If this were true, Babcock would not be competitive with Page, Driggs, or the lower-priced small dairies. The Commission assumed that Babcock's list prices must be higher than National's because National "could not sell milk in this market at net prices which were consistently one or two cents above its competitors'" (op. cit. p. 22,923 (1966)). This theory is contradicted by the facts, for the record shows that various National competitors had the same list prices and better discounts than National. Being a well-known national brand, Sealtest could sell **[*524]** at a higher price than local brands. The record shows that Country Store priced Sealtest 2 cents above Driggs, and Sealtest was selling from **[**13]** 2 to 4 cents above Page in Clark's Market. The record also shows that National had 253 independent store customers in the 0 to 4% discount brackets, accounting for more than 10% of National's sales, even though Page's list price was 2 cents less than Sealtest's. Thus Page, without granting any discount, could undercut National in this group by as much as 2 cents. We conclude that no substantial evidence supports the Commission's finding that Babcock's list prices were higher than National's.

The Commission rejected the good-faith meeting of competition defense with respect to National's discounts to the Associated Grocers and Saveway group purchasers, on the ground that those concerns were already planning to replace Meadowgold as their milk supplier. National's representatives were seasoned dairy men and were familiar with the competitive situation, so that they should have been aware of AG and Saveway dissatisfaction with Meadowgold. It was, we believe, permissible for the Commission to conclude that National did not in good faith believe it was necessary to compete with Meadowgold's prices in order to recapture AG and Saveway as customers.

National has not endeavored to **[**14]** support its discounts to Joseph's, National Food or Wrigley's corporate chains by the defense of meeting competition. Joseph's and National Food were both large customers, and even Wrigley's purchased $4300 worth of milk per month from National. National's failure to support the meeting competition defense to these customers and AG and Saveway justified the Commission's view that National's discounts in this area might substantially injure competition.

Another reason advanced by the Commission majority for rejecting the defense of meeting competition was that National was meeting unlawful discounts with respect to the AG and Saveway accounts. However, as held in *Standard Oil Co. v. Brown, 238 F.2d 54, 58 (5th Cir. 1956)*, ***HN6***[] Section 2(b) may be satisfied unless the seller is meeting prices "that he knows to be illegal or that are of such a nature as are inherently illegal." That standards are met here, for Meadowgold's prices to AG and Saveway were not plainly illegal. Meadowgold's discounts may have been cost justified [2] or made to meet another competitor's discounts. [3] **[**15]** Moreover, as Commissioner Elman observed, ***HN7***[] the Commission previously abandoned any requirement that a seller must show it had

[2] Averaging the cost of serving chain stores was not condemned by the Supreme Court until 1962. *United States v. Borden Co., 370 U.S. 460, 8 L. Ed. 2d 627, 82 S. Ct. 1309*.

[3] Under *Sunshine Biscuits, Inc. v. Federal Trade Commission, 306 F.2d 48 (7th Cir. 1962)*, Meadowgold could obtain new customers by meeting competitive prices selectively.

reason to believe that it was meeting lawful lower prices. See Continental Baking Co. (TRADE REGULATION REPORTS (1963-1965 Transfer Binder) § 16,720 (1963)), Ponca Wholesale Mercantile Co. (TRADE REGULATION REPORTS (1963-1965 Transfer Binder) § 16,814 (1964)), and Beatrice Foods Co. (TRADE REGULATION REPORTS (1965-1967 Transfer Binder) para. 17,311 (1965)).

Since the Commission's opinion does not discuss the meeting competition defense with respect to 17 other **[**16]** Toledo-Monroe customers of National, this opinion need not consider those off-scale discounts.

Next, National relies on the cost savings defense with respect to 8 of its 22 customers receiving discriminatory discounts. The milk deliveries were to the individual stores and not to any central warehouse. Time studies showed that it took National's drivers less time per case to deliver to a large volume store, so that National's per case distribution costs would be less in serving such stores. ***HN8***[] The cost savings proviso permits differentials making "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the delivery **[*525]** methods or quantities" in which commodities are sold or delivered to purchasers (*15 U.S.C. § 13(a)*). National endeavored to establish this defense both on a "per [chain or group] purchaser" and on a store-by-store basis.

Under the former method, National totaled the distribution cost to each unit and divided it by the total dollar purchases of rebatable products of all units in the chain or group to obtain **[**17]** the cost per dollar of serving the purchaser. This averaging method would warrant the same discounts to all stores whose volume qualifies for the particular discount in question, assuming the discount brackets are fairly drawn. Therefore, averaging would be permissible for National with respect to six of its corporate chain customers. [4] **[**19]** However, in the case of the Red & White Stores and the Saveway Stores, the averaging method would not be justified in granting a 12% discount to each member store because various of them individually purchased enough milk only to qualify for a much smaller percentage discount, such as received by most of National's independent store customers. *United States v. Borden, Company, 370 U.S. 460, 8 L. Ed. 2d 627, 82 S. Ct. 1309*, condemns cost justification that would create such artificial disparities. There the Court disapproved of discounts permitting an independent store to receive a lower discount than a chain store of the same size. The following cost savings guidelines were established in *Borden* (*370 U.S. at p. 469*):

> ***HN9***[] **[**18]**
>
> "A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of 'musts' in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered."

National's "per customer" cost savings defense fails because there is no "close resemblance of the individual members" of these two voluntary groups, so that the cost of serving them may not be computed by using the averaging method. [5] Otherwise, as Justice Clark picturesquely put it, one would be "averaging one horse and one rabbit" (at p. 470), with an entirely different cost of serving each.

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[4] One Kroger store took only 7,864 points a month and was cost justified up to an 11.47% bracket. Being only 1 of Kroger's 22 stores and almost qualifying for the 12% discount, this store should be permitted within the averaging. One Seaway Foodtown store took only 5,891 monthly points and was cost justified only up to 9.18%. As to such a borderline store, any injurious effect of the discount would seem so remote that this store could also be considered as sufficiently homogeneous for averaging.

[5] *American Motors Corp. v. Federal Trade Commission, 384 F.2d 247 (6th Cir. 1967)*, certiorari denied, ***390 U.S. 1012, 88 S. Ct. 1260, 20 L. Ed. 2d 164, 36 U.S. Law Week 3390***, does not support National's use of the average cost of serving the members of the chain and voluntary groups. As the court there observed, American Motors' cost report "Did not *average* the volume of

National argues that "purchaser" as used in the cost proviso means all the stores in a chain or group taken as a unit. This may be true, but it does not help National. The crucial question is not whether a chain is a purchaser, but whether the discount is "due allowance" for cost differences. The Commission observed that ***HN10***[] when a store, by virtue of being averaged with a larger store, receives a discount **[**20]** it has not earned, it gains an unfair competitive advantage of the sort which the amended Clayton Act was designed to prevent. An averaging system, when it permits some stores to receive a significantly larger discount than they could earn individually, has an antiicompetitive effect comparable to that **[*526]** of practices long condemned by the Act. Thus a territorial price discrimination violates the Act because a seller's high prices in one area subsidize its low prices in another. *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119, 99 L. Ed. 145, 75 S. Ct. 148*. ***HN11***[] Likewise, the Supreme Court has condemned a basing point system in which the seller absorbs freight charges to some customers and adds "phantom" freight charges to others. *Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S. Ct. 961, 89 L. Ed. 1320*. In that case, the Court noted that the prices were discriminatory because they were related "to factors other than *actual* costs of production or delivery" (*324 U.S. at p. 732*;). The same is true here. In the **[**21]** automotive parts industry, discount sales to buying groups have repeatedly been condemned where the group buying does not create cost savings for the seller. *Mid-South Distributors v. Federal Trade Commission, 287 F.2d 512, 517 (5th Cir. 1961)*, certiorari denied, *368 U.S. 838, 7 L. Ed. 2d 39, 82 S. Ct. 36*; *American Motor Specialties Co. v. Federal Trade Commission, 278 F.2d 225, 228 (2d Cir. 1960)*, certiorari denied, *364 U.S. 884, 5 L. Ed. 2d 105, 81 S. Ct. 169*; *Standard Motor Products, Inc. v. Federal Trade Commission, 265 F.2d 674, 675-6 (2d Cir. 1959)*, certiorari denied, *361 U.S. 826, 4 L. Ed. 2d 69, 80 S. Ct. 73*. Because milk is not centrally warehoused, the usual economies of scale associated with chain and co-op buying are absent here. The cost of selling a given volume of milk to one store is the same whether that store is part of a group or chain or an independent. Therefore, when the group or chain receives a greater discount than the independent, the seller is bowing to the size of the buyer and not making "due allowance" for cost savings. In *Federal Trade Commission v. Standard Motor Products, Inc., 371 F.2d 613 (2d Cir. 1967)*, **[**22]** enforcement of a Commission order condemning an annual rebate system was denied in part because the Commission "should have analyzed the competitive injury resulting from Standard's purchaser classification." *371 F.2d at p. 621, n. 12*. National here asks the Court to fault the Commission for making just such an analysis.

National also argues that abandonment of the averaging system will put it at a competitive disadvantage vis-a-vis intrastate dairies who will continue to grant average discounts to chains. If this happens, the net prices of the competing dairies will either be lower than National's or they will not. If they are lower, the meeting competition defense may be available to protect National; if they are not lower, National will not really be at a competitive disadvantage.

Finally, National relies on a number of cases dealing with the adequacy of cost studies. [6] These are inapplicable because the Commission, reversing the examiner, approved the methodology and results of National's cost study. It is true that if a time-study man has to ride every milk truck on every delivery, the cost justification defense will become a nullity. The Commission has **[**23]** not imposed such an unreasonable requirement here. In fact, it has treated National's one-week study as a reliable barometer of market conditions. In rejecting the averaging system, the Commission has not impugned any of the data obtained by the study; rather, it has interpreted that data in the light of the purpose of the amended Clayton Act to protect independent merchants and in accord with *United States v. Borden, Company, 370 U.S. 460, 8 L. Ed. 2d 627, 82 S. Ct. 1309*.

Borden does permit the grouping together of reasonably homogenous units. For example, if a National cost study showed that a store using 3,000 units **[*527]** justified a certain **[**24]** discount on a cost basis, under *Borden* National could award such a discount to all other stores similarly situated without doing a time study for each store.

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sales or the lesser cost of selling to the respective merchandising distributors" (*384 F.2d at p. 256*). It was chiefly on this basis that *American Motors* distinguished *Borden*.

[6] E.g., *American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951)*; *Reid v. Harper & Bros., 235 F.2d 420 (2d Cir. 1956)*, certiorari denied, ***352 U.S. 952, 1 L. Ed. 2d 242, 77 S. Ct. 326***; *Federal Trade Commission v. Standard Motor Products, Inc., 371 F.2d 613 (2d Cir. 1967)*.

The Commission found that prior to the adoption of the averaging schedule in 1960, National had a discount system in which the purchases of all the stores in the chain or group were aggregated. Under such a system, a group of stores, none of which was individually entitled to any discount, could obtain the maximum discount by aggregating their purchases. An aggregating system bears less resemblance to the realities of cost savings than does an averaging system. National does not seriously dispute this. Rather, it argues that it did not in fact employ an aggregating system but granted the large discounts to meet competition (except as to Joseph's, National Food and Wrigley). Because the evidence is in conflict on this question, we may not disturb the Commission's finding that the prior discount system to chain and group purchasers was based on impermissible aggregating. National did not attempt to cost justify the aggregating practice.

National asserts that it has cost justified its discounts to 6 corporate chains **[**25]** (Big Bear, Joseph's, National Foods, Kroger, Wrigley's, and Seaway Foodtown (except for one store)) even on the store-by-store basis demanded by the Commission. [7] The Commission's brief does not dispute this and our study of the record supports National's portrayal. Nevertheless, National's remaining unjustified discounts in this area adequately support the Commission's competitive injury conclusions.

Memphis Area

In Memphis, 200 independent stores, representing 50% of National's ice cream customers, received no discount. At the same time, National had the following discount schedule in effect for independent stores:

Gallons	**Discounts/Gallon**
0 -- 49	0
50 -- 79	2 cents
80 -- 109	3 cents
110 -- 139	4 cents
140 and over	5 cents

Under this schedule most independents received no discount. Chain and group stores were **[**26]** accorded a 7 cents per gallon off schedule discount.

The sale of ice cream in this area was highly competitive, and the independent stores receiving no discount were located near many of the chain and group members receiving the 7 cents per gallon discount, thus enabling them to sell ice cream at lower prices than the independents. Numerous chain and group member stores handled smaller ice cream volume than numerous independents and yet received the 7 cents discount solely due to their affiliation. Concomitantly, many independents received no discount while equally small affiliated stores received the 7 cents per gallon discount. We agree with the Commission that these facts show that National's discounts had the probable effect of lessening competition at the secondary level. See *Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 50-51, 92 L. Ed. 1196, 68 S. Ct. 822*; *United Biscuit Company of America v. Federal Trade Commission, 350 F.2d 615, 621 (7th Cir. 1965)*, certiorari denied, *383 U.S. 926, 15 L. Ed. 2d 845, 86 S. Ct. 930*; *Whitaker Cable Corporation v. Federal Trade Commission, 239 F.2d 253, 255 (7th Cir. 1956)*, **[**27]** certiorari denied, *353 U.S. 938, 1 L. Ed. 2d 761, 77 S. Ct. 813*. As with the Toledo-Monroe market, such a conclusion is not foreclosed by the availability of these discounts to National's independent customers deciding to join a voluntary or cooperative group.

As in the Toledo-Monroe area, the Commission concluded that National's **[*528]** discount schedule was cost justified. However, to cost justify the 7 cents per gallon discount to chain and group stores, National used an averaging method even though the chain and group stores varied in size. Under *United States v. Borden, Company, 370 U.S. 460, 8 L. Ed. 2d 627, 82 S. Ct. 1309*, such a cost justification defense was properly rejected.

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[7] The Commission did hold that National's regular discount schedule of 0% to 6% to independent stores was cost justified on a store-by-store basis.

National also contends that its 7 cents per gallon discount granted to Malone & Hyde, Inc., a wholesale grocer sponsoring a voluntary chain of stores, was a legitimate functional discount. On the other hand, the Commission found that National sold to the M & H member stores rather than to M & H. The invoices stated that the ice cream was "sold to" the particular stores, not to M & H. In addition to the 7 cents per gallon discount, National granted M & H a 2% allowance **[**28]** for assuming the credit risk of the member stores. As the Commission noted, this allowance is consistent with the member stores themselves being the purchasers, for if M & H were the purchaser, National would have no risk as to the credit of the stores. The Commission permitted this 2% allowance as a payment for services performed by M & H for National. It was not included in the price discrimination that the Commission found National gave to the M & H stores.

The Commission explained its conclusion that the M & H stores were the purchasers from National as follows (op. cit. p. 22,925):

> "The circumstances are such that there is very little difference between the manner in which a Malone & Hyde member store is serviced by respondent as compared to a non-member retail customer. In both cases, respondent receives orders directly from the store, delivers the ice cream directly to the store and services the cabinets. Whereas an independent store owner may pay the deliveryman, the Malone & Hyde store is furnished with a copy of the invoice and the original is sent to Malone & Hyde headquarters. Once a week, respondent bills Malone & Hyde for all stores and receives a check drawn **[**29]** on the Malone & Hyde account."

In our view, M & H is sufficiently unlike the ordinary wholesaler to support the Commission's decision that the member stores were the actual purchasers. However, under *Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222, 36 U.S. Law Week 4233*, ***HN12***[] the M & H retail stores could be classified as purchasers from National even if they technically purchase from M & H where, as here, such a classification would further the purposes of the Clayton Act, as amended. Cf. *Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 512-523, 9 L. Ed. 2d 466, 83 S. Ct. 358*.

New Orleans Area, and Scope of Order

Here National sold a private label milk, "Velva," to H.G. Hill Stores, Inc., a chain (and its successor, Winn-Dixie Stores, Inc.) at a net price of about 10 cents per gallon less than to many of National's store customers receiving no discount. Besides the 20% discount to Hill, National sold milk to 5 other wholesale customers at 5-10% off its wholesale list price. The Commission sustained **[**30]** the defense of meeting competition with respect to all customers receiving discriminatory discounts except the Hill Stores.

To sustain the defense of meeting competition with respect to Hill in 1951, National relied on competitors' bids to public institutions. However, the bids to such institutions were not subject to the Act and involved different delivery costs and therefore would not show what the competitors' bids were to Hill.

To sustain the defense of meeting competition with respect to Hill in 1954, National asserts that Hill's representative told National of a low offer from the Franklinton, Louisiana, Co-operative. The Commission disregarded the Franklinton offer because National had not verified it [8] and because the cooperative's **[*529]** offer was suspect by virtue of National's own cost study. Also, according to the Commission's interpretation of the testimony of National official Lewis Robinson, National did not learn of the cooperative's offer until after making its bid. The Commission

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[8] Efforts to verify were present in *Forster Manufacturing Co. v. Federal Trade Commission 335 F.2d 47, 54 (1st Cir. 1964)*, certiorari denied, ***380 U.S. 906, 85 S. Ct. 887, 13 L. Ed. 2d 794***; Beatrice Foods Co., TRADE REGULATION REPORTS (1965-1967 Transfer Binder) para. 17,311, at p. 22,470 (1965), and Continental Baking Co., TRADE REGULATION REPORTS (1963-1965 Transfer Binder) para. 16,720, at p. 21,648 (1963), on which National relies.

found that National's 1954 price to Hill was based on its own cost study. This conclusion was permissible from the evidence adduced.

[31]** National contends that it ceased selling milk to Hill's successor in 1960 and that a 1958 Louisiana statute bans discounts on milk, so that the requisite competitive effects no longer exist under Section 2(a). But such a longtime discriminatory practice, if followed elsewhere by National, could similarly injure competition with customers receiving no equivalent discounts, so that the Commission was entitled to consider this evidence in framing its order. *Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 96 L. Ed. 1081, 72 S. Ct. 800*; *Foremost Dairies, Inc. v. Federal Trade Commission, 348 F.2d 674, 681-682 (5th Cir. 1965)*, certiorari denied, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435*. Even though National has stopped granting unjustified discounts to Winn-Dixie in New Orleans, its similar practices in Toledo-Monroe and Memphis, as well as its former practice in New Orleans, justified the nation-wide order entered. In contrast to *Dean Milk Co. v. Federal Trade Commission, 395 F.2d 696 (7th Cir. 1968)*, there are no considerations present here that impel a limitation of the Commission's order to the specific areas where **[**32]** the price discriminations were proved. National operates in 35 states and it is concededly typical for Sealtest to have volume discount schedules in effect at its various operations. The practices condemned by the Commission occurred in wide-spread areas over a long period of years. Consequently we cannot say that this order was so broad as to constitute an abuse of discretion. See *Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428, 431, 1 L. Ed. 2d 438, 77 S. Ct. 502*; *Swift & Company v. United States, 393 F.2d 247 (7th Cir. 1968)*, and *Lloyd A. Fry Roofing Co. v. Federal Trade Commission, 371 F.2d 277, 284, 286 (7th Cir. 1966)*.

We have considered other points raised by the parties but they merit no discussion.

The order is affirmed and will be enforced.

[Minnesota v. United States Steel Corp.](#)

United States District Court for the District of Minnesota, Third Division

May 17, 1968

Nos. 4-68 Civ. 37, 4-68 Civ. 36, 4-68 Civ. 38, 4-68 Civ. 41, 3-68 Civ. 34, 3-68 Civ. 36, 3-68 Civ. 37, 3-68 Civ. 39, 4-68 Civ. 37

Reporter
44 F.R.D. 559 *; 1968 U.S. Dist. LEXIS 12589 **; 12 Fed. R. Serv. 2d (Callaghan) 498; 1968 Trade Cas. (CCH) P72,469

STATE OF MINNESOTA, State of North Dakota, State of South Dakota, et al., State of Wisconsin, City of St. Paul, the Housing and Redevelopment Authority in and for the City of Minneapolis, Minnesota, Independent School District # 625 of the City of St. Paul, Minnesota, Housing and Redevelopment Authority of the City of St. Paul, Minnesota, v. UNITED STATES STEEL CORP., Paper, Calmenson & Co., St. Paul Foundry & Manufacturing Co., (now the Maxson Corp.), St. Paul Structural Steel Co., Crown Iron Works Co., and the Hustad Co.

Core Terms

class action, conspiracy, cases, notice, absentee, suits, class member, predominate, plaintiffs', questions, tolling, consolidated, member of the class, statute of limitations, antitrust, discovery, damages, government entity, indictment, steel, defendants', parties, grand jury, proceedings, complaints, joinder, prices, depositions, limitations, pleadings

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

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

See *15 U.S.C.S. § 16(b)*.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN2[] Antitrust & Trade Law, Clayton Act

Under *Fed. R. Civ. P. 23(a)(1)*, the first prerequisite for maintaining a class action is that the class be sufficiently numerous so that joinder of all members is impracticable.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Under *Fed. R. Civ. P. 23(a)(3)*, the claims of the representatives of the class must be co-extensive with the claims of the members of the class.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

While a disparity of damages may be argued to go to the question of "predominance," such disparate proof fails to make a class representative's claims atypical. Since the representative parties need prove a conspiracy, its effectuation, and damages therefrom--precisely what the absentees must prove to recover--the representative claims can hardly be considered atypical.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Fed. R. Civ. P. 23(b)(3) requires liberal interpretation to avoid frustrating its purpose of encouraging the prosecution of claims too small to permit of otherwise ordinary independent vindication.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

In the normal antitrust case, where a conspiracy to fix prices is at issue, but damages differ widely among the several plaintiffs, the predominant questions are common to the class.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Antitrust & Trade Law, Clayton Act**

Commencement of a *Fed. R. Civ. P. 23(b)(3)* class action tolls the four-year statute of limitations provided by Clayton Act § 5(b), *15 U.S.C.S. § 16(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN8[] **Class Actions, Prerequisites for Class Action**

Affirmative class action determinations relate back to the time of the institution of the lawsuits.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Under *Fed. R. Civ. P. 23*, "one-way intervention" is not possible, for the class determination is to be made as soon as possible after institution of suit. Absentees thus are compelled when in receipt of notice under *Rule 23(c)(2)* to make a binding decision within a short time of commencement of the suit, and never after a decision on the merits.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

The "superiority" criterion of *Fed. R. Civ. P. 23(b)(3)* explicitly permits the court to look at the existence of other lawsuits when deciding whether a class action should be maintained.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] **Class Actions, Prerequisites for Class Action**

See *Fed. R. Civ. P. 23*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

HN13[] **Grand Juries, Secrecy**

See *Fed. R. Crim. P. 6(e)*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

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

While courts have vigilantly recognized the policy of secrecy in conjunction with grand jury proceedings, exception is made when the movants for disclosure show "particularized need."

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Witnesses' names are matters before the grand jury and so are entitled to secrecy.

Civil Procedure > Trials > Consolidation of Actions

HN16[] **Trials, Consolidation of Actions**

See *Fed. R. Civ. P. 42(a)*.

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > No Contest Pleas

HN17[] **Entry of Judgments, Consent Decrees**

Nolo contendere pleas do not establish a prima facie case under the Clayton Act, because under Clayton Act § 5(a), *15 U.S.C.S. § 16(a)*, they are the equivalent of consent judgments.

Judges: [1]** Neville, District Judge.

Opinion by: NEVILLE

Opinion

[*562] NEVILLE, District Judge.

Before the court are eight separate civil treble damage suits bottomed on the antitrust laws, brought by eight different governmental entities against six steel companies. The City of St. Paul, Minnesota, commenced its action on February 1, 1968, by filing a complaint in the Third Division of the District of Minnesota. Thereafter, the Housing and Redevelopment Authority for the City of Minneapolis, Independent School District # 625 of the City of St. Paul and the Housing and Redevelopment Authority of the City of St. Paul, filed separate independent complaints, the first two on February 6 and the latter on February 8, 1968. These four suits were brought in the Third Division of this district and will be referred to as "Third Division cases." Common counsel represent these several plaintiffs.

Four other plaintiffs, the State of Minnesota, the State of North Dakota, the State of South Dakota and the State of Wisconsin commenced separate actions in the Fourth Division of this court, the first three on February 8, 1968, and the State of Wisconsin on February 9, 1968. These four "Fourth Division cases" **[**2]** were transferred to the Third Division pursuant to an order of this court to the end that all eight cases might be considered together to expedite and economize as to pretrial measures.

All eight actions name the same six structural steel fabricating companies above as defendants. [1] Plaintiffs seek treble damages from the defendants under the Sherman and Clayton Acts allegedly for conspiring in restraint of interstate trade and commerce affecting the structural steel fabricating industry. The defendants are claimed to have conspired to fix prices, unduly inflating the same and rendering them non-competitive, and further are claimed to have allocated contracts and business among themselves.

These private civil suits follow in the wake of a previous investigation by the United States Department of **[**3]** Justice of the structural steel fabricating industry and the institution by the government of criminal action under the antitrust laws. On February 10, 1964, these same six defendants were indicted by the grand jury for the District of Minnesota. The criminal action was terminated on **[*563]** September 16, 1964, by entry of judgments of conviction of each of the defendants following *nolo contendere* pleas. The private plaintiffs allege violations of the antitrust laws substantially identical to those charged in the indictment.

At the institution of each of the above actions, the court entered a separate preliminary order in the form contained in the Recommended Procedures for Protracted Cases (adopted by the Judicial Conference 1960), fixing a joint preliminary informal pretrial conference for March 15, 1968 and temporarily enjoining discovery and other proceedings. At that pretrial conference, a number of questions were raised and at the court's suggestion briefs were requested and argument set for a continued date of April 15, 1968. The court is satisfied that the eight cases portend protracted litigation and, at least until some clear showing to the contrary is made, **[**4]** should be treated jointly as such under the aforesaid Recommended Procedures.

The court now has before it nine different motions brought by the various parties:

I. To determine whether or not the several actions are entitled to treatment as class actions under *Rule 23 of the Federal Rules of Civil Procedure*.

II. To disqualify one of plaintiffs' counsel and, since he is admitted to the bar elsewhere and not in Minnesota, to refuse his admittance to this court for the purpose of presenting and participating in these law suits; and requiring answers of witnesses to certain questions in deposition proceedings related to this question.

III. To permit intervention as a party plaintiff by the Metropolitan Airports Commission.

IV. To permit plaintiffs access to the list of grand jury witnesses and subpoenas.

V. To vacate a previous order by a judge of this court dated July 16, 1964, sealing or withholding from the public record certain documents in the criminal antitrust proceedings.

VI. To consolidate the Third Division cases.

VII. To lift the present order placing restraint on discovery proceedings so as to permit the serving of interrogatories and prescribing a schedule for **[**5]** discovery proceedings.

VIII. To permit defendants an extension of time to answer plaintiffs' complaints.

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[1] Although the original complaints named St. Paul Foundry & Manufacturing Company as a defendant, its name has recently been changed and by stipulation the name The Maxson Corporation has been substituted therefor.

IX. To strike certain allegations from plaintiffs' complaints which refer to the previous criminal proceedings.

These motions will be considered seriatim, the first being perhaps both the most important and the most complicated.

I.

Treatment as Class Actions Under *Rule 23 of the Federal Rules of Civil Procedure*.

Each plaintiff seeks to maintain its suit as a class action and has moved this court for an order under *Rule 23* [2] ***[**6]*** *of the Federal Rules of Civil Procedure* declaring it to be the representative of a large group of absentee plaintiffs. Each State plaintiff in the Fourth Division cases seeks to represent the governmental entities and units within such State. [3] **[**7]** The Third Division plaintiffs **[*564]** also each purport to represent classes composed of governmental agencies and entities. [4] Thus, the present parties' classes substantially overlap and conflict in that they presume to represent many of the same governmental entities.

Defendants have cross-motioned, contending that none of these plaintiffs can maintain its suit as a class action under *Rule 23*. Defendants concede that the four State plaintiffs would adequately represent the lesser governmental entities within the classes, but submit that other *Rule 23* criteria **[**8]** are unfulfilled; namely, that the State of Minnesota suit does not meet the requirements of 23(a)(3) and (b)(3), and the suits of the States of North Dakota, South Dakota and Wisconsin are not within 23(a)(1), (a)(3), and (b)(3). [5] The latter objections are also raised with respect to the Third Division plaintiffs, and, additionally, it is submitted that the Third Division plaintiffs would not adequately represent the purported class or classes as required by 23(a)(4).

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[2] Rule 23 of the Fed. R. Civ. P. was amended effective July 1, 1966 and as so amended is applicable to this case. It is lengthy and quotation in full seems unnecessary.

[3] The State of Minnesota seeks to represent itself and:

> "the class consisting of all cities, counties, school districts, municipal and public corporations, political subdivisions, educational institutions, and all other public agencies and entities within the State of Minnesota, supported in whole or in part by state or local government funds, which have, in the course of their operations, purchased structural steel products from one or more of the defendants or co-conspirators during the period covered by this complaint."

The State of Wisconsin seeks to represent itself and:

> "the class of all cities, counties, school districts, municipal and public corporations, political subdivisions and public agencies of Wisconsin . . . ."

The State of North Dakota seeks to represent itself and the same class of entities alleged by the State of Minnesota, differing only in that the class is within the State of North Dakota.

The State of South Dakota seeks to represent: (1) itself; (2) all counties individually enumerated as parties plaintiff; (3) a class consisting of school districts, Boards of Education and political subdivisions which support school districts; and (4) tax-supported municipalities.

[4] The Third Division plaintiffs seek to represent the class or classes consisting of the following:

> "(a) all state, county, municipal and other governments and other political or governmental subdivisions or districts, and all governmental or public corporations, agencies, departments, boards, institutions, and other bodies . . . which are located or which operated within the Complaint Area;
>
> (b) all governmental purchasers which are located or which operated within the State of Minnesota; or
>
> (c) all governmental purchasers which are located or which operated within the Complaint Area, other than those state agencies represented in related actions filed against defendants by the respective Attorneys General of the States of Minnesota, Wisconsin, South Dakota and North Dakota . . . ."

[5] *Rule 23* requires that the terms of (b)(3) be fulfilled in addition to the elements of (a)(1)-(4) if suits of this nature are to be maintained as class actions.

Finally, the defendants earnestly urge the court to find that none of these suits is properly a class action since the absentee members of the classes are barred by the statute of limitations provided by Section 5(b) of the Clayton Act. [6] **[**10]** Inasmuch **[*565]** as these suits were filed far more than one year after termination of the government's criminal proceedings, the four-year clause **[**9]** clearly provides the pertinent standard. [7] Defendants' argument is that any possible fraudulent concealment was eliminated and revealed as a matter of law on February 10, 1964, by the return of the grand jury indictment, [8] and that only the present eight plaintiffs filed their claims within four years of the known accrual of the claims and hence within the period of the applicable four year statute of limitations. Thus, defendants argue that all absentee class members are barred from the action (assuming no violative acts were committed after the return of the indictment) and that notice under *Rule 23* need not issue. Plaintiffs oppose this suggestion, contending that the filing of their claims as class actions tolls the running of the statute of limitations as to absentee members of the classes with the same force and effect as though each member of the class, on or before February 10, 1968, had instituted and filed its own lawsuit.

[11]** The court holds and orders that all of these suits may be maintained as class actions and that the filing of these actions tolls the statute of limitations as to absentee plaintiffs, or, put another way, those eligible entities who chose to join the class in the manner hereinafter prescribed may date themselves back for purposes of the statute of limitations to the date of the filing of the class action which they join.

The Prospective Members of the Classes are Sufficiently Numerous to Make Joinder Impracticable--Rule 23(a)(1).

HN2[] Under *Rule 23(a)(1)* the first prerequisite for maintaining a class action is that the class be sufficiently numerous so that joinder of all members is impracticable. Defendants admit that the State of Minnesota alleges a class sufficiently numerous to satisfy 23(a)(1). [9] Defendants urge the court to defer ruling on whether joinder is impracticable with the States of North Dakota, South Dakota and Wisconsin. The court is of a contrary view, however, and is satisfied that 23(a)(1) is fulfilled at this point in the case with respect to these latter State plaintiffs,

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[6] ***HN1***[] The Clayton Act provides in § 5(b):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under *section 15* of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5(b), 38 Stat. 731, as amended, *15 U.S.C. § 16(b) (1964 ed.)*.

[7] See *Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 571 (10th Cir. 1961)*, petition for cert. dismissed, ***Wade et al, v. Union Carbide & Carbon Corp., et al., 371 U.S. 801, 9 L. Ed. 2d 46, 83 S. Ct. 13 (1962)***; *United Shoe Mach. Corp. v. International Shoe Mach. Co., 275 F.2d 459 (1st Cir. 1960)*; *Herman Schwabe, Inc. v. United Shoe Mach. Corp., 274 F.2d 608 (2d Cir. 1960)*.

[8] By resolving the question whether the limitation period is tolled by commencement of a class action under 23(b)(3) against the defendants' position, the court need not answer the disputed question of whether as a matter of law the return of the indictment ended any fraudulent concealment. Since, by virtue of the tolling effect, all class members are within the statutory time period unless individual knowledge prior to the indictment date is shown, no absentee plaintiff is prejudiced by the assumption *arguendo* that the indictment eliminated fraudulent concealment. See ***State of Michigan v. Morton Salt Co., 259 F. Supp. 35, 45 (D. Minn. 1966)***, aff'd sub nom. *Hardy Salt Co. v. State of Illinois, 377 F.2d 768* (8th Cir.), cert. denied, ***389 U.S. 912, 19 L. Ed. 2d 260, 88 S. Ct. 238 (1967)***.

[9] By affidavit, Minnesota states that it represents approximately 852 municipalities, 87 counties, 500 school districts and a number of other educational institutions and special governmental districts and entities.

which have alleged by affidavit sufficiently numerous absentee class members [10] **[**12]** to make **[*566]** joinder impracticable. If, at a later date, the posture of these actions becomes such that joinder or another alternative is practicable, the court may well then invoke its management discretion reserved by 23(c)(1), (c)(4), and 23(d). Whether the class action status continues somewhat depends upon the response to notice given pursuant to this order. Furthermore (without resolving the "overlap" problem for the moment), the Third Division cases also meet the requirements of 23(a)(1). In all of these eight cases, problems of management and administration would be rendered extremely cumbersome and difficult by joinder of all absentee members, service of separate pleadings, entry of a separate order as to each joinder, etc. Joinder would tend to result in great multiplicity, one of the major evils *Rule 23* procedures seek to prevent.

[13]** *There are Questions of Law and Fact Common to the Classes--Rule 23(a)(2)*

Defendants concede that plaintiffs' actions involve questions common to the classes or members of the classes. Certainly it is clear that the existence or non-existence of a conspiracy, the territorial effect thereof and the impact on prices, pricing policies and competitive practices and perhaps other questions, are common to all members of the class. If there be no proof of a conspiracy, no one recovers in the eight different cases under the theory of the various pleadings. The establishment of a conspiracy and its effect is thus common to all claims of all members of the classes.

The Claims of the Eight Representative Parties Plaintiff are Typical of the Claims of the Classes--Rule 23(a)(3).

While the defendants concede that the plaintiffs' actions involve questions of law and fact common to the classes, they nevertheless controvert the allegations that such claims are "typical" of the claims of the absentee members as required by 23(a)(3). The court finds, however, that the present representatives press claims typical of those held by the members of the classes. While there may be **[**14]** some doubt regarding the precise meaning of 23(a)(3), [11] the courts looking at this question generally have required that ***HN3***[] the claims of the representatives of the class be co-extensive with the claims of the members of the class. See *Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)*, rev'g, *41 F.R.D. 147 (S.D.N.Y. 1966)*; *State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968)*; *Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968)*; *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)*.

Defendants argue that the plaintiffs' claims are neither typical nor co-extensive in that all plaintiffs have sustained substantially different damages requiring extensive proof because of diverse methods of procuring and purchasing fabricated steel products. But all claims in the classes herein will require proof of a conspiracy, plus a showing of price **[**15]** fixing, allocation of business or other non-competitive activity, as well as evidence of purchases at allegedly inflated prices. [12] **[*567]** Although each plaintiff will have to prove a precise purchase or purchases to

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[10] By affidavit, it appears that the State of North Dakota represents approximately 149 municipalities, 52 counties, 498 school districts and 5 special governmental districts.

By affidavit, South Dakota represents approximately 600 municipalities, 67 counties, 500 school districts and several special governmental districts.

By affidavit, Wisconsin represents 72 counties, 184 cities, 383 villages, approximately 572 school districts of several types, 1,124 towns and 755 special districts, such as metropolitan sewerage and drainage districts.

[11] See 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 562 n. 3 (Wright ed., Supp. 1966).

[12] Each plaintiff, absentee and present, will probably also be required to prove fraudulent concealment virtually up to the time of the indictment. Such requires proof of two elements: (1) Use of fraudulent means by party raising the ban of the statute and (2) Successful concealment. *Kansas City, Missouri v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962)*, cert. denied, ***371 U.S. 912, 83 S. Ct. 256, 9 L. Ed. 2d 171***. Certainly proof of the first element, if not also the second, is typical of the claims of the various members of the classes.

show damages, the former two elements of proof will redound to the benefit of the entire class of claimants, and the court therefore is disposed to reject the defendants' theory. ***HN4***[] While a disparity of damages may be argued to go to the question of "predominance", see *School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967)*, such disparate proof fails to make the representatives' claims atypical, especially in light of the positions taken by the above cited decisions. Since the representative parties need prove a conspiracy, its effectuation, and damages therefrom--precisely what the absentees must prove to recover--the representative claims can hardly be considered atypical. Moreover, if the "typical" requirement of 23(a)(3) is thought to mean only a lack of adversity between the representatives and the absentee plaintiffs, there is no showing of adverse interests in these actions which would militate against class action **[**16]** treatment.

The Representative Parties Will Fairly and Adequately Protect and Represent the Interests of the Classes--Rule 23(a)(4).

Defendants concede that the State plaintiffs fairly and adequately represent their classes of lesser governmental entities, but submit that the four Third Division plaintiffs fail adequately to represent their classes. The Third Division plaintiffs, on the other hand, already acting through common counsel, have sought to consolidate **[**17]** their respective actions, [13] and also ask that leave be granted to the Metropolitan Airport Commission to intervene as an additional party plaintiff in the consolidated suit. [14]

Irrespective of consolidation, **[**18]** 23(a)(4) is satisfied by the Third Division plaintiffs. In *Eisen v. Carlisle & Jacquelin, supra*, the only circuit court decision passing upon amended *Rule 23* in this context, the court reversed the district court, holding *inter alia* that a plaintiff having merely $70 at stake in the litigation can fairly and adequately represent a class of all "odd-lot" traders on the New York Stock Exchange, whose total number approached 3,750,000 during the period of inquiry. Other courts under both the old and new rules have reached similar results although admittedly upon facts less exaggerated than *Eisen.* [15]

[19]** In view of the court's decision on the "overlap" problem hereinafter, further discussion is of no value on this question. It is to be noted though that chief counsel for the Third Division plaintiffs is an experienced antitrust lawyer, having only recently left the Antitrust Division of the **[*568]** Department of Justice. He represents the second largest city in Minnesota, a large school district, two significant housing authorities, and now the Metropolitan Airport Commission. It is apparent that his representation will be fair, adequate and prosecuted with vigor.

Defendants further argue that the Third Division plaintiffs cannot represent any class because as required by local law they have not been authorized to do so. The court rejects this theory and agrees with the court in *Union Asphalt, supra*, which held that *Rule 23* controls the determination of whether representation is adequate. Since *Rule 23* does not look to state law, state law is irrelevant in making a *Rule 23* determination. Although some courts

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[13] The Third Division plaintiffs' motions to consolidate the pretrial aspects of this litigation is granted as hereinbelow and a like ruling is tentatively made on the trial aspects pursuant to *Rule 42 of the Federal Rules of Civil Procedure*. Defendants have alleged no prejudice and this order should result in greatly decreased multiplicity of pretrial problems, administration and management difficulties.

[14] The Metropolitan Airport Commission's motion for leave to intervene in the Third Division case as consolidated is granted under *Rule 24(b)(2) of the Federal Rules of Civil Procedure* as hereinbelow set forth. The statute of limitations provides no bar in light of the disposition with regard thereto, plus the intervenor's membership in any event in the class alleged by the Third Division complaint.

[15] See, e.g., *Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968)* (ten plaintiffs representing large class of governmental entities); *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)* (five franchisees on behalf of 650 others nationwide); *City of Chicago v. Allen Bradley Co., 32 F.R.D. 448 (N.D. Ill. 1963)* (one city representing injured municipalities nationwide).

have made an excursion into state law under similar facts, [16] this court believes the result depends only upon the criteria specified by *Rule 23*. Thus, since **[**20]** that criteria is otherwise satisfied by the Third Division suit herein, the suit may be maintained under *Rule 23* and fulfills the scope and purport of 23(a)(4). As a practical matter, the court hereinafter in connection with the notice provision of 23(c)(2) is requiring that each member who wishes to join the class must furnish a certified resolution of authorization at that time. [17]

[21]** *Rule 23(b)(1) and (2)*.

Plaintiffs by their pleadings do not purport to fall within, and thus no substantial objection to the class action has been made on the basis of, *Rule 23(b)(1)(A)* and *(B)*, nor *23(b)(2)*. *Rule 23(b)(1)(A)* if it has any significance in this case clearly advances a reason for declaring a class action here, for if multiple suits were tried before different juries, "inconsistent or varying adjudications" might well result. Plaintiffs do claim, however, to fall under *Rule 23(b)(3)*.

Rule 23(b)(3).

Common Questions of Law and Fact Predominate and Class Action Treatment is Superior to Other Available Methods for a Fair and Efficient Adjudication of the Controversy.

While extremely numerous absentees comprise the classes [18] in this case, and thus ultimately proof of many separate purchase transactions will be required to establish the damages (if any there be) of each class member, the larger issue undoubtedly will involve the alleged conspiratorial conduct between the six defendants and conceivably other co-conspirators. Defendants contend that a "meeting" type conspiracy in what they claim to be a non-oligopolistic industry which results in **[**22]** price fixing and business allocation as alleged by plaintiffs requires relatively little quantum of proof, and that the numerous damage elements "raise a myriad of particularized and complex questions of law amidst highly individualized factual settings." (Brief of defendants, p. 30.) Moreover, since fraudulent concealment is in issue with respect to each governmental entity, absent and present, the individual questions it is said cumulatively will far overshadow **[*569]** any common questions of law and fact. [19] Plaintiffs, on the other hand, argue that the conspiracy proof, as the crux of the case, clearly will predominate over the lesser questions of damages and concealment. Ironically plaintiffs argue that the case presents difficult and lengthy problems regarding proof of conspiracy, while defendants submit that proof of the conspiracy aspect is minimal in relation to other aspects. In partial disregard of the arguments of each, the court finds in favor of the maintenance of the class action.

[23]** In determining "predominance," defendants attempt to establish as a test the total amount of time which will be spent on proof of the common issue of conspiracy in a class action compared to time spent on individual damage and fraudulent concealment proof in the trial of the same class action. They thus argue that the question of

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[16] See, e.g., *State of Illinois v. Brunswick Corp., 32 F.R.D. 453 (N.D. Ill. 1963)*.

[17] As rather a collateral matter, defendants have noted that in the South Dakota action, the various counties are joined and named as parties plaintiff. Defendants question whether the Attorney General has authority to represent the counties, absent a showing of direct authority by resolution of the various county boards or some other appropriate type of direct authorization. The court deems this question immaterial and holds that if there is any merit to this objection at all, it is obviated by the fact that clearly the counties will qualify as members of the class represented in the South Dakota action. If counsel desires to propose an amendment to the South Dakota pleading to cure his wording in this regard, such may be noticed and brought on for hearing at the next pretrial conference in this case.

[18] See notes 9 and 10, supra.

[19] In fact, since fraudulent concealment proof will in large part probably consist of the same evidence of attempts to conceal, secrete and otherwise hide the fact of the conspiracy (if such there was), the common questions here will likely predominate on this phase of the doctrine of fraudulent concealment over the individual questions of when each plaintiff learned of the conspiracy.

conspiracy does not predominate. If this be the correct approach to the question, arguably it is true that as a class action more time in toto will be spent in proof of individual damage claims in any of the class actions than will be spent in proof of conspiracy. Following defendants' line of reasoning, it would seem, however, that the situation should be considered and compared to that which would exist were no class action to be allowed. So for instance, if there were to be but a single case for trial, the court would expect that the great bulk of the time of that trial would be consumed with proof or the attempted proof of the existence and effect of a conspiracy and that the fraudulent concealment and damage issues would be far less predominant in the sense of time consumed at the trial. Were there to be 500 separate suits, this same pattern undoubtedly **[**24]** would prevail as to each. It seems specious and begging the question to say that if these 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer. Of course, if defendants are upheld in their current posture of denying any conspiracy, then this is clearly the only issue that ever will be tried and certainly it cannot then be gainsaid but that such is the predominant question.

Under amended *Rule 23*, courts apparently were not required to make a finding that the common questions of law and fact predominated over purely individual questions. [20] Moreover, the Rules Advisory Committee shed little light on this problem in its Note to amended *Rule 23*, when it said such issues "may or may not" predominate in antitrust litigation. [21] Thus, there is little authority regarding the concept of predominance under 23(b)(3). Such authority as there is, however, indicates that the common questions of law and fact in the matter at bar sufficiently **[**25]** predominate, permitting maintenance of class actions.

In *Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)*, plaintiff brought suit against the two largest "odd-lot" dealers of the New York Stock Exchange, alleging a conspiracy to monopolize odd-lot trading and charge excessive brokerage fees in **[*570]** violation of the Sherman Act. Plaintiff sought to represent all odd-lot traders (approximately 3,750,000) under 23(b)(3), contending that these traders had been injured by an illegal "odd-lot differential" charged for odd-lot transactions on the Exchange. The district court had held that *Rule 23(b)(3)* treatment was improper, for, among other reasons, the questions of law and fact common to the class (i.e., the conspiracy) would not predominate **[**26]** as required by 23(b)(3). On appeal, the court reversed, holding that 23(b)(3) was fulfilled. The court found that the conspiracy question common to all traders would predominate, even though the damage issue as to each absentee member would require separate proof and calculation. In noting that the absentee and representative plaintiffs would mutually share proof of a conspiracy, the court stressed that ***HN5***[] 23(b)(3) requires liberal interpretation to avoid frustrating its purpose of encouraging the prosecution of claims too small to permit of otherwise ordinary independent vindication. The rationale regarding predominance was framed in the following language:

> "We realize that members of the proposed class might have had different motives when they entered into the odd-lot market. We are also mindful of the fact that there may be a wide variety of orders some of which may require special handling by the odd-lot dealer. Nevertheless, the alleged underlying conspiracy does contain a so-called 'common nucleus of operative facts.' *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)*. All of these differences among the class members bear only on the computation of damages, **[**27]** a factor which, by itself, does not justify dismissal of the class action. *Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966)*; *City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506 (E.D. Pa. 1965)*. Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate sub-classes or to require the members to bring individual suits for damages. *Fed. R. Civ. P. 23(c)(4)*; *Advisory Committee's Note at 106*. Even if individual questions arise during the course of litigation, which render the action 'unmanageable,' the court still has the

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[20] Old *Rule 23(a)(3)* providing for the spurious class action merely required "*a* common question of law or fact affecting the several rights" of the class members.

[21] *Advisory Committee's Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966)*.

> power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself. *Fed. R. Civ. P. 23(c)(1)*. Therefore, at this early stage of the proceedings, we find there has been an adequate demonstration that common questions of law or fact predominate over individual questions. See *Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966)*."

It appears nearly a certainty that the individual issues that might arise in the present case nowhere approach the number **[**28]** nor the burden likely to arise in the *Eisen* case.

Lower federal district courts have reached the same result in antitrust treble damage suits over defendants' contentions of lack of predominance similar to those raised here. In *State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968)*, the court held that a price-fixing conspiracy suit brought by the State of Iowa on behalf of all purchasing governmental entities in the state contained common questions of law and fact predominating over non-common questions. There defendants attempted to show that the entirely diverse damages questions would predominate over common questions. The court rejected the position, after stating the defendants' contention as follows:

> " . . . Numerous disparate facts are set out in the defendants' brief which are said to indicate the unavailability of a class action. Many have to do with the manner in which the members of the alleged class have purchased asphalt products from the defendants. **[*571]** Some members purchased directly from the defendants while others negotiate with contractors who agree to supply asphalt products. Variations in the kind of asphalt **[**29]** product purchased, differences in prices due to transportation charges and quantity of purchase, normal variations in price due to market conditions, and other factors are described in detail in the briefs and affidavits."

The Iowa court relied upon and adopted the reasoning of the court in *Philadelphia Elec. Co. v. Anaconda Am. Brass Co., supra*, where similar arguments against *Rule 23* treatment were raised by defendants. There it was stated that:

> "The defendants point out that the products mentioned in the complaint include 'at least twelve separate groups of products which are separately priced and have distinct end uses'; that plaintiffs may have purchased like products from other manufacturers, at prices not shown to have been affected by the alleged conspiracy; that during the period covered by the alleged conspiracy there were dozens of price changes in each product-line; and that there were wide variations in methods of purchase and in prices actually paid. But these circumstances, it seems to me, demonstrate merely (1) the possible desirability of establishing sub-classes as the facts develop; (2) the likelihood that plaintiffs may be unable to prove all they **[**30]** claim; and (3) the fact that many of the issues relating to damages are individual rather than common to the class. Cf. *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)*; *Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966)*; *Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966)*."

Both courts appeared convinced that ***HN6***[] in the normal antitrust case, where a conspiracy to fix prices is at issue, but damages differ widely among the several plaintiffs, the predominant questions are common to the class.

Defendants argue that the above two decisions reached improper results under *Rule 23(b)(3)*. *School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967)*, is said to present a better analysis. There the price-fixing alleged dealt with library editions of children's books. The conspiracy was alleged to be a national conspiracy, and originally (though later modified) the class was claimed to comprise "all public libraries and schools and school systems maintaining libraries . . . and other educational institutions . . . situated throughout the United States, . . . aggregate 60,000 in number." The court noted that the **[**31]** commodity involved was "commercially unique" in deciding that the case did not qualify under 23(b)(3). The court found that there were many small, intricate transactions, where prices varied according to the "demand, the publisher, the cost of the reading content, the illustrations and the binding." The court envisioned difficulties of management of such a nationwide suit as a class action.

Also furnished the court by defendants is the case of *City of New York v. International Pipe & Ceramics Co., 44 F.R.D. 584 (S.D.N.Y. 1968)*, dealing with an alleged conspiracy in the concrete pipe industry. The refusal to countenance that case as a class action is based on far different grounds than exist in the case at bar. The City purported originally to represent all governmental agencies "in the United States"; later those east of the Rocky Mountains. The court pointed out that already there were some 66 similar cases pending throughout the United States. Defendants were not sellers beyond 150 to 200 miles from their plants or places of business; apparently the conspiracies were local in nature. The court stated:

> "Only a very small number of the total end user purchasers whom plaintiff **[**32]** would represent as class members did in fact purchase from the handful **[*572]** of manufacturers named as defendants in this action."

Philadelphia Electric and *Union Asphalt* better exemplify the normal claimed antitrust price-fixing situation such as alleged to be present in the matter at hand, while *School District of Philadelphia* illustrates the unusual suit not limited in territory and dealing with "commercially unique" products. The issues must not be "pre-tried" by the court at this stage of the litigation, *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)*, though it seems in any event that the suits at bar do not contain horrendous damage questions. Somewhat diverse modes of acquisition are presented in nearly all antitrust litigation. While doubtlessly some of the difficulties of damage proofs paraded by the defendants will occur, most claimants should have little trouble and raise relatively simple questions. Steel is not a unique product, but rather is sold in transactions similar to other industrial products. Moreover, the number of claimants here is far less profuse than in *Eisen.* In sum, here as in the normal antitrust case, **[**33]** proof of the conspiracy will present the predominant questions of both law and fact. Cf. M. Frankel, Some Preliminary Observations Concerning Civil *Rule 23*, 43 F.R.D. 39, 43 (1967); *Advisory Committee's Notes, 39 F.R.D. 69, 103 (1966)*.

The court also finds that class actions will be superior to other available methods of resolving the disputes. When the parties are as numerous as they are here, joinder is an extremely large burden on the court and its facilities. An additional consideration is that similar claims might well go unprosecuted by any other alternative. *Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)*. While claims held by steel purchasers would undoubtedly normally be larger than those brought in the *Eisen* case, nevertheless, it is extremely difficult to bring an antitrust action against six major steel fabricators without the financial aid made possible by the class action device. Few are the individual claimants with a sufficient interest at stake or resources to bring a suit requiring proof of a conspiracy among business corporations. Discovery expense alone normally would be prohibitive. The court therefore deems the class action device to be **[**34]** superior to any other alternative such as Rule 20 joinder or *Rule 24* intervention. Since avoidance of multiplicity of litigation is greatly to be favored, the class action device as invoked in this instance well serves such purpose.

The court in finding as above has considered and employed the criteria set forth in 23(b)(3)(A)(B) and (C) and as to (D) envisions that the difficulty in management of the class actions is within reason and is not insurmountable. The court has not permitted itself to be persuaded either way by the statute of limitations questions. To quote from *Philadelphia Electric:*

> " . . . Plaintiffs should not be rewarded for delay in filing suit by a lowering of the standards for class action approval. On the other hand, however, the suggestion that the standards for class action approval should be more stringent for actions commenced near the expiration of the period of limitations, is equally unacceptable."

Statute of Limitations--§ 5(b) of the Clayton Act.

For the reasons stated in the foregoing portion of this memorandum, the four State actions and the consolidated Third Division actions may be maintained under *Rule 23(b)(3)*. The question **[**35]** remains whether the applicable statute of limitations provides reason for not giving notice to absentee class members pursuant to 23(c)(2) because they are barred. Section 5(b) of the Clayton Act controls the limitation period since these private suits involve almost precisely the questions and situations alleged in the earlier government criminal proceedings. Plaintiffs have failed to commence their **[*573]** suits within the one year tolling period subsequent to termination of the government case, and so the four year provision of § 5(b) applies. Without acknowledging or conceding any issue regarding fraudulent concealment, defendants admit *arguendo* that the representatives filed these actions before expiration of the four year period provided by § 5(b), measured from the date the grand jury returned a criminal indictment against the six defendants. Likewise, a similar concession is made for the sake of argument with regard to the absentee plaintiffs; defendants admit that these absentees were not barred by the statute if so applied at the time the class actions were filed. Defendants, however, strenuously contend that the filing of these suits as class actions under **[**36]** 23(b)(3) did not toll the statute of limitations as to absent class members who did not file their own independent actions before the statute of limitations ran against them. Thus, it is argued that even though the actions are otherwise proper 23(b)(3) suits, notice to absentees is not required and should not be given because such members are barred in any event. Notice therefore is said to be futile. Plaintiffs contend that not only the case law demands a different result and supports their position that the statutory period is tolled by commencement of a class action under 23(b)(3), but argue additionally that policy measures intrinsic to ***antitrust law*** compel a like result. The question is not free from difficulty.

HN7[] Commencement of a *Rule 23(b)(3)* class action tolls the four year statute of limitations provided by § 5(b) of the Clayton Act. The court reaches this conclusion and so finds based upon three considerations: (1) the only reported decision found to date under the new *Rule 23* held the statutory period tolled under very similar circumstances; (2) the vast majority of pre-amendment *Rule 23* cases established the propriety of tolling in "spurious" class actions; and (3) **[**37]** policy considerations inherent in § 5(b), plus the changes wrought by new *Rule 23(b)(3)*, demand that tolling be permitted.

After the July 1, 1966 effective date for new *Rule 23*, the only court which apparently has encountered the tolling problem is *Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968)*. There several private treble damage actions under the antitrust laws were commenced as *Rule 23(b)(3)* class actions shortly before termination of the § 5(b) limitation period. In concluding that absentee class members were not barred and should be given notice pursuant to 23(c) the court stated the arguments and legal conclusions of the parties at length, rejected their premise that a negative ruling on class action maintenance would preclude the absentee members from bringing suit, and decided that ***HN8***[] affirmative class action determinations relate back to the time of the institution of the lawsuits. Defendants in *Philadelphia Electric* raised the precise arguments raised at bar:

> " . . . The defendants argue . . . that to permit a class action under these circumstances would be to approve the resurrection of a lot of stale claims and the stirring-up **[**38]** of unwarranted litigation which would not otherwise have occurred to anyone; that under the circumstances it is highly unlikely that silent class members could have been relying on the class action as the vehicle for vindicating their rights; and that, from the standpoint of court congestion, the total avoidance of a large number of lawsuits is obviously 'superior' to the class action here attempted."

Since these arguments were all rejected by the court, the case, which is nearly identical to the matter at bar, is persuasive authority for plaintiffs herein. The form of notice in that case was to be proposed by the parties. Because of the numerous class members involved, the court required that members of the class electing not to be excluded from the class **[*574]** be directed to file proofs of claim on or before a specified date with failure to comply tantamount to adjudication of no claim on the merits.

Under the pre-amendment case law, the majority of courts passing upon the tolling problem concluded that the institution of a spurious class action tolled the applicable statute of limitations for the benefit of absentee class members. See *Escott v. Barchris Constr. **[**39]** Corp., 340 F.2d 731 (2d Cir. 1965)*, cert. denied, *Drexel & Co. v. Hall, 382 U.S. 816, 15 L. Ed. 2d 63, 86 S. Ct. 37 (1966)* (Securities Act of 1933); *Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961)*, petition for cert. dismissed, *Wade V. Union Carbide & Carbon Corp., 371 U.S. 801, 9 L. Ed. 2d 46, 83 S. Ct. 13 (1962)* (Sherman Act); *Culver v. Bell & Loffland, Inc., 146 F.2d 29 (9th Cir. 1944)*, (Fair Labor Standards Act); *York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944)*, rev'd on other grounds, *326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945)*; *Newberg v. American Dryer Corp., 195 F. Supp. 345 (E.D. Pa. 1961)* (Securities Act of 1933); *Kam Koon Wan v. E. E. Black, Ltd., 75 F. Supp. 553 (D. Hawaii 1948)* (Fair Labor Standards Act); *Mutation Mink Breeders' Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155 (S.D.N.Y. 1959)* (Lanham Trade-Mark Act). Additionally, plaintiffs receive support from Professor Moore in 3A Moore, Federal Practice para. 23.12, at 3476 (2d ed. 1967).

Defendants rely principally upon three decisions. *Athas v. Day, 161 F. Supp. 916 (D. Colo. 1958)* and *P. W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.D.N.Y. 1960)* are said to clearly support the defendants' **[**40]** position, while *Escott v. Barchris Constr. Corp., supra*, cited by plaintiffs favorably, also is said to support the defendants. The court, rather than dwell at length in analysis of these conflicting cases, [22] notes that the weight of authority under pre-amended *Rule 23* spurious class actions quite decisively points toward the plaintiffs' contentions herein. However, no Supreme Court case nor any decision of the Eighth Circuit supporting defendants' position has been brought to the court's attention. The issue is not free from doubt elsewhere as demonstrated by the above conflicting cases, but in the court's opinion policy considerations augur for the weight of authority of cases under old *Rule 23* with even greater force under amended *Rule 23(b)(3)*.

The policy **[**41]** approach to the limitation question is stressed in most recent authority discussing the problem. See *Escott v. Barchris Constr. Corp., supra*; *Advisory Committee's Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 99, 104 (1966)*; Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv.L.Rev. 356, 384 (1967); Note, Class Actions Under *Rule 23* and Federal Statutes of Limitation: A Study of Conflicting Rationale, 13 Vill.L.Rev. 370 (1968). But see, 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 568 (Wright ed. Supp. 1968). Such a policy analysis looks to the statute of limitations in question as well as the possible consequence under *Rule 23(b)(3)*.

New *Rule 23(b)(3)* removes most of the possible pernicious effects of tolling present under the unamended *Rule 23* and the line of cases exemplified by *Union Carbide & Carbon Corp. v. Nisley, supra.* That decision reached a proper result in a § 5(b) context. New *Rule 23* removes the problem of "one-way intervention" prevalent in the *Union Carbide* **[*575]** case. [23] There the absentee members of the spurious class were permitted to intervene even after judgment **[**42]** for the class had been entered and the statute of limitations had run. Thus, such members were able to await the outcome of the action to decide whether to enter the class. If the plaintiffs lost, they would not intervene and consequently would not be bound by the judgment and (if still within the statute of limitations) could commence their own suit while if successful, the absentees could directly benefit. Naturally, this situation evoked much criticism from the authorities. ***HN9***[] Under the new *Rule 23* such "one-way intervention" is not possible, for the class determination is to be made as soon as possible after institution of suit. Absentees thus are compelled when in receipt of notice under 23(c)(2) to make a binding decision within a short time of commencement of the suit, and surely never after a decision on the merits. Much of the inequity of *Union Carbide* is dissipated in this fashion.

[43]** Defendants quote extensively from the legislative history of § 5(b) [24] in an effort to show that the policy of that section is frustrated by permitting maintenance of a suit such as this as a class action. It is possible to argue that Congress has given liberal treatment to antitrust civil litigants already, and therefore class action tolling is superfluous and an unwarranted extension. [25] There is doubt that Congress ascertained a problem of tolling in this situation at all. [26]

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[22] For an excellent analysis of the case law dealing with tolling problems under federal statutes of limitation, see Note, Class Actions Under New *Rule 23* and Federal Statutes of Limitation: A Study of Conflicting Rationale, 13 Vill.L.Rev. 370 (1968).

[23] The Rules Advisory Committee spoke with particularity about the problem of one-way intervention:

> "Hitherto, in a few actions conducted as 'spurious' class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. . . . Under proposed sub-division (c)(3), one-way intervention is excluded . . .."

[24] S. Rep. No. 619, 84th Cong., 1st Sess. 6 (1955); H.R. Rep. No. 422, 84th Cong., 1st Sess. 6, 9 (1955). These reports deal with the purposes sought to be furthered by § 5(b).

[25] See 13 Vill.L.Rev.. 370 (1966).

[44]** Defendants further argue that the § 5(b) limitation policies must be discerned in light of *Order of R. R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 88 L. Ed. 788, 64 S. Ct. 582 (1944)*, where the court noted the policy underlying statutes of limitation:

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id. at 348-49*.

The defendants conclude that a 23(b)(3) complaint does not sufficiently give notice to defendants so as to satisfy the *Railway Express* case, since it only tells of other absentee members and is not specific as to their identity nor as to whether they will or will not enter the action. Two observations are pertinent in this regard. First, notice is given **[**45]** by the filing of the styled class action and defendants thus are forewarned of impending **[*576]** litigation. While it is true that the exact number of plaintiffs is unascertainable, the court believes that defendants are advised sufficiently to avoid surprise, preserve records relevant thereto (especially where only one conspiracy is alleged and the geographic limitations are quite well defined), and begin defense preparations. Second, under the new *Rule 23*, the class membership will be defined in the normal situation shortly or within a reasonable time after the statutory period expires. So, in the matter at hand, defendants have been unaware of the precise number of class members beyond the limitation period only for the short time between February 10, 1968, and the date required for response to the notice prescribed by the court herein.

While it is true that the reliance of class members upon the bringing of the class action and thus not bringing their own action may be de minimus in this case, the court does not believe that the "stirring up" of litigation argument is persuasive here. The consequences to potential class members should in fact be irrelevant, since the statute **[**46]** of limitations is a defendant's shield. If the defendant receives the protection the statute guarantees, its policy is satisfied. That plaintiffs did not in fact rely is unimportant. Moreover, the State plaintiffs here allege that but for their own reliance upon prior case law tolling the statute, they would have forewarned the lesser state entities of the need for dispatch in bringing their own litigation. Since this is a different, clearer reliance than that in *York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944)*, rev'd on different grounds, *326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945)*, which is now rejected by most authority, the reliance rationale is more appropriate here.

In sum, this action may be maintained as a class action under *Rule 23(b)(3)* and it is so ordered.

Overlapping Classes.

Four State Attorneys General have brought class suits representing all significant lesser governmental entities within their respective jurisdictions. These representatives are proper representatives of their classes and within the scope and purport of *Rule 23(b)(3)*. The Third Division cases, however, which were filed prior to the four State cases seek to represent the **[**47]** same governmental entities. No cases claim to represent any class comprised of private individuals. If all suits are given class action status, all lesser governmental entities are within one of the classes represented by the States, as well as the Third Division classes. This over-lap in the court's judgment is best resolved by permitting the maintenance of the Third Division suits as class suits only to the extent that absent class members may request entrance to the class if so desired, within the time hereinafter prescribed by the court without, however, there being any notice on behalf of these plaintiffs sent from this court or otherwise pursuant to *Rule 23(c)*. The net effect, therefore, will be to give any such intervenors or absent class members the benefit of the Third Division filing date for purposes of the statute of limitations tolling and to this extent the Third Division actions will continue as class actions. ***HN10***[] The "superiority" criteria of 23(b)(3) explicitly permits the court to look at the existence of other law suits when deciding whether a class action should be maintained.

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[26] See generally, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*; ***State of Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966)***, aff'd sub nom. *Hardy Salt Co. v. State of Illinois, 377 F.2d 768* (8th Cir.), cert. denied, ***389 U.S. 912, 19 L. Ed. 2d 260, 88 S. Ct. 238 (1967)***.

While the giving of notice pursuant to *Rule 23(c)* may always arguably create a problem **[**48]** of solicitation by the very nature of the Rule, nevertheless such should be avoided whenever and to the extent possible. In this situation, the best resolution seems to be with permitting the Attorneys General to assume this task and to speak for and represent the class members in court; provided that any member of the class may be separately represented if it **[*577]** wishes and/or may elect to, and will be permitted as above stated and within the times hereinafter limited, join the Third Division cases. The Attorneys General act in parens patriae, as it were, and have a responsibility to the various lesser governmental entities which the City of St. Paul, for instance, does not have. Further it would be expected that Attorneys General will not charge the prospective class members a percentage of any recovery made as a fee for their representation.

The court realizes that possibly problems may exist and will have to be solved in the future as to "lead counsel" for plaintiffs, division of work, areas of responsibility, etc., although the court sincerely hopes plaintiffs' counsel will be able to work these matters out among themselves. If, however, plaintiffs ultimately prevail **[**49]** and the court awards in addition to the recovery made, an attorney's fee as permitted by the Clayton Act, *15 U.S.C.§ 15*, the court reserves the question as to the division thereof and does not purport now to establish the amount of, nor the right or rights in and to a legal fee upon completion of the law suits. The court will attempt to evaluate the contributions made by various plaintiffs counsel and establish fees accordingly.

Notice Under Rule 23(c).

HN11[] The Rule provides that "the court shall direct to the members of the class the best notice practicable . . . ." The court does not interpret this as requiring personal notice from the court itself but as permitting the court to direct one or some of the parties to give a notice in such form as the court may approve. Each of the Attorneys General in the Fourth Division cases has indicated it has adequate lists of, and facilities for mailing notice to, governmental entities within its borders. The court therefore directs that these offices fulfill this function of giving notice. The notices should contain the matter required by *Rule 23(c)(2)*, and in addition should include something in the nature of a verified proof of claim **[**50]** form to be filled out and returned so as to indicate name of the claimant, the appropriate or knowledgeable government official familiar with the details of the claim, the gross amount of purchases and dates thereof for which claim is made, the person or firm from or through whom bought or general contractor dealt with, type of building or structure into which the steel was incorporated or other end use made of the product and any other matters deemed appropriate. Attached to or accompanying the proof of claim form should be a certified resolution of the governing body authorizing the submission of the claim. Plaintiffs may desire from, or may wish to furnish to, class members other information. There is no prohibition by the court against such, provided that the notice or any information shall be informative and not urging action nor solicitations. The following time table is established:

> WITHIN 10 days from date of this order, Fourth Division plaintiffs shall submit to all defendants, the other plaintiffs, and to the court for its approval, a copy of the proposed notice and proof of claim forms.
>
> WITHIN 10 days thereafter, defendants and the other plaintiffs may send **[**51]** to these plaintiffs and to the court suggestions or objections as to the form of notice and proof of claim forms for consideration by the court.
> WITHIN 15 days from the court's approval of the notice and proof of claim form, the same shall be transmitted to the prospective members of the class by the four Attorneys General.
>
> WITHIN 60 days from such latter date, Fourth Division plaintiffs shall file with the clerk of this court and makes copies available to each defendant the responses or proofs of claims received from the members of the class, and this, subject to further **[*578]** court order, shall then comprise the classes (together with any such filings in addition to present pleadings made by or in the cases represented by the Third Division plaintiffs) and all not so filing shall be barred and excluded from the classes. Each Attorney General also shall file and furnish a copy to the other parties proof of mailing, showing a list of those to whom mailed.

II.

Qualifications of Plaintiffs' Counsel

On March 15, 1968, at the opening of the informal pretrial conference, objection was made by defendants to the appearance for the Third Division plaintiffs of a member **[**52]** of the District of Columbia Bar whose admission to this court had been moved for the purpose of participating with local counsel in this litigation. The objection was based on Canon 36 of the American Bar Association Canons of Ethics that, as a lawyer, he had been an employee of the Department of Justice, Antitrust Division in 1964 at the time of the investigation and ultimate criminal indictment of the six defendants in this case. He did not leave the Department of Justice until November, 1966. Canon 36 provides in pertinent part:

> ***HN12***[] "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

The court heard oral evidence and satisfied itself that while with the Department of Justice, counsel did not handle nor was he assigned to the cases involving the steel industry at any time; that he never saw any grand jury minutes or documents, nor participated in such proceedings; that he never saw or examined any F.B.I. reports or any other governmental agent's reports; that he never examined the Department **[**53]** of Justice files on the steel cases nor conferred with anyone within the Department of Justice about the cases. At the time of instituting these cases, as a former employee, he had, and now has, no greater rights or "in" with the Department of Justice than any other practicing attorney. In view of this showing, the court holds that plaintiffs' counsel is not in violation of Canon 36, in that he never "investigated or passed upon" any matters relating to the case at bar. The rationale and holding of *Hilo Metals Co. v. Learner Co., 258 F. Supp. 23 (D. Hawaii 1966)* is thus not applicable here; nor is the "appearance of evil" doctrine espoused by Judge Kaufman in *United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955)* and in a subsequent article which he authored, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv.L.Rev. 657 (1957). *Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 283 F. Supp. 464 (D. Minn. 1968)* is clearly distinguishable. That was a case where counsel had participated actively in a 13-week government criminal trial, had examined F.B.I. reports, grand jury transcripts, etc., all involving many of the same issues and facts **[**54]** as later were involved in a private damage suit in which the former government counsel appeared for plaintiffs. There the attorney had "investigated and passed upon" and the "appearance of evil" could be said to exist.

Defendants further raised the possibility that counsel for plaintiffs may have solicited the retainer of his law firm to handle the Third Division cases in violation of Canon 28 of the Canons of Ethics. Defendants requested permission to take certain depositions to inquire into this field and the court permitted such to the extent of taking the depositions of two members of the City of St. Paul corporate counsel's office. These were available at the April 15, 1968 hearing. On the basis thereof, and the records as a whole, and assuming **[*579]** *arguendo* that defendants have standing to make this challenge, the court concludes and makes a finding that there is no showing or evidence of any solicitation on the part of plaintiffs' counsel; that the members of the City of St. Paul corporate counsel's office who were deposed are reputable and respected members of the Minnesota Bar and their testimony accords with that given by plaintiffs' counsel to the effect **[**55]** that it was the City of St. Paul which approached the Washington, D.C. law firm (of which plaintiffs' counsel is a member) seeking advice on antitrust matters, including the possibility of instituting the action in the case at bar. Any further inquiry into this aspect could go far afield and the court declared at the hearing on April 15, 1968, that it was satisfied that there has been no violation of Canon 28. Plaintiffs' counsel is therefore admitted to this court for the purpose of participating in this litigation with local counsel, and defendants' motions to require further answers from deponents in the depositions and for leave to take further depositions are denied. It is so ordered.

III.

Motion for Intervention

Counsel for Third Division plaintiffs has moved, on behalf of and representing the Minneapolis-St. Paul Metropolitan Airports Commission, an agency of the State of Minnesota, to intervene as a party plaintiff in the City of St. Paul action (or the consolidated Third Division actions). Since this Commission would be, and is, one of the members of the class, and since it has chosen to be identified with the St. Paul action and to be represented by legal counsel **[**56]** other than the Attorney General, and since at the last hearing there was no objection raised to this motion other than the general one by defendants as to the maintenance of class actions, this motion is granted and it is so ordered.

IV.

Motion to Disclose Grand Jury Witnesses and Subpoenas

The Third Division plaintiffs by written motion seek an order on behalf of themselves and the other plaintiffs authorizing their attorneys to inspect and copy all subpoenas issued to, and all lists of names of, witnesses appearing before the federal grand jury for the District of Minnesota in the investigation antedating the criminal indictment which was returned on February 10, 1964, charging the defendants herein with violations of the antitrust laws. Plaintiffs' grounds for the motions are three:

> (1) "The interests of justice require that such information, available to and in possession of defendants in this litigation, should be equally available to plaintiffs;"
>
> (2) "The importance of the testimony which witnesses gave during the course of the grand jury investigation and the likely importance in the connection with the pending litigation, demonstrates the immediate need for **[**57]** the requested information prior to the initiation of discovery;" and
>
> (3) "The interests and even-handed application of justice requires prompt disclosure to plaintiffs of information which has been made available to defendants."

Defendants resist this motion principally upon the ground of traditional grand jury secrecy [27] which is said to encompass **[*580]** information including subpoenas and witnesses' names as well as the minutes. Furthermore, defendants contend that the reasons justifying disclosure to civil litigants are wholly absent in the matter at bar, and that *U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18* (9th Cir.), cert. denied, *382 U.S. 814, 15 L. Ed. 2d 62, 86 S. Ct. 32 (1965)*, cited as dispositive by plaintiffs, is inapposite. The court finds in accordance with the defendants' position, and, accordingly, denies the motion for access to the list of grand jury witnesses and subpoenas.

[58]** While the Supreme Court has vigilantly recognized the policy of secrecy in conjunction with grand jury proceedings, see, e.g., *Dennis v. United States, 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (1966)*; *Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L. Ed. 2d 1323, 79 S. Ct. 1237 (1959)*; *United States v. Procter & Gamble Co., 356 U.S. 677, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958)*; *Costello v. United States, 350 U.S. 359, 100 L. Ed. 397, 76 S. Ct. 406 (1956)*; *United States v. Johnson, 319 U.S. 503, 87 L. Ed. 1546, 63 S. Ct. 1233 (1943)*, nevertheless, exception is made under these cases when the movants for disclosure show "particularized need." Under the facts presented at bar, plaintiffs have not in the court's opinion shown sufficient "particularized need" to merit disclosure, at least at this time.

First, defendants represent to the court that they have neither had nor do they have access to the information sought. Some of what defendants know of the grand jury proceeding was gleaned from government summaries of

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[27] ***HN13***[] *Fed. R. Crim. P. Rule 6(e)*:

"Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

HN14[] -

certain grand jury testimony with the witnesses' names deleted by the court. These summaries were made in conjunction with the government's motion for **[**59]** sentencing in the criminal proceedings previously mentioned. The information plaintiffs seek to discover here is stated never to have been disclosed to defendants. [28] The major reason for secrecy of proceedings at this late stage is to prevent intimidation of future grand jury witnesses who might believe their names would be released if names were disclosed here, and hence be reluctant to testify. See Note, Release of Grand Jury Minutes in the National Deposition Program of the Electrical Equipment Cases, 112 U.Pa.L.Rev. 1133 (1964); [29] ***HN15***[] *U.S. Indus., Inc. v. United States Dist. Court, supra.* Witnesses' names are matters before the grand jury and so are entitled to secrecy. *Application of State of California, 195 F. Supp. 37, 40 (E.D. Pa. 1961)*. Plaintiffs have cited no decision going so far as to permit violation of grand jury secrecy merely for purposes of discovery by plaintiffs in a subsequent civil suit against the same defendants. In sum, plaintiffs have failed to bear their burden at this point in the litigation which is a prerequisite to **[*581]** revealing grand jury information. The normal routes of civil discovery will well give plaintiffs adequate opportunity to **[**60]** prepare their case. Mere savings of monetary burden will not suffice to bring the court's discretion into play under *Rule 6(e), Fed. R. Crim. P.* *United States v. Procter & Gamble Co., 356 U.S. 677, 682, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958)*; *Application of State of California, supra*; *City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 486 (E.D. Pa. 1962)*. The time may come when the parties are well into or have completed their discovery that a "particularized need" will become apparent for disclosure of the information requested. If a proper showing subsequently is made, the court will be open to consider an appropriate motion in this regard.

[61]** V.

Motion to Vacate Prior Order

Plaintiffs counsel has moved the court to vacate the order of the Honorable Edward J. Devitt, a judge of this court dated July 13, 1964, in which order the judge ordered that certain information "shall not become a part of the public records." This court indicated at the time of hearing that he would discuss this motion with Judge Devitt. He advises that the submissions were really briefs by the government and each of the defendants, dealing with sentencing, and done for the purpose of affording a guide to the court upon which to impose appropriate sentences. The government submitted a "statement of facts" and each of the defendants submitted a similar statement of facts. The court at the time indicated that the submissions would be confidential and the same were in fact not filed.

It has long been the policy of this court not to disclose presentence investigatory reports from the Probation Officer. It seems to this court, affirming the opinion held by Judge Devitt, that the submissions were in the nature of or in the same category as probation office reports and should be held confidential. Again, the time may come when the parties have completed **[**62]** their discovery that the court will wish to reconsider this ruling, but a promise of confidentiality given and ordered by the court prior to any submissions should not be lightly removed and since at least at this time there is an absence of a showing of any real exigency, the court rules that the motion should be denied. The court is not unaware of *U.S. Indus., Inc. v. United States Dist. Court, supra*, wherein the court exercised his discretion and permitted a disclosure of a somewhat similar document. This court exercises its discretion to deny disclosure.

VI.

Consolidation

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[28] Certain it is that defendants must have knowledge of at least some of the grand jury witnesses, for undoubtedly one or more of their own employees were called together with others in the industry who would be known to defendants. Appropriate interrogatories or other discovery proceedings undoubtedly can ascertain these names.

[29] Apparently disclosure of grand jury proceedings was permitted to some extent to plaintiffs in civil antitrust cases in what have been styled the Electrical cases (some unreported) for the purposes of impeachment and the refreshing of recollection. No such exigency appears here, at least at this stage of the case.

Counsel for Third Division plaintiffs has moved to consolidate the four Third Division cases. The court is quite clear as to the reasons for, and the advantages of, a consolidation, though does not find in plaintiffs' moving papers whether counsel wishes true consolidation so that the Third Division cases result in but one judgment and thus one right to appeal, or whether he wishes something less. [30] No opposition was voiced to the motion, though no similar motion was made by the Fourth Division plaintiffs.

[63]** *Rule 42(a) of the Federal Rules of Civil Procedure* provides:

> "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such **[*582]** orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

The court believes that all eight actions, plus the complaint in intervention of the Metropolitan Airports Commission as an intervenor in the Third Division cases, should be consolidated (or at least treated jointly) for purposes of all pretrial matters, all motions and discovery proceedings, and certainly for trial. Each of the eight plaintiffs may of course, and should, it would seem continue to be separately represented and participate separately in the trial. A consolidation as the court envisions and intends will result in but one trial which will bind all parties plaintiff and defendants, as well as all class members, and is indeed the purport of the Recommended Procedures for Protracted Litigation and is necessary to save time, money and multiplicity **[**64]** of litigation. Separate judgments will be expected to result, however, and appellate rights should not be consolidated. The motion to consolidate is granted and ordered, as and to the extent above as to all cases, both Fourth and Third Division cases. The question of severing the trial and perhaps trying the conspiracy issue first and separately, and the damages and fraudulent concealment issues either thereafter or theretofore is reserved for later consideration by the court.

VII.

Discovery Proceedings

At the institution of these actions, the court entered orders temporarily restraining discovery. Plaintiffs have moved to lift the orders, at least to the extent that will permit plaintiffs to pose interrogatories to defendants concerning conspiracy. The court is of the view that the restraining order should continue for the time being and it is so ordered. Until the court's order determining the classes to be made after submission of proofs of claims and related documents as hereinabove provided, it is not feasible to make a specific schedule for any type of extensive discovery. The court would contemplate an additional pretrial conference within 30 days after such date **[**65]** and would request that at that time the parties submit a schedule and plan, hopefully agreed upon in advance, for the taking of depositions, identification, deposit and inspection of documents, requests for admissions and any other discovery proceedings. The court would then attempt to fix a time table or schedule for discovery. [31]

The only discovery feasible at this time it would seem is the serving of interrogatories. Within 30 days from date hereof, plaintiffs may, if they wish, submit interrogatories to the defendants relating to questions germane to conspiracy; provided **[**66]** that defendants may have 75 days within which to answer the same despite the 15 day limitation of Rule 33; provided further that any objections to the interrogatories or requests for protective orders shall be promptly noticed and submitted to the court after receipt by defendants of the interrogatories.

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[30] For the various meanings and concepts of the term consolidation within the purview of *Rule 42(a)*, see 2B W. Barron & A. Holtzoff, Federal Practice & Procedure § 941 et seq. (Wright ed. 1961).

HN16[] -

[31] The court's oral order from the bench made on the record March 15, 1968 will remain in full force and effect to the end that none of the parties shall destroy or remove from the court's jurisdiction any documents or evidence now in existence relating to this case, used in the prior grand jury proceedings or relating in general to the business of selling structural steel or relating to knowledge on the part of plaintiffs or class members.

Within 30 days of the filing of the proofs of claims following notice to members of the class, defendants may pose "transaction" interrogatories to plaintiffs and to all members of the class; provided 60 days shall be allowed for answers thereto.

[*583] VIII.

Extension of Time to Defendants to Answer

Defendants, at the first pretrial hearing and renewed at the second pretrial hearing on April 15, 1968, moved the court to extend the time to answer, move or otherwise plead to the plaintiffs' complaints. This motion was granted. The court no longer can see a valid reason why responsive motions, answers or other pleadings should not be interposed. Consequently the court orders that the time within which defendants may so answer, move or otherwise plead expires 30 days from the date of this order.

IX.

Motion to Strike Allegations of Complaints

Each of the eight complaints **[**67]** makes specific references to, and pleads in some detail, the government investigation of the steel industry, the return of the criminal indictment by the grand jury and the *nolo contendere* pleas entered by all of the defendants. The claim of the defendants is that under *Rule 12(f) of the Federal Rules of Civil Procedure*, these allegations are immaterial, impertinent and highly prejudicial.

The plaintiffs all concede that ***HN17***[] *nolo contendere* pleas do not establish a *prima facie* case against defendants because under § 5(a) of the Clayton Act they are denominated the equivalent of consent judgments. However, plaintiffs argue that the government proceedings are material and relevant in establishing fraudulent concealment, which is clearly in issue at this stage of the cases, and become essential in establishing the tolling of the statute of limitations. Since *rule 9(b), Fed. R. Civ. P.*, requires particularity in pleading fraud, plaintiffs submit that the government proceeding must be pled.

On the authority of *State of Illinois v. Sperry Rand Corp., 237 F. Supp. 520 (N.D. Ill. 1965)* and *N.W. Elec. Power Cooperative v. General Elec. Co., 30 F.R.D. 557 (W.D. Mo. 1961)*, the court **[**68]** disagrees with plaintiffs and accordingly grants the defendants' motions to strike all allegations in the original or amended complaints relating to the above discussed matters. Plaintiffs may continue to plead that the date of discovery was not until February 10, 1964, but no reference should be made otherwise to the criminal proceedings. Against the objection that the court is ruling now and in advance on the admissibility of evidence, suffice it to say that this matter is sufficiently prejudicial to defendants as to require this action now. Such striking of course will not limit discovery scope and is not intended to. Plaintiffs' counsel will furnish to the clerk and counsel amended pleadings, or substitute sheets to supplant those in the present pleadings within 30 days from the date of this order.

From the complaints in State of Minnesota, State of North Dakota and State of Wisconsin cases, the following is stricken:

1. From paragraph 18: " . . . the filing of the indictment by the United States referred to hereinafter . . ."
2. All of paragraph 22.
3. From paragraph 23: " . . . the institution of proceedings by the United States of America against the **[**69]** defendants hereon . . ."

From the complaint in the case of State of South Dakota, the following is stricken:

From paragraph 11: " . . . when it had learned of the indictment filed against the defendants herein in the United States District Court for the District of Minnesota, Fourth Division . . ."

From the original complaints of all four Third Division plaintiffs the following is stricken:

1. From paragraph 16: " . . . after an indictment, hereinafter **[*584]** alleged in Paragraph 17 was brought by the United States against the defendants . . ."

2. All of Paragraph 17.

From the amended complaints of all Third Division plaintiffs and the complaint of intervenor Metropolitan Airports Commission, the following is stricken:

1. From paragraph 17: " . . . when an indictment changing a similar combination and conspiracy was brought by the United States against the defendants . . ."
and
" . . . when defendants were convicted on pleas of nolo contendere . . ."

2. All of paragraph 18.

Let this be filed as an order in all eight pending cases.

Perma Life Mufflers v. International Parts Corp.

Supreme Court of the United States

April 22-23, 1968, Argued ; June 10, 1968, Decided

No. 733

Reporter

392 U.S. 134 *; 88 S. Ct. 1981 **; 20 L. Ed. 2d 982 ***; 1968 U.S. LEXIS 3168 ****; 1968 Trade Cas. (CCH) P72,486

PERMA LIFE MUFFLERS, INC., ET AL. v. INTERNATIONAL PARTS CORP. ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: *376 F.2d 692*, reversed and remanded.

Core Terms

pari delicto, antitrust, damages, provisions, dealers, anti trust law, mufflers, franchise, terms, manufacturer, participated, cases, illegal scheme, treble damages, resale price, conspiracy, violations, parties, fault, franchise agreement, Sherman Act, restrictions, franchisees, territorial, selling, prices, deter, source of a supply, public interest, anticompetitive

LexisNexis® Headnotes

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN1[] **Private Actions, Remedies**

There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law in pari delicto doctrine a defense to treble-damage actions. Although in pari delicto literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. The United States Supreme Court has often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. A plaintiff in an antitrust suit can not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation.

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

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN2[] Private Actions, Remedies

The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

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

HN3[] Price Fixing & Restraints of Trade, Vertical Restraints

The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN4[] Price Discrimination, Defenses

The doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] Complaints, Requirements for Complaint

Pleadings must be construed as to do substantial justice. *Fed. R. Civ. P. 8(f)*.

Lawyers' Edition Display

Summary

In a private antitrust action instituted in the United States District Court for the Northern District of Illinois, Eastern Division, to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain competition in violation of the Sherman Act and the Clayton Act under certain provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories. The District Court entered summary judgment for the defendants on the ground that the plaintiffs' claims were barred by the doctrine of in pari delicto. The Court of Appeals for the Seventh Circuit reversed

the judgment with regard to the claim under the Robinson-Patman Act, but affirmed the ruling that the other claims were barred under the doctrine of in pari delicto (*376 F2d 692*).

On certiorari, the Supreme Court of the United States reversed the judgment of the Court of Appeals, with directions to reverse the District Court's judgment and to remand the case for trial. In an opinion by Black, J., expressing the view of five members of the court, it was held that (1) the doctrine of in pari delicto was not to be recognized as a defense to a private antitrust action, (2) the plaintiffs therefore were not barred from recovery on the ground that they had sought their franchises with knowledge of the terms and had enjoyed profits as dealers and sought to acquire additional franchises, since their participation was not voluntary in any meaningful sense in view of the agreement clauses, which were clearly detrimental to their interests and to which they allegedly had continually objected, (3) the possible beneficial byproducts of a restriction in the agreements from a plaintiff's point of view could be taken into consideration in computing damages, and (4) there was no merit in the defendants' contention that the plaintiffs were barred from recovery, wholly apart from the idea of pari delicto, on the ground that the plaintiffs actively supported the entire restrictive program as such, since the record refuted such contention and showed, to the contrary, that the illegal scheme had been thrust upon the plaintiffs by the defendants.

White, J., concurring, joined the opinion of the court with the observation that the in pari delicto defense in its historic formulation was not a useful concept for determining whether a plaintiff should be barred because of his own conduct, that the determination of whether a party to an illegal venture was entitled to damages from the other participants should be made by hewing closer to the aims and purposes of the Clayton Act, which gives treble damage recovery to a private plaintiff injured by conduct violating the antitrust laws, and that in general, recovery should be denied where the plaintiff and the defendant were substantially equally responsible for the injury resulting to one of them, whereas recovery should be permitted in favor of the one least responsible where one was more responsible than the other.

Fortas, J., concurred in the result, stating that the doctrine of in pari delicto had a significant yet limited role in private ***antitrust law***, barring recovery if the fault of the parties was reasonably within the same scale, but that the plaintiffs in the case at bar were not barred under the doctrine, although they should not be allowed to recover damages based upon any clause in the franchise agreements if they were chargeable with responsibility for the particular clause, because it was in substance their own act.

Marshall, J., concurred in the result, expressing the view that a limited application of the basic principle behind the in pari delicto doctrine was both proper and desirable in the antitrust field, barring recovery where the plaintiff was substantially equally at fault, that summary judgment for the defendants in the instant case was not proper, since the record indicated that the plaintiffs had not sought out or supported all the anticompetitive restrictions in the franchises, that if the defendants showed that certain provisions were inserted in the franchise agreements at the behest and for the benefit of the plaintiffs and their fellow franchisees, the plaintiffs should be barred from contending that they were damaged by the existence and enforcement of such provisions, and that if it was established that the plaintiffs actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action for anticompetitive restraints intended for their benefit, the plaintiffs should be barred from seeking damages as to the agreement as a whole.

Harlan, J., joined by Stewart, J., concurred in part and dissented in part, stating that the defense of in pari delicto, properly applied, should be permitted in antitrust cases, that plaintiffs who were truly in pari delicto were those who had themselves violated the law in co-operation with the defendant, that the lower courts had erred in holding that the plaintiffs were in pari delicto merely because they had voluntarily entered into the franchise agreements and accepted benefits therefrom, and that the case should be remanded for consideration of the motion for summary judgment upon proper standards, requiring the determination of whether any agreement allegedly in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §50 > exclusive dealership agreements -- defense -- doctrine of in pari delicto -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act (*15 USC 13*) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act (*15 USC 1*) and 3 of the Clayton Act (*15 USC 14*) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that they sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting dealers from selling outside their designated exclusive sales territories, the doctrine of in pari delicto is not available as a defense, and recovery is not barred on the ground that the plaintiffs had sought their franchises with knowledge of the terms of the agreements and had enjoyed profits as dealers and sought to acquire additional franchises, where their participation was not voluntary in any meaningful sense, since the plaintiffs had not sought each and every clause of the agreements, many of which were clearly detrimental to their interests and to which they allegedly had continually objected, and since the plaintiffs' acquiescence was necessary to obtain an otherwise attractive business opportunity.

PLEADING §48.5 > summary judgment -- private antitrust action -- > Headnote:
LEdHN[2][] [2]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act (*15 USC 13*) by granting discriminations in prices and services, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act (*15 USC 1*) and 3 of the Clayton Act (*15 USC 14*) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that they sell at fixed resale prices, tying the sale of mufflers to the sale of other goods in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, the defense that the restraints were permissible as reasonable means to protect the defendants' registered trade and service marks cannot be decided as a summary judgment question, but must be resolved along with all the other issues by a trial on the merits.

APPEAL §910.6 > grant of certiorari -- > Headnote:
LEdHN[3][] [3]

The Supreme Court of the United States will grant certiorari where the rulings by the Court of Appeals in a private antitrust action to recover treble damages seem to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.

ACTIONS §18 > defenses -- > Headnote:
LEdHN[4][] [4]

Broad common-law barriers to relief should not be invoked where a private suit serves important public purposes.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > private action -- > Headnote:
LEdHN[5][] [5]

The purposes of the antitrust laws are best served by insuring that a private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- effect of violation by plaintiff -- > Headnote:
LEdHN[6][] [6]

Although the plaintiff who reaps the reward of treble damages in a private antitrust action may be no less morally reprehensible than the defendant, nevertheless the law encourages his suit to further the overriding public policy in favor of competition; permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position, since they remain fully subject to civil and criminal penalties for their own illegal conduct.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- plaintiffs' participation in illegal arrangement -- > Headnote:
LEdHN[7][] [7]

In private antitrust actions, the courts do not have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others.

DAMAGES §159 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §41 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §42 > private antitrust action -- plaintiffs' participation in violation -- > Headnote:
LEdHN[8][] [8]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act (*15 USC 13*) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act (*15 USC 1*) and 3 of the Clayton Act (*15 USC 14*) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, the possible beneficial byproducts of a restriction in the agreement from a plaintiff's point of view can be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation by operating under the agreement are not a ground for completely denying him the right to recover which the antitrust acts give him.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- defense -- doctrine of in pari delicto -- > Headnote:
LEdHN[9][] [9]

The doctrine of in pari delicto, with its complex scope, contents, and effect, is not to be recognized as a defense to a private antitrust action.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §41 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §42 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §50 > private antitrust action -- plaintiffs' participation in violation -- > Headnote:
LEdHN[10][] [10]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act (*15 USC 13*) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act (*15 USC 1*) and 3 of the Clayton Act (*15 USC 14*) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, there is no merit in the defendants' contention that the plaintiffs are barred from recovery, wholly apart from the idea of pari delicto, on the ground that the plaintiffs actively supported the entire restrictive program as such, participating in its formulation and encouraging its continuation, where the record refuted such contention and showed, to the contrary, that the illegal scheme had been thrust upon the dealers by the defendants, neither of the most strenuously challenged provisions, requiring the dealers to purchase their supplies exclusively from the defendants and to carry the defendants' full line of parts, being in a dealer's self-interest, since they obligated the dealer to buy from the defendants regardless of whether more favorable prices could be obtained from other sources and regardless of whether the dealer needed certain parts at all, and it being shown that the defendants had repeatedly refused, with warnings and threats, numerous requests by the plaintiffs for permission to purchase from other sources of supply.

RESTRAINTS OF TRADE, MONOPOLIES AND TRADE PRACTICES §34 > private antitrust action -- common ownership of corporate defendants -- > Headnote:
LEdHN[11][] [11]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts with one of the defendant corporations, alleged that the defendants had conspired to restrain competition in violation of the

Sherman Act under provisions of the dealership agreements which imposed restrictions upon the dealers, the fact of common ownership of the defendants, who were a parent corporation, three of its subsidiaries, and some of the officers and agents of the corporations, does not save the defendants from any of the obligations that the law imposes on separate entities, under the asserted theory that because the defendants were all part of a single business entity they were entitled to co-operate without creating an illegal conspiracy.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §31 > private antitrust action -- dealership franchise agreements -- > Headnote:
LEdHN[12][] [12]

In a private antitrust action to recover treble damages from the defendants, who were commonly owned corporations and some of their officers and agents, and who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership franchise agreements with one of the defendant corporations, asserted a violation of the Sherman Act under provisions of the franchise agreements which imposed restrictions upon the dealers, each plaintiff can charge a combination between himself and the corporation with which the agreements were made, as of the day the plaintiff unwillingly complied with the restrictive franchise agreements, or between such corporation and other franchise dealers, whose acquiescence in the corporation's firmly enforced restraints was induced by the communicated danger of termination of the franchise.

PLEADING §176 > private antitrust action -- sufficiency of complaint -- > Headnote:
LEdHN[13][] [13]

In a private antitrust action to recover treble damages from the defendants, who were commonly owned corporations and some of their officers and agents, and who manufactured automobile mufflers and exhaust system parts, wherein the plaintiff, who had entered into dealership sales contracts with one of the defendant corporations, alleged that the defendants had conspired to restrain competition in violation of the Sherman Act under certain provisions of the dealership agreements which imposed restrictions upon the dealers and which the defendants had refused to eliminate, there is no merit in the defendants' contention that the complaint failed to allege with sufficient specificity certain alternative theories of conspiracy which were asserted by the plaintiffs and which were based on charges of combinations between each plaintiff and the corporation with which the agreements were made, and between such corporation and other franchise dealers, in view of the rules providing for trying cases to serve the ends of justice and particularly the requirement of *Rule 8 (f) of the Federal Rules of Civil Procedure* that pleadings be construed as to do substantial justice, the gist of the plaintiffs' cause of action having been clear from the outset, and the defendants not being prejudiced if the plaintiffs were permitted to rely on the alternative theories of conspiracy.

Syllabus

Petitioners, dealers who had operated "Midas Muffler Shops," brought this antitrust action for treble damages against respondent Midas, Inc., its parent corporation (International), two other subsidiaries, and corporate officers and agents, charging an illegal conspiracy in violation of *§ 1* of the Sherman Act, and violations of § 3 of the Clayton Act and § 2 as amended by the Robinson-Patman Act. Petitioners attacked provisions of the sales agreements which they had made with Midas including those which barred petitioners from purchasing from other sources, prevented them from selling outside designated territories, tied muffler sales to other Midas-line products, and required petitioners to sell at fixed retail prices. The District Court entered summary judgment for respondents. The

Court of Appeals reversed the judgment on the Robinson-Patman claim but affirmed the District Court's ruling that petitioners' other claims were barred **[****2]** by the doctrine of *in pari delicto*, noting that petitioners, with full knowledge of the restrictions, had enthusiastically sought and enormously profited from the Midas franchises and had sought additional franchises. The court also held that petitioners' Sherman Act claim was barred because Midas and International were part of a single business entity and therefore entitled to cooperate without creating an illegal conspiracy. *Held*:

1. There is nothing in the language of the antitrust laws indicating a congressional intent that the doctrine of *in pari delicto* should constitute a defense to a private antitrust action, and such application of the doctrine would undermine the important function performed by the private antitrust action in enforcing the antitrust laws. Pp. 138-140.

2. The record refutes respondents' argument that petitioners actively participated in formulating the restrictive plan and encouraged its continuation. Pp. 140-141.

3. Common ownership does not relieve separate corporate entities of the obligations which the antitrust laws impose; and in any event each petitioner can charge a combination between Midas and himself or other acquiescing franchisees. **[****3]** Pp. 141-142.

Counsel: Robert F. Rolnick argued the cause for petitioners. With him on the briefs were Raymond R. Dickey and Bernard Gordon.

Glenn W. McGee argued the cause for respondents. With him on the brief were John T. Chadwell, David J. Gibbons, John C. Berghoff, Jr., David Silbert, and Jay Erens.

Opinion by: BLACK

Opinion

[*135] **[***988]** **[**1982]** MR. JUSTICE BLACK delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2]***[] [2] ***LEdHN[3]***[] [3]The principal question presented is whether the plaintiffs in this private antitrust action were barred from recovery by a doctrine known by the Latin phrase *in pari delicto*, which literally means "of equal fault." The plaintiffs, petitioners here, were all dealers who had operated "Midas Muffler Shops" under sales agreements granted by respondent **[**1983]** Midas, Inc. Their complaint charged that Midas had entered into a conspiracy with the other named defendants -- its parent corporation International Parts Corp., two other subsidiaries, **[****4]** and six individual defendants who were officers or agents of the corporations -- to restrain and substantially lessen competition in violation of *§ 1* of the Sherman Act [1] and § 3 of the Clayton Act. [2] They also charged that the defendants had violated § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, [3] by granting discriminations in prices and services to some of their customers without offering the same advantages to the plaintiffs. The District Court entered summary judgment for respondents with respect to all of petitioners' **[*136]** claims. On appeal the Court of Appeals reversed the judgment for respondents on the Robinson-Patman claim but, over Judge Cummings' dissent, affirmed the District Court's ruling that the other claims were barred by the doctrine of *in pari delicto*. The court also held that petitioners' Sherman Act claim was barred because Midas and International, while functioning as separate corporations, had a common ownership and therefore could cooperate without creating an illegal conspiracy. [4] *376 F.2d 692 (1967)*. Because these rulings by

[1] 26 Stat. 209, *15 U. S. C. § 1*.

[2] 38 Stat. 731, *15 U. S. C. § 14*.

[3] 49 Stat. 1526, *15 U. S. C. § 13*.

the Court of Appeals seemed to threaten the effectiveness of the private action **[****5]** as a vital means for enforcing the antitrust policy of the United States, we granted certiorari. *389 U.S. 1034 (1968)*. For reasons to be stated, we reverse.

[**6]** The economic arrangements that led to this lawsuit have a long history. Respondent International Parts has been in the business of **[***989]** manufacturing automobile mufflers and other exhaust system parts since 1938. In 1955 the owners of International initiated a detailed plan for promoting the sale of mufflers by extensively advertising the "Midas" trade name and establishing a nation-wide chain of dealers who would specialize in selling exhaust system equipment. Each prospective dealer was offered a sales agreement prepared by Midas, Inc., a wholly owned subsidiary of International. The agreement **[*137]** obligated the dealer to purchase all his mufflers from Midas, to honor the Midas guarantee on mufflers sold by any dealer, and to sell the mufflers at resale prices fixed by Midas and at locations specified in the agreement. The dealers were also obligated to purchase all their exhaust system parts from Midas, to carry the complete line of Midas products, and in general to refrain from dealing with any of Midas' competitors. In return Midas promised to underwrite the cost of the muffler guarantee and gave the dealer permission to use the registered trademark "Midas" **[****7]** and the service mark "Midas Muffler Shops." The dealer was also granted the exclusive right to sell "Midas" products within his defined territory. He was not required to pay a franchise fee or to purchase or lease substantial capital equipment from Midas, and the agreement was cancelable by either party on 30 days' notice.

Petitioners' complaint challenged as illegal restraints of trade numerous provisions of the agreements, such as the terms barring them from purchasing **[**1984]** from other sources of supply, preventing them from selling outside the designated territory, tying the sale of mufflers to the sale of other products in the Midas line, and requiring them to sell at fixed retail prices. Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused and had threatened to terminate their agreements if they failed to comply. Finally they alleged that one of the plaintiffs had had his agreement canceled by Midas for purchasing exhaust parts from a Midas competitor, and that the other plaintiff dealers had themselves canceled their agreements. All the plaintiffs claimed treble damages for the monetary loss they had suffered **[****8]** from having to abide by the restrictive provisions.

The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari* ***[*138]*** *delicto*. The court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had "solemnly subscribed" to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, "it would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." *376 F.2d, at 699*.

LEdHN[4][] [4]***LEdHN[5]***[] [5]***LEdHN[6]***[] [6]We find ourselves in complete disagreement with the Court of Appeals. ***HN1***[] There is nothing in the language of **[****9]** the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although **[***990]** *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co*. v. *Seagram & Sons, 340 U.S.*

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[4] In their motion for summary judgment respondents also argued that the restraints were permissible as reasonable means to protect their registered trade and service marks, but because they had failed to answer interrogatories pertinent to this defense, the district judge ordered it stricken, without prejudice to renewal if respondents promptly answered the relevant interrogatories. Because of its disposition of the case, the Court of Appeals reached neither the merits of this defense nor the question whether respondents had ever properly renewed it. In the circumstances of this case, we think the merits of this defense cannot be decided as a summary judgment question but must be resolved, along with all the other issues, by a trial on the merits.

211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in Simpson v. Union Oil Co., 377 U.S. 13 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws **[****10]** even though by signing the agreement he had to that extent **[*139]** become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that HN2[] the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra*.

LEdHN[1B][] [1B] LEdHN[7][] [7] **[****11]** LEdHN[8][] [8] LEdHN[9][] [9]In light of these considerations, we cannot accept the Court of Appeals' idea that courts have power to undermine **[**1985]** the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. The argument that such **[*140]** conduct by petitioners defeats their right **[****12]** to sue is completely refuted by the following statement from *Simpson*: "HN3[] The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws." 377 U.S., at 16. Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement **[***991]** once they had been forced to accept its more onerous terms as a condition of doing business. The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him. We therefore hold that **[****13]** HN4[] the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

LEdHN[10][] [10]Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record. One of the restrictions which petitioners most strenuously challenge is the requirement that dealers purchase their supplies exclusively from Midas. Another is the requirement that dealers carry Midas' full line of parts. Neither of these provisions could be in a dealer's self-interest since they obligate **[*141]** him to buy from Midas regardless of whether more favorable prices **[****14]** can be obtained from other sources of supply and regardless of whether he needs certain parts at all. [5] In addition, the depositions refer to

[5] Respondents suggest that these requirements were beneficial to a dealer because they helped him win customers who had confidence in the "Midas" brand, and some dealers evidently did try to reap some benefit from these requirements by advertising, "You get only nationally-advertised Midas products." It seems highly unlikely, however, that benefits of this kind could do more than mitigate very slightly the losses that a dealer would suffer when forced to buy higher-priced Midas products, particularly since dealers would have bought the higher-priced Midas products voluntarily if they thought customer preferences for the brand would be sufficiently strong to offset the higher price.

numerous instances in which petitioners asked Midas for permission to purchase from some other source of supply. The record shows that these requests were repeatedly refused by Midas representatives, **[**1986]** who underscored the refusals by describing the very requests as "heresy" and by commenting that dealers who bought from outside sources of supply were "asking for trouble" or "were going to be punished." A Midas official warned petitioner Pierce, who had been buying some exhaust parts from other manufacturers, "Joe, this is just like cheating on your wife; it is grounds for divorce."

[**15]** These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas.

LEdHN[11][] [11]***LEdHN[12]***[] [12]***LEdHN[13]***[] [13]There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and **[***992]** were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not **[*142]** save them from any of the obligations that the law imposes on separate entities. See *Timken Co*. v. *United States, 341 U.S. 593, 598 (1951)*; *United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)*. In any event each petitioner can clearly charge a combination between **[****16]** Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht v. Herald Co., 390 U.S. 145, 150, n. 6 (1968)*; *Simpson v. Union Oil Co., supra*, or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by "the communicated danger of termination," *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967)*; *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*. Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that ***HN5***[] pleadings "be so construed as to do substantial justice." *Rule 8 (f), Fed. Rules Civ. Proc.* The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely **[****17]** on these alternative theories of conspiracy.

It follows that the judgment of the Court of Appeals must be reversed. The case is remanded to that court with directions to reverse in full the judgment of the District Court and to remand the case for trial.

It is so ordered.

Concur by: WHITE; FORTAS; MARSHALL; HARLAN (In Part)

Concur

MR. JUSTICE WHITE, concurring.

I join the opinion and judgment of the Court with the following observations.

As long ago as 1927, in *Eastman Kodak Co. of N. Y*. v. *Southern Photo Materials Co., 273 U.S. 359*, the Court **[*143]** recognized that participation in an unlawful course of conduct would not bar recovery where the defendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement. In *Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*, where plaintiff was said to have participated in an illegal scheme other than the one charged in his complaint, the Court made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble-damage suit. See also *Bales v. Kansas City Star Co., 336 F.2d 439, 444 (C. A. 8th Cir. 1964)*; **[****18]** *Jewel Tea Co*. **[**1987]** v. *Local Unions, 274 F.2d 217, 223* (C. A. 7th Cir.), cert. denied, *362 U.S. 936 (1960)*. These cases are enough to warrant reversal in this case, once it is concluded that the illegal arrangement in which petitioners participated **[***993]** was thrust on them by respondents. This is the conclusion reached by the Court and I agree with it.

I also agree that the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which the plaintiff might be barred because of his own conduct from those in which he may have been a party to an illegal venture but is still entitled to damages from other participants. Judgments like these would be better made by hewing closer to the aims and purposes of § 4 of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 15*, which gives treble-damage recovery to the private plaintiff injured by conduct which violates the antitrust laws.

Under § 4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough **[****19]** with respect to causation if the defendant "materially contributed" to plaintiff's injury, *Continental Ore Co*. v. *Union Carbide & Carbon Corp., 370 U.S. 690, 702 (1962)*; or "substantially **[*144]** contributed, notwithstanding other factors contributed also," *Momand v. Universal Film Exchanges, Inc., 172 F.2d 37, 43 (C. A. 1st Cir. 1948)*, cert. denied, *336 U.S. 967 (1949)*. The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co*. v. *Union Leader Corp., 333 F.2d 798, 805-806* (C. A. 1st Cir.), cert. denied, *379 U.S. 931 (1964)*.

Under this rule, a third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the **[****20]** reach of *§ 1* of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

This may be the result required under § 4 when conspirators are sued by an injured outsider. But what is the situation when one party to the combination sues the other? Assume three situations: first, A, a manufacturer, sells to B, a retailer. A, over B's objection, insists on B's adhering to specified resale prices. B agrees since A's product is an important part of his business and he can get it nowhere else. B suffers a decline in business because of an inability to match or better the price for competing products. B sues A. He is obviously in a position to prove that A was a substantial cause of his injury.

Second, suppose that when B maintains the suggested prices on A's product, he simply sells more of C's competing product, which he also handles. B is not hurt, but A is. A sues B.

[*145] Third, suppose that D and E, competitors, combine to fix higher prices. D's best customer sets up his own source of supply to D's great damage. D sues E, claiming that E was a substantial cause of his injury.

[**21]** It is arguable that in each supposed situation recovery should be **[***994]** denied because the plaintiff was a party to the illegality and wrongdoers should be left where they are found. In terms of the deterrent aims of the statute permitting injured plaintiffs to recover treble damages, however, this undiscriminating approach **[**1988]** makes little sense. When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N. Y*. v. *Southern Photo Materials Co., supra*, clearly permit recovery by the less responsible, but injured, party. In the first hypothetical case, therefore, B should recover from A in order to deter A and others like him from imposing resale price maintenance schemes on their customers.

In the second case, where manufacturer A, contrary to his expectations, was injured and retailer B was not, there is no reason, based on the deterrent purposes of § 4, to permit **[****22]** recovery from B, even though his cooperation was essential to the combination and even though had a third party been injured he could have recovered from either A or B, or from both. A, the moving force, should not be rewarded for his efforts to further an unlawful price arrangement and in effect to take from B the profits, trebled, that B made by selling the products of A's competitor. B was unwilling to enter the illegal scheme, was motivated principally by what he thought was economic necessity -- the need to avoid losing business by being unable to offer a major **[*146]** product line -- and would have been only marginally deterred by the prospect of antitrust liability.

In the third case, where D and E are competitors, if D simply proves the agreement and the resulting loss, should he recover from E, absent some believable showing that E was the more responsible for the illegal scheme? No doubt E was a substantial factor in the combination and hence in the injury; a judgment for damages might deter him and others from violating the law. But D is equally responsible for his own damages. To permit him a recovery may be a counterdeterrent. By assuring him illegal profits **[****23]** if the agreement in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent. In this situation, it is doubtful that the ends of § 4 would be measurably served by permitting D's recovery. If judge or jury finds the parties equally responsible for the conduct which caused injury, D's recovery under § 4 should be denied for failure of proof that E was the more substantial cause of the injury.

No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the **[***995]** provision or conduct making the scheme illegal under *§ 1*; proof of **[****24]** whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing **[*147]** who ultimately profited or suffered from the arrangement.

As I view the record in the case before us, the evidence is insufficient to show that petitioners were as responsible as respondents, or more so, for the admittedly illegal scheme. The evidence before us does not suggest that petitioners were equal partners with respondents with respect to the origin and implementation of this scheme for distributing respondents' mufflers, or in terms of benefits from the scheme. In such circumstances summary judgment for respondents was improper.

[1989]** MR. JUSTICE FORTAS, concurring in the result.

I agree with the result in this case. Petitioners' right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto. Simpson v. Union Oil Co., 377 U.S. 13 (1964)*.

The doctrine has, however, a significant if limited role in private ***antitrust law***. If the fault of the parties is reasonably within the same scale -- if the **[****25]** "*delictum*" is approximately "*par*" -- then the doctrine should bar recovery. This might be the case, for example, if a manufacturer of mufflers and a manufacturer of other parts had combined to formulate and operate a collusive scheme. One co-adventurer could not sue the other for discriminatory or restrictive practices which allegedly diminished its take from the enterprise.

But equality of position of this general nature is necessary before *in pari delicto* may apply to bar an antitrust remedy. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar him **[*148]** from recovering in his own and the public interest if he can show that he has suffered compensable harm. Our decision in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals "from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] may do business. **[****26]** " *Ring v. Spina, 148 F.2d 647, 653 (1945)*.

As the Court points out, it is possible that the franchisee may be proved to be a collaborator, or coadventurer, or a true *particeps criminis* with respect *to a particular aspect* of the plan -- for example, if he *originated and insisted* upon the inclusion of a territorial exclusivity clause which was not in the franchise as drafted by the franchisor. He could not recover damages based upon this, if, essentially, it is his own act.

Clearly, petitioners here are not co-adventurers or partners in the franchise arrangement as a whole, and they are not barred by *in pari delicto*. On remand, as the Court orders, if petitioners are chargeable with responsibility for a particular clause of the agreement or restrictive covenant because it is, in substance, their own act, they should not be allowed to recover for injury **[***996]** they may have suffered because of it.

MR. JUSTICE MARSHALL, concurring in the result.

While I agree with the result and much of the reasoning in the opinion of the Court in this case, I find myself unable to accept what I take to be the holding that the doctrine of *in pari delicto* **[****27]** has no place in a treble-damage antitrust action. Not only is it unnecessary to pass on such a broad proposition on the facts of this case, as the Court's opinion reveals, but the holding itself is, in my opinion, incorrect.

I agree that the "complex scope, contents, and effects" of the doctrine as it has grown up in the common law should not be applied mechanically to private antitrust **[*149]** actions under the relevant federal statutes. On the other hand, I believe that a limited application of the basic principle behind the doctrine of *in pari delicto* is both proper and desirable in the antitrust field. As the Court notes, *ante*, at 138, the literal meaning of *in pari delicto* is of equal fault. I would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should **[**1990]** be barred from imposing liability on the defendant.

Such an approach would still require reversal of the decision of the Court of Appeals in this case. As this Court's opinion makes perfectly clear, the mere fact that a party enters **[****28]** into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions. *Simpson v. Union Oil Co., 377 U.S. 13 (1964)*. Furthermore, the Court is certainly correct in concluding that the record is replete with evidence, relating to the tying and exclusive-dealing provisions of the franchise agreement, which indicates, with sufficient probative force to withstand respondents' motion for summary judgment, that the petitioners did not actively seek out or support all the anticompetitive restraints embodied in the franchise.

However, the inquiry should not stop here. The franchise agreement also contains provisions requiring both resale price maintenance and the observance of territorial restrictions on sales by franchisees. Both of these sets of restrictions are ones which, at least on their face, would ordinarily be expected to benefit the franchisees more than Midas. Both restrict competition between franchisees, not between Midas and other suppliers competing to sell parts to **[****29]** Midas franchisees. If Midas can **[*150]** make an adequate showing that those provisions were inserted into the franchise agreement at the behest and for the benefit of petitioners and their fellow franchisees, petitioners should, in my opinion, be barred from contending that they were damaged by the existence and enforcement of the provisions.

I agree with the Court that petitioners should not be barred from recovering damages attributable to the enforcement of the tying and exclusive dealing provisions against them on the sole ground that they participated in the formulation of other anticompetitive provisions in the agreement. Cf. *Moore v. Mead Service Co., 340 U.S. 944* ***[***997]*** *(1951)*, vacating *184 F.2d 338 (C. A. 10th Cir. 1950)*. However, if Midas could show, which it has quite clearly not done at this stage of the litigation, that petitioners actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action (such as the tying and exclusive dealing provisions) for anticompetitive restraints intended for their benefit (such as resale price maintenance or exclusive territories), **[****30]** petitioners should be barred from seeking damages as to the agreement as a whole.

It may be argued that the course I propose unduly complicates private antitrust litigation. A holding that a party who voluntarily enters into an agreement containing provisions that violate the antitrust laws is barred from any recovery on that agreement altogether (as the Court of Appeals has held here) or, at the other extreme, is absolutely free to recover any damages that he can show to stem from his operations under the agreement (as this Court's opinion seems to hold) would presumably be considerably easier to apply in most cases. It seems to me, however, that neither holding would represent a satisfactory resolution of the difficult problems concerning the administration of the antitrust laws raised by **[*151]** agreements such as the one involved in the present case.

The reasons for rejecting the approach taken by the Court of Appeals are, as I have said, persuasively set forth in the opinion of the Court. The reasons I see for rejecting the approach taken by this Court are, perhaps, less related to the public interest in eliminating all forms of anticompetitive business conduct and more **[****31]** related to the equities as between the parties. The principle that **[**1991]** a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our juris-prudence. The traditional doctrine of *in pari delicto* is itself firmly based on this principle. I nevertheless agree, because of the strong public interest in eliminating restraints on competition, that many of the refinements of moral worth demanded of plaintiffs by such traditional legal and equitable doctrines as *volenti non fit injuria*, unclean hands, and many of the variations of *in pari delicto* should not be applicable in the antitrust field. However, I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress -- in the form of treble damages -- from a partner who is no more responsible for the existence of the illegality than the plaintiff.

The possible added deterrence to violations of the antitrust laws that would be produced by the Court's holding may well be equaled, if not surpassed, by the new incentive it will create to commit such violations, for **[****32]** a potential violator will have less to lose if he can attempt to recover his losses from his partner should the scheme not work out to his benefit.

The Court's opinion appears to seek to minimize the consequences of doing away with the *in pari delicto* defense by suggesting that a defendant will be able to have the "beneficial byproducts of a restriction" (*ante*, at 140) to the plaintiff taken into account in the computation **[*152]** of damages. This, of course, is to some extent already true in any antitrust case. Illegal conduct does not *per* **[***998]** *se* result in a money judgment for a plaintiff; injury must always be shown. However, a defendant might also be permitted to show that the plaintiff's financial rewards from some of the illegal provisions of an agreement outweighed the harm suffered from other illegal provisions, and accordingly on some sort of offset theory the plaintiff would recover nothing.

If such an offset approach on the issue of damages is envisioned by the Court, it hardly seems an adequate means of preventing unjust enrichment. First, that approach clearly permits damages to be awarded when injury is shown to outweigh benefit regardless **[****33]** of the nature of the plaintiff's participation in the scheme. Second, it adds an unnecessarily speculative element to the factual inquiry required in an antitrust case. While a trier of fact may have some difficulty in allocating responsibility between the parties to an agreement, the allocation can be made for the most part on the basis of hard evidence as to the facts surrounding the making of the agreement. The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed. Cf. *Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264-266 (1946)*. Such speculation is ordinarily unavoidable if damages are to be provable. Here there is no necessity for permitting additional speculation as to offsetting benefits in order to prevent unjust enrichment because the same goal can be achieved by a factual evaluation of the parties' respective fault.

For example, it is obviously much easier to determine in this case whether petitioners actively participated in the formulation and implementation of the various illegal provisions of the franchise agreement than it is to decide whether the monetary **[****34]** benefits that petitioners obtained **[*153]** through the resale price maintenance and exclusive territorial provisions surpassed the losses they suffered from the exclusive dealing and tying arrangements. Since I regard a respective-fault approach as superior to a damage-offset approach on principle, the complications inherent in the latter inquiry merely reinforce my conviction that the Court is being unwise in broadly rejecting the doctrine of *in pari delicto*.

Dissent by: HARLAN (In Part)

Dissent

[1992]** MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

The variety of views this case has engendered seems to me to stem from lack of agreement on a definition of the term "*in pari delicto*," as well as a disagreement, perhaps, on the standards that should govern the use of the defense to which that term is properly applied. I believe that the courts below misused the term, but that properly used it refers to a defense that should be permitted in antitrust cases. Consequently, I would remand this case not for immediate trial but for fresh consideration of the motion for summary judgment upon proper standards.

Plaintiffs who **[****35]** are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant. [1] If the law is the **[***999]** Sherman Act, both are, in principle, liable equally to criminal prosecution. For example, two manufacturers who agree on a price at which they will sell are "of equal fault," as are a manufacturer and a dealer who strike a bargain whereby each accepts an illegal restriction that benefits the other.

[*154] When a person suffers losses as a result **[****36]** of activities the law forbade *him* to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to "further the overriding public policy in favor of competition," *ante*, at 139, to pay violators three times their losses in doing what public policy seeks to deter them from doing. Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too "fastidious regard for the relative moral worth of the parties," *ibid*., to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.

There are, however, three situations quite distinct from that to which I think the term *in pari delicto* is properly applied. The first is the "consent" situation in which the Latin maxim "*volenti non fit injuria*" is sometimes invoked. Where X and Y conspire to fix prices at which they will sell, they are *in pari delicto*. If Z, *knowing of the conspiracy*, nevertheless purchases from X, he is not *in pari delicto*. He has committed no offense: the most that can be said is that he knowingly allowed **[****37]** an offense to be committed against him. I would agree, for many of the reasons stated in the opinions of MR. JUSTICE BLACK, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL, that there should be no defense in such a situation, where the plaintiff has done nothing the law told him not to do.

A second situation distinguishable from true *in pari delicto* is illustrated by *Kiefer-Stewart Co*. v. *Seagram & Sons, 340 U.S. 211*, relied on by the Court. It was there alleged in defense to a treble-damage action that the defendants' illegal actions were taken in reprisal against altogether independent illegal actions by the plaintiff. Here again, I accept the decision that this is no defense. Our law frowns on vigilante justice. Since the plaintiff is in part enforcing the public interest against the defendants' violations, I would permit him to do so, and **[*155]** leave punishment for any independent violation by him to proper means of enforcement.

The third distinguishable situation may or may not be illustrated by *Simpson v. Union Oil Co., 377 U.S. 13*, **[**1993]** and *Albrecht v. Herald Co., 390 U.S. 145*, two cases **[****38]** that I find it quite difficult to understand. [2] In each of them, the plaintiff had been offered a dealership, on terms that he did not participate in formulating, and in each case he at first "accepted" such a dealership. Since neither case stated satisfactorily where the alleged combination in restraint of trade was to be found, it is not clear whether the plaintiff's acceptance of a dealership was itself a forbidden act. If it was **[***1000]** not, then these cases fall under the heading of "consent" cases. A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law in contriving those terms. If, however, those plaintiffs were doing something the law told them not to do, I suggest that recovery in those cases can best be understood on the theory of a "coercion" exception to the *in pari delicto* doctrine. That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to

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[1] This is at least the traditional use of the term. See, *e. g., Williams* v. *Hedley*, 8 East 378, 381-382, 103 Eng. Rep. 388, 389. See generally Note, In Pari Delicto and Consent as Defenses in Private Antitrust Suits, 78 Harv. L. Rev. 1241, distinguishing the two defenses. The present case is as good an illustration as any of the usefulness of maintaining distinct terms for the distinct situations properly characterized by "*in pari delicto*," "consent," "unclean hands," and so forth.

[2] See my dissenting opinion in *Albrecht, 390 U.S., at 156*.

legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability **[****39]** is not "*par*," and that the business accepting dictation is only minimally blameworthy.

In my view, the District Court and the Court of Appeals did not apply the true *in pari delicto* standard to this case. The District Court said that "each plaintiff voluntarily entered into the franchise agreement . . . and accepted the benefits therefrom. They are . . . [therefore?] *in pari delicto* with defendants . . . ." [3] **[****40]** At another **[*156]** point the court said, "We have repeatedly held that a person who freely assents to an act suffers 'no legal injury' if harm results therefrom." [4] Although the District Court made a passing distinction of the "coercion" and "unclean hands" doctrines, it is not clear that it meant to hold that the violation of the Sherman Act, if any, was one for which plaintiffs were subject to public-law sanctions along with the defendants.

The Court of Appeals decision was similar. That court relied on the District Court's language quoted above, adding that each of the plaintiffs had made a substantial profit from selling auto parts, a fact that might bear on the measure of any damages but which, apart from illegal action on the part of the plaintiffs, should not afford an absolute defense. [5]

It is by no means clear on this record, however, that the plaintiffs may not be said to have been *in pari delicto* in the proper sense of that term. This question is rendered more difficult by the complexity of the record history of plaintiffs' activities, and by the formidable obscurity of the law of dealer liability for vertical restraints, an obscurity fostered by *Simpson, supra*, *Albrecht, supra*, and above all by *United States v. Parke, Davis & Co., 362 U.S. 29*. **[****41]** Although I make no attempt to drain the bog at this point, I am of the view that before this case goes to trial the lower courts should be given another opportunity to consider the *in pari delicto* defense. I would remand this case to determine whether any agreement alleged to be in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants. I would permit the lower courts to consider this question upon the existing affidavits and such additional material as either side may wish to adduce.

References

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L Ed Index to Anno, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

[**42]** Annotation References:

Validity under federal antitrust laws of agreement conferring exclusive sales agency for designated territory. *9 L Ed 2d 1235*.

Validity, under 3 of the Clayton Act (*15 USC 14*), of contract by purchaser of goods to take his entire requirements from the seller. *5 L Ed 2d 1105*.

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[3] 1966 Trade Cases para. 71,801, at 82,705.

[4] *Id*., at 82,706.

[5] See *376 F.2d 692, at 693, 695*.

Robinson-Patman Act as construed by Supreme Court. *2 L Ed 2d 1737*.

Validity, construction, and application of provisions of Robinson- Patman Act regarding furnishing of services or facilities. *89 L Ed 1336*; 13 ALR 2d 362.

Actions for threefold damages under *Federal Antitrust Act. 53 L Ed 826*.

Right of manufacturer, producer, or wholesaler to control resale price. 7 ALR 449, 19 ALR 925, 32 ALR 1087, 103 ALR 1331, 125 ALR 1335.

Participation in illegal combination as defense to action under Anti-trust Act. 160 ALR 381.

Contract by one party to sell his entire output to, or to take his entire requirements of a commodity from, the other as contrary to public policy or antimonopoly statutes. 83 ALR 1173 .

Hanover Shoe v. United Shoe Mach. Corp.

Supreme Court of the United States

March 5, 1968, Argued ; June 17, 1968, Decided *

No. 335

Reporter

392 U.S. 481 *; 88 S. Ct. 2224 **; 20 L. Ed. 2d 1231 ***; 1968 U.S. LEXIS 3147 ****; 1968 Trade Cas. (CCH) P72,490

HANOVER SHOE, INC. v. UNITED SHOE MACHINERY CORP.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Disposition: *377 F.2d 776*, affirmed in part, reversed in part, and remanded.

Core Terms

leasing, machines, manufacturer, shoe, damages, monopolization, decree, overcharge, buyer, cases, competitors, shoe machinery, monopoly power, Sherman Act, profits, antitrust, customers, machinery, practices, anti trust law, violations, factories, bought, taxes, prima facie evidence, Clayton Act, treble-damage, predatory, charges, effects

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Clayton Act, Penalties**

Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, *15 U.S.C.S. § 16(a)*, makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws prima facie evidence as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Business Torts > General Overview

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

* Together with No. 463, United Shoe Machinery Corp. v. Hanover Shoe, Inc., also on certiorari to the same court.

HN2[] Antitrust & Trade Law, Clayton Act

Section 4 of the Clayton Act, 38 Stat. 731, *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. The court thinks it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of *§ 4*.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > False Charges & Rebates

HN3[] Antitrust & Trade Law, Clayton Act

A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

Lawyers' Edition Display

Summary

The plaintiff, a manufacturer of shoes and customer of the defendant manufacturer of shoe machinery, brought, in the United States District Court for the Middle District of Pennsylvania, the present treble damage antitrust action based on defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale. In support of its action, plaintiff relied solely on a decree in favor of the United States in a former action against defendant as prima facie evidence under *15 USC 16(a)*. The District Court awarded damages, in the amount of *$ 4,239,609. (245 F Supp 258*.) On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on certain questions relating to the damage award. (*377 F2d 776*.)

On writs of certiorari, the Supreme Court reversed the judgment of the Court of Appeals on questions relating to the damage award. In an opinion by White, J., expressing the views of seven members of the court, it was held that (1) the decree in the government's suit determined the illegality of defendant's "lease only" policy and hence was prima facie evidence on that issue, (2) the plaintiff made out a prima facie case by showing the illegality of defendant's "lease only" practice and the amount of defendant's overcharge, (3) defendant was not entitled to assert a "passing on" defense, (4) plaintiff was entitled to damages for the entire period of the applicable Pennsylvania statute of limitations, and (5) the District Court, in computing damages, properly refused to reduce the amount of recovery by the amount of alleged tax advantages to plaintiff, and properly deducted a loan credit interest component of 2.5 percent from the profits that it thought plaintiff would have earned by purchasing machines.

Stewart, J., dissented, expressing the view that the decree in the government's suit was not prima facie evidence of the illegality of defendant's "lease only" practice, and that, in the absence of other evidence, defendant's liability to plaintiff was not established.

Marshall, J., did not participate.

Headnotes

CASES AND QUESTIONS CERTIFIED §9 > time for certification -- > Headnote:
LEdHN[1][] [1]

A Federal District Court acts within its discretion in denying as untimely certification to another District Court of a question of the construction of the latter court's opinion and decree in a former case, where the District Court, in the instant case, had already ruled upon the question.

EVIDENCE §486 > JUDGMENT §141 > in government's antitrust action -- estoppel -- prima facie evidence -- > Headnote:
LEdHN[2][] [2]

In determining the extent of estoppel resulting from a decree in favor of the government in its civil antitrust action, the court is not limited to the decree; if by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in the government's antitrust suit, the private plaintiff in a subsequent action against the same defendant for treble damages can treat the outcome of the government's case as prima facie evidence on that issue.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §75 > scope of relief -- > Headnote:
LEdHN[3][] [3]

A provision in a decree rendered in favor of the government in its civil antitrust action which requires that defendant no longer offer for lease its machine type unless it also offers such type for sale, is a justifiable remedy even if the practice that it bans was not instrumental in the monopolization of the market.

EVIDENCE §486 > JUDGMENT §141 > antitrust action -- estoppel -- prima facie evidence -- > Headnote:
LEdHN[4][] [4]

The portions of the court's opinion in favor of the government in its civil antitrust action which, supported by the court's findings of fact, condemn defendant's practice of making its machines available by lease only, estop defendant as against the government, and therefore constitute prima facie evidence in a private plaintiff's subsequent antitrust action against the same defendant for treble damages.

JUDGMENT §65 > antitrust action -- construction -- > Headnote:
LEdHN[5][] [5]

Under the applicable standard for determining monopolization under 2 of the Sherman Act (*15 USC 2*), it is not error for the courts below to conclude--in a private party's antitrust action for treble damages--that defendant's practice of only leasing and refusing to sell its major machines was determined to be illegal monopolization in a judgment rendered in favor of the government in its former civil antitrust action against defendant, where the court, in the government's case, both in its opinion with respect to violation and in its opinion with respect to remedy, not only dealt with the objectionable clauses in defendant's standard lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of defendant's monopoly power, and where the court's relevant findings in the government's case were sufficient to show that the "lease only" system played a significant role in defendant's monopolization of the shoe machinery market, and those findings were not limited to the particular provisions of defendant's leases, but dealt as well with defendant's policy of leasing but not selling its important machines, with the advantages of that practice to defendant, and with its impact on potential and actual competition.

APPEAL §1512.5 > concurrent findings of courts below -- > Headnote:
LEdHN[6][] [6]

The United States Supreme Court will not disturb--in a treble damage antitrust action based on defendant's monopolization of the shoe machinery market by offering its machinery only for lease but not for sale--the findings of the District Court, affirmed by the Court of Appeals, that plaintiff would have bought rather than leased from defendant had it been given the opportunity to do so.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > damages -- refusal to sell -- necessity of demand -- > Headnote:
LEdHN[7][] [7]

The plaintiff, in an action based on defendant's monopolization of the shoe machinery market by offering its machinery only for lease but not for sale, is not required to prove an explicit demand for the purchase of machines during the damage period, where, as stated by the Court of Appeals, plaintiff had been a customer of defendant in the leasing of machinery for many years, and was well aware of defendant's power as a supplier of machinery and of its policy against sales, and where in such circumstances it would be ironic as well as idle to require the victim of the monopoly to meet an explicit demand the denial of which was implicit in the continuance of the monopoly.

EVIDENCE §343.5 > antitrust suit -- treble damages -- prima facie case -- > Headnote:
LEdHN[8][] [8]

Under 4 of the Clayton Act (*15 USC 15*), providing for the recovery of treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, the plaintiff buyer has made out a prima facie case of injury and damage, where he shows that the price paid by him for materials purchased for use in his business was illegally high and where he also shows the amount of the overcharge.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > treble damages -- seller's overcharges -- > Headnote:
LEdHN[9][] [9]

A buyer who was overcharged by the seller in violation of the federal antitrust laws is entitled to treble damages not only where, in the face of the overcharge, he does nothing and absorbs the loss, or maintains his own price and takes steps to increase his volume or to decrease other costs, but also where he raises the price for his own product.

EVIDENCE §395 > inferences -- damages -- > Headnote:
LEdHN[10][] [10]

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged.

SALE §78 > unlawful price -- damages -- > Headnote:
LEdHN[11][] [11]

If a cost rise is merely the occasion for a price increase that a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from the businessman without being liable for damages.

ACTION OR SUIT §2 > right of action -- > Headnote:
LEdHN[12][] [12]

The possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > damages -- "passing on" defense -- > Headnote:
LEdHN[13][] [13]

In a treble damage action based on defendant's monopolization of the shoe machinery market by offering its machines only for lease but not for sale, in which action plaintiff proved injury and the amount of its damages by proving that defendant had overcharged plaintiff during the damage period and by showing the amount of the overcharge, the defendant is not entitled to assert a "passing on" defense by contending that plaintiff suffered no legally cognizable injury because the illegal overcharge during the damage period was reflected in the price charged for shoes sold by plaintiff to its customers and that plaintiff, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing.

COURTS §777.5 > retrospective operation of decision -- > Headnote:
LEdHN[14][] [14]

Cursory and conclusory statements in a decision do not provide sufficiently strong proof of a prevailing opinion as to the law to permit the sort of justifiable reliance thereon which alone could generate an argument that the decision should be given only prospective effect.

COURTS §777.5 > retrospective or prospective operation of decision -- in antitrust suit -- > Headnote:
LEdHN[15][] [15]

The decision in *American Tobacco Co. v United States (1946) 328 US 781, 90 L Ed 1575, 66 S Ct 1125*, holding that proof of predatory practices is not essential to a finding of monopolization in violation of 2 of the Sherman Antitrust Act (*15 USC 2*), does not fundamentally change the law of monopolization in a way which should be given only prospective effect.

DAMAGES §170 > time for which recoverable -- > Headnote:
LEdHN[16][] [16]

The plaintiff in a treble damage antitrust action who has proved defendant's monopolization of the shoe machinery market by offering its machine only for leasing but not for sale, is entitled to damages for the entire period of the applicable statute of limitations.

LIMITATION OF ACTION §201.5 > antitrust suit -- damages -- > Headnote:
LEdHN[17][] [17]

Even though plaintiff's cause of action--defendant's monopolization of the above machinery market, in violation of 2 of the Sherman Antitrust Act (*15 USC 2*)--arose outside the applicable state statute of limitations, plaintiff is not barred from claiming treble damages for injury occurring within the statutory period, since defendant's conduct is not the kind of violation which, if it occurs at all, must occur within some specific and limited timespan, and since defendant's conduct constitutes a continuing violation of the Act, inflicting continuing and accumulating harm on plaintiff.

DAMAGES §7 > deduction of tax benefits -- > Headnote:
LEdHN[18][] [18]

In computing plaintiff's damages resulting from defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale, the fact that plaintiff would have had to pay additional taxes, had he purchased machines instead of renting them during the years in question, cannot be considered in reducing the amount of plaintiff's recovery.

DAMAGES §159 > loss of profits -- cost of capital -- > Headnote:
LEdHN[19][] [19]

In computing damages resulting from defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale, the District Court properly deducts an interest component of 2.5 percent from the profits that it thought plaintiff would have earned by purchasing machines, and the court's determination is not subject to attack on the ground that it did not properly take account of the cost of capital to plaintiff, where the court found that in the years in question plaintiff was able to borrow money for between 2 percent and 2.5 percent per annum, and that had plaintiff bought machines it would have obtained the necessary capital by borrowing it at about this rate.

Syllabus

Following this Court's affirmance of a district court judgment in a civil action against United Shoe Machinery Corp. (United), a manufacturer and distributor of shoe machinery, which the Government had brought under *§ 4* of the Sherman Act, Hanover Shoe, Inc. (Hanover), a shoe manufacturer and customer of United's, brought this private treble-damage suit against United for its alleged monopolization of the shoe machinery industry in violation of *§ 2* of the Sherman Act, by means of its practice of leasing and refusing to sell its shoe machinery. Hanover, relying on § 5 (a) of the Clayton Act (making a final judgment or decree in a Government antitrust suit prima facie evidence as to all matters respecting which the judgment or decree would be an estoppel between the parties thereto), submitted the court's findings, opinion, and decree in the Government's case as its evidence that United had monopolized the shoe **[****2]** machinery industry and that its refusal to sell the machines was an instrument of the monopolization. In 1965 the District Court rendered judgment for Hanover, holding that it was entitled to damages for the period from July 1, 1939 (the earliest date permitted by the statute of limitations), to September 21, 1955, when this suit was filed, in an amount equal to three times the difference between what Hanover had paid in rentals and what it would have paid had United been willing to sell the machines, plus interest. The Court of Appeals affirmed as to liability, but disagreed with the District Court on certain aspects of the damage award, including the relevant damage period. It fixed that period's end date somewhat earlier and ruled that its start was June 10, 1946, when this Court decided *American Tobacco Co. v. United States, 328 U.S. 781*, and endorsed the views in *United States v. Aluminum Co. of America, 148 F.2d 416 (C. A. 2d Cir.)*, prior to which the Court of Appeals concluded it had been necessary in an action for violation of *§ 2* to prove the existence of predatory practices as well as monopoly power. Both parties were granted **[****3]** review of the Court of Appeals decision. United contends that the decision in the Government's suit against it did not determine that United's leasing practice was an instrument of monopolization; that Hanover sustained no injury since any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to its customers; and that the District Court's damage calculations which the Court of Appeals upheld were erroneous because they did not properly allow for the cost of capital to Hanover as an element of the cost of acquiring the shoe machinery, the District Court having made an adjustment only to the extent of deducting a 2.5% interest component from the profits it thought Hanover would have earned by buying the machines. Hanover contends that the Court of Appeals erred in changing the start of the damage period and in ordering the District Court on remand to reduce its damage calculations by whatever tax advantages Hanover might have obtained by leasing as compared with buying the shoe machinery. *Held*:

1. The courts below did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization **[****4]** in the Government's case, as reference to the court's findings and opinion, as well as decree, in that case makes clear. Pp. 483-487.

2. Hanover proved injury and the amount of its damages within the meaning of *§ 4* of the Clayton Act when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; and the possibility that it might have recouped the overcharge by "passing it on" to its customers was not relevant in the assessment of its damages. Pp. 487-494.

3. Hanover is entitled to damages for the entire period of the applicable statute of limitations, since the *Alcoa-American Tobacco* decisions did not fundamentally alter the law of monopolization in a way which should be given only prospective effect. Pp. 495-502.

4. The District Court did not otherwise err in its computation of damages. Pp. 502-504.

Counsel: James V. Hayes argued the cause for petitioner in No. 335 and respondent in No. 463. With him on the briefs were Breck P. McAllister and Robert F. Morten.

Ralph M. Carson argued the cause for respondent in No. 335 and petitioner in No. 463. With him on the briefs were Robert D. Salinger, Philip C. Potter, Jr., and **[****5]** Roland W. Donnem.

Opinion by: WHITE

Opinion

[*483] **[***1235]** **[**2226]** MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. (hereafter Hanover) is a manufacturer of shoes and a customer of United Shoe Machinery Corporation (hereafter United), a manufacturer and distributor of shoe machinery. In 1954 this Court affirmed the judgment of the *District Court for the District of Massachusetts, 110 F.Supp. 295 (1953)*, in favor of the United States in a civil action against United under *§ 4* of the Sherman Act, 26 Stat. 209, *15 U. S. C. § 4*. *United Shoe Machinery Corp*. v. *United States, 347 U.S. 521*. In 1955, Hanover brought the present treble-damage action against United in the District Court for the Middle District of Pennsylvania. In 1965 the District Court rendered judgment for Hanover and awarded trebled damages, including interest, of $ 4,239,609, as well as $ 650,000 in counsel fees. *245 F.Supp. 258*. On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on **[***1236]** certain questions relating to the damage award. **[****6]** *377 F.2d 776 (1967)*. Both Hanover and United sought review of the Court of Appeals' decision, and we granted both petitions. *389 U.S. 818 (1967)*.

I.

Hanover's action against United alleged that United had monopolized the shoe machinery industry in violation of *§ 2* of the Sherman Act; that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had been an instrument of the unlawful monopolization; and that therefore Hanover **[*484]** should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.

LEdHN[1][] [1]Section 5 (a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, *15 U. S. C. § 16 (a)*, ***HN1***[] makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws "prima facie evidence . . . as to all matters respecting which said judgment **[****7]** or decree would be an estoppel as between the parties thereto . . . ." Relying on this provision, Hanover submitted the findings, opinion, and decree rendered by Judge Wyzanski in the Government's case as evidence that United monopolized and that the practice of refusing to sell machines was an instrument of the monopolization. United does not contest that prima facie weight is to be given to the judgment in the Government's case. It does, however, contend that Judge Wyzanski's decision did not determine that the practice of leasing and refusing to sell was an instrument of monopolization. This claim, rejected by the courts below, is the threshold issue in No. 463. If the 1953 judgment is not prima facie evidence of the illegality of **[**2227]** the practice from which Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all. [1]

[1] Following the District Court's rejection of United's construction of Judge Wyzanski's opinion and decree, United filed a motion requesting that the District Court certify the question of construction to Judge Wyzanski. United contends that the District Court erred in denying this motion, but we need not pass upon the merits of United's novel request, for the District Court clearly acted within its proper discretion in denying as untimely certification to another court of a question upon which it had already ruled.

[**8]** ***LEdHN[2]***[] [2]Both the District Court and the Court of Appeals concluded that the lease only policy had been held illegal in **[*485]** the Government's suit. We find no error in that determination. It is true that *§ 4* of the decree [2] on which United relies condemned only certain clauses in the standard lease and that nowhere in the decree was any other aspect of United's leasing system expressly described or characterized as illegal monopolization. It is also arguable that § 5 of the decree, which required that United thenceforward not "offer for lease any machine type, unless it also offers such type **[***1237]** for sale," was included merely to insure an effective remedy to dissipate the accumulated consequences of United's monopolization. We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie **[****9]** evidence on that issue. See *Emich Motors Corp*. v. *General Motors Corp., 340 U.S. 558, 566-569 (1951)*.

LEdHN[3][] [3] ***LEdHN[4]***[] [4] ***LEdHN[5]***[] [5]Section 5 of the decree would have been a justifiable remedy even if the practice it banned had not been instrumental in the monopolization of the market. But in our view the trial court's findings and opinion put on firm ground the proposition **[****10]** that the Government's case involved condemnation of the lease only system as such. In both its opinion with respect to violation and its opinion with respect to remedy, the court not only dealt with the objectionable clauses in the standard **[*486]** lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of United's monopoly power. [3] **[****12]** These **[**2228]** portions of the court's opinion are well supported by its findings of fact, which also estop United as against the Government and which therefore constitute prima facie evidence in this case. We have set out the relevant findings in an Appendix to this opinion. They are themselves sufficient to show that the lease only system played a significant role in United's monopolization of the shoe machinery market. Those findings were not limited to the particular provisions of United's **[*487]** leases. They dealt as well with United's policy of leasing but not selling its important machines, with the advantages of that practice to United, and with its impact on potential and actual competition. When the applicable standard for determining monopolization **[****11]** under *§ 2* is applied to these facts, it must be concluded that the District **[***1238]** Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case. [4]

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[2] "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." *110 F.Supp., at 352*.

[3] In its opinion on remedy, in answering United's objection to its conclusion that the decree should require United to offer machines for sale as well as for lease, the court plainly said that United "has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market." *110 F.Supp., at 350*. Clearly, if after purging the leases of objectionable clauses United would still be monopolizing by leasing but not selling its machines, the lease only policy must also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment. Moreover, in its opinion on violation, where the three principal sources of United's market power were identified, the court pointed to "the magnetic ties inherent in its system of leasing, and not selling, its more important machines" and to the "'partnership'" aspects of leasing but not selling those machines. *110 F.Supp., at 344*. The leases assured "closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers." *Id., at 343*. A shoe manufacturer by leasing was "deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancelation before the end of the term." *Id., at 340*. The lease system had "aided United in maintaining a pricing system which discriminates between machine types," *id., at 344*, discrimination which the court later said had evidenced "United's monopoly power, a buttress to it, and a cause of its perpetuation . . . ." *Id., at 349*.

[4] In its brief on appeal from the judgment and decree rendered in the Government's case, United recognized that "the principal practices which the [District] Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant serviced the leased machines without a separate charge." Brief for Appellant 6, *United Shoe*

II.

LEdHN[6][] [6] **LEdHN[7]**[] [7]The District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so. [5] **[****14]** The District Court determined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing **[****13]** these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending **[*488]** that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called "passing-on" defense, and we affirm that judgment. [6]

[**15]** **LEdHN[8]**[] [8]*Section [***1239] 4* of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 15*, **HN2**[] provides that any person "who shall be injured **[*489]** in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and **[**2229]** shall recover threefold the damages by him sustained . . . ." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of *§ 4*.

LEdHN[9][] [9]If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that **[****16]** if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Fundamentally, this is the view stated by Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)*, where Atlanta sued the defendants for treble damages for antitrust violations in

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Machinery Corp. v. *United States, 347 U.S. 521 (1954)*. United also said that "evidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id*., at 170.

[5] The Court of Appeals affirmed this finding and we do not disturb it. See also n. 16, *infra*. We also agree with the courts below that in the circumstances of this case it was unnecessary for Hanover to prove an explicit demand during the damage period. See *Continental Ore Co*. v. *Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)*.

[6] The chronology of events with respect to this issue in the lower courts was as follows: After the pretrial conference, a separate issue which was thought might determine the action was set for trial pursuant to *Fed. Rule Civ. Proc. 42 (b)*. The general question was whether, assuming that Hanover had paid illegally high prices for machinery leased from United, Hanover had passed the cost on to its customers, and if so whether it had suffered legal injury for which it could recover under the antitrust laws. After evidence had been taken on the issue, Judge Goodrich, sitting by designation, ruled that when Hanover had been forced to pay excessive prices for machinery leased from United, it had suffered a legal injury: "This excessive price is the injury." *185 F.Supp. 826, 829 (D. C. M. D. Pa. 1960)*. He also rejected the argument "that the defendant is relieved of liability because the plaintiff passed on its loss to its customers." *Ibid*. In his view it was unnecessary to determine whether Hanover had passed on the illegal burden because Hanover's injury was complete when it paid the excessive rentals and because "'the general tendency of the law, in regard to damages at least, is not to go beyond the first step'" and to exonerate a defendant by reason of remote consequences. *Id., at 830* (quoting from *Southern Pacific Co*. v. *Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)*). The Court of Appeals heard an interlocutory appeal pursuant to *28 U. S. C. § 1292 (b)* and affirmed. *281 F.2d 481 (C. A. 3d Cir. 1960)*. Certiorari was denied. ***364 U.S. 901 (1960)***. United preserved the issue and presented it again to the Court of Appeals in appealing the treble-damage judgment entered after trial of the main case. The Court of Appeals adhered to the principles of its prior decision. United brought the question here.

connection with the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined, **[*490]** the Court saying **[****17]** that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. ***HN3***[] A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id., at 396*. The same approach was evident in *Thomsen v. Cayser, 243 U.S. 66 (1917)*, another treble-damage antitrust case. [7] **[****18]** **[**2230]** With respect to overcharge cases arising under the transportation laws, similar views were expressed by Mr. Justice Holmes in *Southern Pacific Co*. v. *Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)*, **[***1240]** and by Mr. Justice Brandeis in *Adams v. Mills, 286 U.S. 397, 406-408 (1932)*. In those cases the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages. [8]

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[7] "It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover three-fold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co*. v. *Abilene Cotton Oil Co., 204 U.S. 426, 436*. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion." *243 U.S., at 88*.

[8] *Southern Pacific Co*. v. *Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918)*, involved an action for reparations brought by shippers against a railroad. The shippers alleged exaction of an unreasonably high rate. To the claim that the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge, the Court said that the answer was not difficult:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Probably in the end the public pays the damages in most cases of compensated torts." *245 U.S., at 533-534*. *Adams v. Mills, 286 U.S. 397 (1932)*, is to the same effect. See also *I. C. C*. v. *United States, 289 U.S. 385 (1933)*.

Keogh v. Chicago & N. W. R. Co., 260 U.S. 156 (1922), is relied upon by United as stating a contrary rule. There the Court affirmed a judgment on the pleadings in a shipper's action under the antitrust laws charging a conspiracy among railroads to set unreasonably high rates. Because the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws. After giving this and other reasons for its judgment, the Court ended its opinion by saying that it would have been impossible for the shipper to have proved damages since no court could say that if the rate had been lower the shipper would have enjoyed the difference; the benefit might have gone to his customers. The Court, however, was careful to say earlier in its opinion that the result would have been different had the rate been unreasonably high, an approach confirmed by Mr. Justice Brandeis in *Adams v. Mills, supra.* We ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price. It should also be noted that the Court, in speaking of the impossibility of proving damages, indicated no intention to preclude recovery in cases such as *Chattanooga Foundry* or *Thomsen v. Cayser, supra.*

That is where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts in treble-damage suits brought by customers of vendors who were charged with violating the Sherman Act by price fixing or monopolization. Some courts sustained the defense, both where the plaintiff complained of overcharging for materials or services used by him to produce his own product, *e. g., Wolfe v. National Lead Co., 225 F.2d 427* (C. A. 9th Cir.), cert. denied, ***350 U.S. 915 (1955)***, and where the price fixing concerned articles purchased for resale, *e. g., Miller Motors, Inc*. v. *Ford Motor Co., 252 F.2d 441 (C. A. 4th Cir. 1958)*; *Twin Ports Oil Co*. v. *Pure Oil Co., 119 F.2d 747* (C. A. 8th Cir.), cert. denied, ***314 U.S. 644 (1941)***. Others, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it irrelevant that the plaintiff may have passed on the burden of the overcharge. Recently, for example, the defense was rejected in the cases brought against manufacturers of electrical equipment by local utilities who purchased equipment at unlawfully inflated prices and used it

[**19]** **[*491]** United **[***1241]** seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of *§ 4* **[**2231]** to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic **[*492]** circumstances were such that the overcharged buyer could only charge his customers a higher price *because* the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.

LEdHN[10][] [10] ***LEdHN[11]***[] [11] ***LEdHN[12]***[] [12]We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence **[****20]** a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, **[*493]** had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually **[****21]** unascertainable figures, the task would normally prove insurmountable. [9] On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

[**22]** **[*494]** In **[**2232]** addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, **[***1242]** in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

LEdHN[13][] [13]Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations -- for instance, when an overcharged buyer has a pre-existing **[****23]** "cost-plus" contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on

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to produce electricity sold to the ultimate consumer. *E. g., Atlantic City Electric Co*. v. *General Electric Co., 226 F.Supp. 59* (D. C. S. D. N. Y.), interlocutory appeal refused, *337 F.2d 844 (C. A. 2d Cir. 1964)*.

Concerning the passing-on defense generally, see Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363 (1954); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5 (1966); Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1584-1586 (1967).

[9] The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer. [10]

[*495] III.

The District Court held that Hanover was entitled to damages for the period commencing July 1, 1939, and terminating September 21, 1955. **[****24]** The former date represented the greatest retrospective reach permitted under the applicable statute of limitations, and the latter date was that upon which Hanover filed its suit. In addition to somewhat shortening the forward reach of the damage period, [11] the Court of Appeals ruled that June 10, 1946, rather than July 1, 1939, marked the commencement of the damages period. June 10, 1946, was the date this Court decided *American Tobacco Co*. v. *United States, 328 U.S. 781*, which endorsed the views of the Court of Appeals for the Second Circuit in *United States v. Aluminum Co. of America, 148 F.2d 416 (1945)*. In the case before us the Court of Appeals concluded that the decisions in *Alcoa-American Tobacco* fundamentally altered the law of monopolization -- that prior to them it was necessary to prove the existence of predatory practices as well as monopoly power, whereas afterwards proof of predatory practices was not essential. The Court of Appeals was also of the view that because in prior litigation United's leases had escaped condemnation as predatory practices illegal under § 1, United's conduct should not be held to have violated **[****25]** **[***1243]** *§ 2* at any time prior to June 10, 1946. *377 F.2d, at 790*. This holding has been challenged, and we reverse it.

[*496] The **[**2233]** theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply **[****26]** prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble-damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.

LEdHN[14][] [14]Neither the opinion in *Alcoa* nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts. In ruling that it was **[****27]** not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. *148 F.2d, at 429*. The conclusion that actions which will show monopolization are not "limited to manoeuvres not honestly industrial" was also premised on earlier opinions of this Court, particularly *United States v. Swift & Co., 286 U.S. 106, 116 (1932)*. In the *American Tobacco* case, this Court noted **[*497]** that the precise question before it had not been previously decided, *328 U.S., at 811*, and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities. [12] **[****29]** These cases make it clear that

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[10] Some courts appear to have treated price discrimination cases under the Robinson-Patman Act as in this category. See, *e. g., American Can Co*. v. *Russellville Canning Co., 191 F.2d 38 (C. A. 8th Cir. 1951)*; *American Can Co*. v. *Bruce's Juices, 187 F.2d 919*, opinion modified, *190 F.2d 73* (C. A. 5th Cir.), petition for cert. dismissed, ***342 U.S. 875 (1951)***.

[11] The Court of Appeals held that Hanover was entitled to damages only up to June 1, 1955, the date upon which Judge Wyzanski approved United's plan for terminating all outstanding leases and converting the lessee's rights to ownership. Because Hanover could have legally required United to convert from leasing to selling as of June 1, 1955, the Court of Appeals held it was not entitled to damages for United's failure to offer machines for sale after that date. This determination has not been challenged in this Court.

[2234]** there was no accepted **[*498]** interpretation **[***1244]** of the Sherman Act which conditioned a finding of monopolization under *§ 2* upon a showing of predatory practices by the monopolist. [13] In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which **[****28]** in effect replaced an older one. Whatever **[*499]** development in ***antitrust law*** was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted

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[12] Although the defendants in *American Tobacco* had been found guilty of conspiracy to restrain trade and of attempt and conspiracy to monopolize as well as of monopolization itself, the grant of certiorari was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under *§ 2* of the Sherman Act." ***324 U.S. 836 (1945)***. After noting that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other . . . ," *328 U.S., at 788*, the Court determined that the jury could have found that the defendants had combined and conspired to monopolize, *id., at 797*, and that it would be "only in conjunction with such a combination or conspiracy that these cases will constitute a precedent," *id., at 798*. The Court stated that "the *authorities* support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," *328 U.S., at 811* (emphasis added), and quoted with approval from *United States v. Patten, 187 F. 664, 672* (C. C. S. D. N. Y. (1911)), reversed on other grounds, *226 U.S. 525 (1913)*, that for there to be monopolization "it is not necessary that the power thus obtained should be exercised. Its existence is sufficient." The Court also said:

"A correct interpretation of the statute *and of the authorities* makes it the crime of monopolizing, under *§ 2* of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59* and authorities cited.

"It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *328 U.S., at 809*. (Emphasis added.)

The Court also welcomed the opportunity to endorse, *328 U.S., at 813-814*, the following views of Chief Judge Hand in *Alcoa*, 148 F.2d., at 431-432:

"[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

. . . .

"In order to fall within *§ 2*, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

[13] Any view of the earlier law of monopolization which would attempt, erroneously in our opinion, to find a requirement of predatory practices must rely heavily on certain dicta in *United States v. United States Steel Corp., 251 U.S. 417, 451 (1920)* (Mr. Justice McKenna for a four-to-three Court), and *United States v. International Harvester Co., 274 U.S. 693, 708 (1927)* (Mr. Justice Sanford reiterating the dicta in *U.S. Steel*). The commentators cited by United for the proposition that predatory practices were required prior to *Alcoa-American Tobacco* place major reliance on these dicta. In any event, the cursory and conclusory nature of these writings clearly does not provide sufficiently strong proof of a prevailing opinion as to the law to have permitted the sort of justifiable reliance which alone could generate a prospectivity argument.

them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts. [14]

[**30]** United **[***1245]** relies heavily on three Sherman Act cases brought against it or its predecessors by the United States and decided by this Court. United argues that these cases demonstrate both that before *Alcoa-American Tobacco* the law was substantially different and that its leasing practices had been deemed by this Court not to be instruments of monopolization. *United States v. Winslow, 227 U.S. 202 (1913)*; *United States v. United Shoe **[**2235]** Machinery Co. of New Jersey, 247 U.S. 32 (1918)*; *United Shoe Machinery Corp*. v. *United States, 258 U.S. 451 (1922)*. In our opinion, however, United overreads and exaggerates the significance of these three cases. In *Winslow*, the Government charged the three groups of companies which had merged to form United with a violation of § 1. The trial court construed the indictment to pertain only to the merger of the companies and not to business practices which resulted from the merger; most significantly, it excluded United's leasing policies **[*500]** from consideration. The Court specifically stated that "the validity of the leases or of a combination **[****31]** contemplating them cannot be passed upon in this case." *227 U.S., at 217*.

The third case, decided in 1922, was brought under § 3 of the Clayton Act rather than *§ 2* of the Sherman Act. This Court affirmed a decree enjoining United from making leases containing certain clauses, terms, and conditions. Nothing in that case indicates that predatory practices had to be shown to prove a *§ 2* monopoly charge or that the leases, or the clauses in them which were left undisturbed, would not adequately demonstrate monopolization by an enterprise with monopoly power.

Of the three cases, the 1918 case most strongly supports United. It involved a civil action by the United States charging violations of §§ 1 and 2 of the Sherman Act. The Government contended that United's machinery leases and license agreements had been used to consummate both violations. A three-judge court dismissed the bill and this Court affirmed by a vote of 4 to 3. There is no question but that the leases as they were then constituted were held unassailable under § 1; the reasons for this ruling are not clear. As for the *§ 2* charge, we cannot read the opinion as specifying what course of conduct would **[****32]** amount to monopolization under *§ 2* if engaged in by a concern with monopoly power. At most the holding was that the leases themselves did not prove a *§ 2* charge -- did not themselves prove monopoly power as well as monopolization. But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power. There is little, if anything, in the 1918 opinion which is illuminating on this issue. Indeed, it may fairly be read as holding that United did not have monopoly power over the market at all, for in rejecting the claim that United's practice of **[*501]** leasing was illegal when used by a corporation **[***1246]** dominant in the market, the Court said:

"This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution . . . ." *247 U.S., at 60*.

Any comfort United might have **[****33]** received from the 1918 case with respect to the legality of its leasing system when employed by one with monopoly power should have been short-lived. In the third case, which was brought under § 3 of the Clayton Act, and in which all the remaining Justices making up the majority in the 1918 case except Mr. Justice McKenna voted with the Court, the opinion for the Court described the 1918 decision as follows:

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[14] United makes the independent argument that Judge Wyzanski's decision in the Government's case so fundamentally altered the law of monopolization that it should not be held liable for damages prior to the date the decision was handed down, February 18, 1953. We reject this contention for the reasons set forth in the textual discussion of *Alcoa-American Tobacco* and the previous *United* cases.

"That the leases were attacked under the former bill as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents." *258 U.S., at 460*.

[2236]** This view was supported by other references to the 1918 opinion which described the question at issue there as being whether United's leases went beyond the exercise of a lawful monopoly.

One might possibly disagree with this reading of the 1918 opinion, but it was an authoritative gloss. After 1922 and after the expiration of the patents on its major machines, there was no sound basis to justify reliance by United on the 1918 case as a definitive pronouncement that its leasing system provided legally insufficient evidence of monopolization, **[****34]** once United's power over the market was satisfactorily shown. The prior cases immunized United's monopoly insofar as it originated **[*502]** in a merger of allegedly competing companies and perhaps are of some help to United in other respects. But they do not establish either that prior to 1946 there was a well-defined interpretation of the Sherman Act which was abruptly overruled in *Alcoa-American Tobacco* or that United's leasing system could not be considered an instrument for the exercise and maintenance of monopoly power.

LEdHN[15][] [15] ***LEdHN[16]***[] [16] ***LEdHN[17]***[] [17]In these circumstances, there is no room for argument that Hanover's damages should reach back only to the date of the *American Tobacco* decision. Having rejected the contention that *Alcoa-American Tobacco* changed the law of monopolization in a way which should be given only prospective effect, it follows that Hanover is entitled to damages for the entire period permitted by the applicable statute of limitations. **[****35]** [15]

IV.

[*1247]** ***LEdHN[18]***[] [18]Two questions are raised here about the **[****36]** manner in which damages were computed by the courts below. Hanover argues that the Court of Appeals erred in requiring the District Court, on remand, to take account of the additional taxes Hanover would have paid, had it purchased machines instead of renting them during the years in question. The Court of Appeals evidently **[*503]** felt that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The view of the Court of Appeals is sound in theory, but it overlooks the fact that in practice the Internal Revenue Service has taxed recoveries for tortious deprivation of profits at the time the recoveries are made, not by reopening the earlier years. See *Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955)*. As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with **[****37]** less income than it would have had if United had not injured it. It is true that accounting for taxes in the year when damages are received rather than the year when profits were lost can change the amount of taxes the Revenue Service collects; as United **[**2237]** shows, actual rates of taxation were much higher in some of the years when Hanover was injured than they are today. But because the statute of limitations frequently will bar the Commissioner from recomputing for earlier years, and because of the policy underlying the statute of limitations -- the fact that such recomputations are immensely difficult or impossible when a long period has

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[15] United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. *Emich Motors Corp*. v. *General Motors Corp., 229 F.2d 714 (C. A. 7th Cir. 1956)*, upon which United relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

intervened -- the rough result of not taking account of taxes for the year of injury but then taxing recovery when received seems the most satisfactory outcome. The District Court therefore did not err on this question, and the Court of Appeals should not have required a recomputation.

LEdHN[19][] [19]United contends that if Hanover had bought machines instead of leasing them, it would have had to invest its own capital in the machines. United argues that the District **[****38]** Court erred in computing damages because it did not properly take account of the cost of capital to **[*504]** Hanover. The District Court found that in the years in question Hanover was able to borrow money for between 2% and 2.5% per annum, and that had Hanover bought machines it would have obtained the necessary capital by borrowing at about this rate. It therefore deducted an interest component of 2.5% from the profits it thought Hanover would have earned by purchasing machines. Our review of the record convinces us that the courts below did not err in these determinations; on the basis of the determinations of fact, Hanover's damages were properly computed. [16]

[**39]** The **[***1248]** 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.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

Excerpts From Judge Wyzanski's Opinion in *United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 323-325 (D. Mass. 1953)*.

Effects of the Leasing System.

The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual.

[*505] For United these are the advantages. (a) United has enjoyed a greater stability of annual revenues than is customary among manufacturers of other capital goods. But this is not due exclusively to the practice of leasing as distinguished from selling. It is attributable to the effects of leasing when, as is the case with United, the lessor already has a predominant share of the market. (b) United has been able to conduct research activities more favorably than if it sold its machines outright. **[****40]** The leasing system, especially the service aspect of that system, has given United constant access to shoe manufacturers and their problems. This has promoted United's knowledge of their problems and has stimulated United's shoe machinery development. This research knowledge would not be diminished substantially if United's service activities covered fewer factories. But if all access to shoe factories were denied the diminution would **[**2238]** be of great consequence to research. (c) The steadiness of revenues, attributable, as stated above, not to the leases alone, but to leases in a market dominated by the lessor, has tended to promote fairly steady appropriations to research. But these appropriations declined in the 1929 depression. Research expenditures might or might not be increased if competition were increased. The experience of United when faced with Compo's cement process suggests that declining revenues, no less than steady revenues, may promote research expenditures. (d) United has kept its leased machines in the best possible condition. (e) Under the leasing system United has enjoyed a wide distribution of machinery in a relatively narrow market. But this **[****41]** is merely another way of saying that United's market position, market power, lease provisions, and lease practices give it an advantage over competitors.

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[16] United also says that because Hanover's managers would have computed their capital costs differently, they would not in fact have decided to stop leasing machines and to begin purchasing them. The District Court found, however, that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United. This finding, affirmed by the Court of Appeals, is supported by the evidence, and we do not disturb it.

Upon shoe manufacturers, United's leasing system has had these effects. It has been easy for a person with modest capital and of something less than superior efficiency **[*506]** to become a shoe manufacturer. He can get machines without buying them; his machines are serviced without separate charges; he can conveniently exchange an older United model for a new United model; he can change from one process to another; and his costs of machinery per pair of shoes produced closely approximate the machinery costs of every other manufacturer using the same machinery to produce shoes by the same process. **[***1249]** Largely as a consequence of these factors, there were in 1950, 1,300 factories each having a daily production capacity of 3,000 pairs a day or less; 100 factories each having a capacity of 3,000 to 8,000 pairs; and 40 larger manufacturers. Many of these larger manufacturers, who collectively account for 40% of the shoe production of the United States, started in a small way and flourished under United's leasing system. **[****42]** Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system. It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify.

However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated. If United shoe machinery were available upon a sale basis, then --

(a) Some shoe manufacturers would be able to secure credit whether by conditional sales, chattel mortgages, or other devices.

[*507] (b) Under such a system, there is no reason to suppose that a purchaser's first installment on a machine would significantly exceed the deposit now often required of a new shoe manufacturer by United.

[**43]** (c) A few shoe manufacturers would be able to borrow at rates of interest comparable to the interest rates at which United borrows, or raises capital.

(d) Some shoe manufacturers would be able to provide for themselves service at a cost less than the average cost to United of supplying service to all lessees of its machines.

(e) Those manufacturers who bought United machines would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed **[**2239]** for any specific future period. While there is no evidence that United plans any change in its informal policies, and while United has not heretofore proceeded to alter its informal policies on the basis of its approval or disapproval of individual manufacturers, United has not expressly committed itself to continue, for example, its 1935 plan for return of machines, its right of deduction fund, its waiver for 4 months of unit charges, or its present high standard of service. United's reserved power with respect to these matters gives it some **[****44]** greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have.

(f) Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines and to take on competitors' machines in their place.

In looking at United's leasing system from the viewpoint of potential and actual competition, it must be **[*508]** confessed at the outset, that any **[***1250]** system of selling or leasing one company's machines will, of course, impede to some extent the distribution of another company's machines. If a shoe manufacturer has already acquired one company's machinery either by outright purchase, by conditional purchase, or on lease on any terms whatsoever, the existence of that machine in the factory is a possible impediment to the marketing of a competitive machine.

Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent **[****45]** effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect.

(a) The 10 year term is a long commitment.

(b) A shoe manufacturer who already has a United leased machine which can perform all the available work of a particular type may be reluctant to experiment with a competitive machine to the extent he would wish. He may hesitate to ask for permission to avoid the full capacity clause. If permission is given for an experimental period he may find the experimental period too short. Thus a competitor may not get a chance to have his machine adequately tried out by a shoe manufacturer. If a shoe manufacturer prefers a competitive machine to a United machine on hand, he may not know the exact rate at which future payments may be commuted. If he knows, he may find that a fresh outlay to make those commuted payments (which admittedly are not solely for revenue but also are for protection against competition, and which admittedly discriminate in favor of a lessee who takes a new United machine and not a competitor's machine) plus the rentals he has already **[*509]** **[****46]** paid cost him more than if he had bought a similar machine in the first place and were now to dispose of it in trade or in a second-hand market. Thus for a maker of competitive machines he may be a less likely customer than if United had initially allowed him to buy the machine.

(c) United's lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United.

(d) United's practice of rendering repair service only on its own machines and without separate charge has brought about a situation in which there are almost no large scale independent repair **[**2240]** companies. Hence when a typical small shoe manufacturer is considering whether to acquire a complicated shoe machine, he must look to the manufacturer of that machine for repair service. And a competitor of United could not readily market such a complicated machine unless in addition to offering **[****47]** the machine he was prepared to supply service. As the experience of foreign manufacturers indicates, this has proved to be a serious stumbling block to those who have sought to compete with United.

(e) If a shoe manufacturer is deciding **[***1251]** whether to introduce competitive machines, (either for new operations or as replacements for United machines on which the lease has not expired), he faces the effect of those decisions upon his credit under the Right of Deduction Fund. If he already has virtually all United machines, and if he replaces few of them by competitive machines, the Fund will take care of substantially all his so-called deferred charges, and may cover some of his minimum payments. This is because credit to the Fund earned **[*510]** by a particular machine enures to the benefit of all leased machines in the factory, and the maximum advantage to the shoe manufacturer is to have a large number of United machines to which the credit can be applied. This advantage to the shoe manufacturer of acquiring and keeping a full line of United machines deters, though probably only mildly, the opportunities of a competing shoe manufacturer.

Dissent by: STEWART

Dissent

MR. JUSTICE **[****48]** STEWART, dissenting.

Hanover sued United under the Clayton Act for damages allegedly flowing from United's practice of offering its machines for lease but not for sale. Hanover did not attempt to prove as an original matter that this practice violated the antitrust laws. Instead, it relied exclusively upon § 5 (a) of the Clayton Act, 38 Stat. 731, as amended, which provides:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." *15 U. S. C. § 16 (a)*.

Hanover recovered an award of treble damages solely upon the theory that the 1953 judgment and decree in *United States v. United Shoe Machinery Corp., 110 F.Supp. 295*, aff'd *per curiam*, *347 U.S. 521*, had established the unlawfulness **[****49]** of United's practice of making its machines available by lease only. So it follows, as the Court says, "if the 1953 judgment is not prima facie evidence of the illegality of the practice from which **[*511]** Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all." *Ante*, at 484.

I think that the 1953 judgment did not have the broad effect the Court attributes to it today. On the contrary, that judgment, it seems evident to me, held unlawful only particular kinds of leases with particular provisions, not United's general practice of leasing only. [1]

The only precedent cited by the Court for its expansive application of § 5 (a) is *Emich Motors Corp*. v. *General Motors Corp., 340 U.S. 558*. That case **[****50]** dealt with the estoppel effect of a general jury verdict in a criminal case. **[**2241]** We deal here with a civil case which was **[***1252]** tried to a federal judge, who rendered a thoroughly considered opinion and carefully precise decree.

One section of the decree, *§ 2*, broadly set out what the court found United's antitrust violations to be:

"Defendant violated *§ 2* of the Sherman Act, *15 U. S. C. A. § 2*, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, eyelets, grommets, and hooks, which is concerned with supplying the demand for those products by shoe factories within the United States. . . ." *110 F.Supp., at 352*.

Another section of the decree, *§ 4*, clearly specified the unlawful means by which these antitrust violations had been accomplished, and United's general leasing practice was not one of those means:

"All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred **[*512]** payment charges, and all leases under **[****51]** which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." *Ibid*.

In addition to these two sections setting forth the violations found, the decree contained some 20 remedial sections. Section 3 enjoined the violations found in *§ 2*. Section 6 prohibited the particular types of leases found to be unlawful in *§ 4*. Another section of the decree, § 5, went further and provided that in the future United's machines must be offered for sale as well as for lease. But it is a commonplace that "relief, to be effective, must go beyond the narrow limits of the proven violation," *United States v. Gypsum Co., 340 U.S. 76, 90*. *United States v. Loew's Inc., 371 U.S. 38, 53*; *United States v. Bausch & Lomb Co., 321 U.S. 707, 724*.

[1] I am not alone in this view. See *Cole v. Hughes Tool Co., 215 F.2d 924, 932-933*; *Laitram Corp*. v. *King Crab, Inc., 244 F.Supp. 9, 18*. See also n. 2, *infra*.

I can find nothing in Judge Wyzanski's written opinion in the 1953 case to suggest that he found United's lease-only practice, as such, to be a violation of the antitrust laws or illegal in any way. [2] **[****53]** To the contrary, that opinion **[****52]** repeatedly emphasized the anticompetitive effects of the particular types of leases held illegal, and carefully explained that the purpose of requiring that customers **[*513]** in the future be given an option to purchase was to create an eventual second-hand market in United's machines and to make the machines available to United's competitors, so that they might study and copy them. *110 F.Supp., at 349-350*. The opinion specifically stated that the reason for ordering United to offer its machines for sale was *not* to **[***1253]** widen the choices available to customers. [3]

The Court today adds as an Appendix to its opinion -- like a *deus ex machina* -- **[**2242]** Judge Wyzanski's findings of fact. But it is irrelevant with respect to § 5 (a) that the 1953 findings describe United's lease-only practice, when neither the decree nor the opinion held that practice to be unlawful.

The real key to why the Court has gone astray in this case is to be found, I think, in the concluding sentence of Part I of the Court's opinion. For there the Court reveals that it is really not trying to determine what Judge Wyzanski decided in 1953, but is determining instead how this Court would decide the issues if the 1953 case were before it as an original matter today. [4]

[**54]** In my view the 1953 *United Shoe* decision does not establish United's liability to Hanover. I do not reach, therefore, the other questions dealt with in the Court's opinion.

I would reverse the judgment of the Court of Appeals.

References

Am Jur, Judgments (Rev ed 69, 70); Monopolies, Combinations, and Restraints of Trade (1st ed 156, 181-183, 185, 188)

14 Am Jur Pl & Pr Forms, Monopolies, Combinations, and Restraints of Trade, Forms 14:311-14:314, 14:327, 14:328

US L Ed Digest, Damages 7, 159, 170; Evidence 343.5, 486; Judgment 65, 141; Limitation of Actions 201.5; Restraints of Trade and Monopolies 67

ALR Digests, Damages 14, 252, 365; Evidence 631; Judgment 68, 69, 102.5; Limitation of Actions 213; Restraints of Trade and Monopolies 13, 15

L Ed Index to Anno, Damages; Restraints of Trade and Monopolies

ALR Quick Index, Damages; Punitive Damages; Restraints of Trade and Monopolies

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[2] Neither, apparently, could Judge Wyzanski. After the trial court in this action filed its opinion holding that the 1953 decree had condemned United's lease-only practice, United applied to Judge Wyzanski for a construction of his decree. While denying the application upon grounds of comity, Judge Wyzanski indicated a willingness to construe his decree if officially requested by the trial judge in the present case, Judge Sheridan. During the course of the hearing before Judge Wyzanski, he made his own views clear to government counsel:

"Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?"

[3] *110 F.Supp., at 349-350*. The language quoted by the Court, *ante*, at 486, n. 3, is not a statement of why the District Court in 1953 ordered United to offer its machines for sale, but rather part of the court's answer to United's argument that it would be unfair to make United sell while its competitors continued only to lease. *110 F.Supp., at 350*.

[4] "When the *applicable standard* for determining monopolization under *§ 2* *is applied to these facts*, it must be concluded that the District Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case." (Emphasis added.)

Annotation References:

Punitive damages for business tort as subject to federal income tax. *99 L Ed 491 at page 495*.

Actions for threefold damages under *Anti-trust Act. 53 L Ed 826.* **[****55]**

[Northern Natural Gas Co. v. Federal Power Com.](#)

United States Court of Appeals for the District of Columbia Circuit

June 21, 1968, Decided

No. 21,333

Reporter

399 F.2d 953 *; 1968 U.S. App. LEXIS 6434 **; 130 U.S. App. D.C. 220; 1968 Trade Cas. (CCH) P72,498

Northern Natural Gas Co. and Northern Natural Gas Transportation Co., Petitioners, v. Federal Power Commission, Respondent; Union Gas Co. of Canada, Ltd., Michigan Consolidated Gas Co., Michigan Wisconsin Pipe Line Co., Great Lakes Gas Transmission Co., TransCanada Pipe Lines Ltd. The Consumers' Gas Co., Midwestern Gas Transmission Co., Northern and Central Gas Co., Ltd., Michigan Public Service Commission, Wisconsin Gas Co., Wisconsin Public Service Corp., Wisconsin Michigan Power Co., Wisconsin Fuel & Light Co., Wisconsin Natural Gas Co., Panhandle Eastern Pipe Line Co., County of Wayne, Michigan, Public Service Commission of Wisconsin, Madison Gas and Electric Co., and State of Minnesota, Intervenors

Disposition: [1]** Remanded.

Core Terms

joint venture, Northern, natural gas, Transportation, pipeline, markets, suppliers, costs, subsidiary, consumers, regulation, proposals, anti trust law, monopoly, antitrust, public interest, benefits, estimate, certificated, lessen, competitor, customer, saving, weigh, utilized, appears, region, rates, pipe, per day

LexisNexis® Headnotes

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN1[] **Energy & Utilities Law, Antitrust Issues**

Although the Federal Power Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN2[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Regulated industries must, to some degree at least, accommodate the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN3[] **Exemptions & Immunities, Collectives & Cooperatives**

Even where there are specific statutory exemptions for regulated industries from the antitrust laws, such exemptions are to be very narrowly construed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Governments > Legislation > Interpretation

HN4[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Congressional directives require certain regulatory agencies to enforce portions of the antitrust laws.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN5[] **Public Enforcement, State Civil Actions**

The Federal Power Commission has been instructed to transmit evidence concerning apparent violations of the Federal antitrust laws to the Attorney General. Section 20(a) of the Natural Gas Act, *15 U.S.C.S. § 717s(a) (1964)*.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN6[] Procedural Matters, Jurisdiction

Congress has also explicitly advised certain agencies to consider basic issues of competition while regulating the industries within their jurisdiction.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

By its very nature an illegal restraint of trade is in some ways contrary to the public interest.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN8[] Presiding Officers, Administrative Law Judges

Regulatory agencies do not have jurisdiction to determine violations of the antitrust laws. Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. However, the antitrust laws are merely another tool that a regulatory agency employs to a greater or lesser degree to give understandable content to the broad statutory concept of the public interest.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > General Overview

HN9[] Antitrust & Trade Law, Clayton Act

Section 7 of the Clayton Act, *15 U.S.C.S. § 18 (1964)*, states: No corporation engaged in commerce shall acquire the whole or any part of the stock or other share capital 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, or to tend to create a monopoly.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN10[] Antitrust & Trade Law, Clayton Act

In deciding whether one is a true potential competitor for purposes of antitrust laws, consideration should be given to the nature or extent of the market, the nearness of the absorbed company to it, that company's eagerness to enter the market, its resourcefulness, and so on.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Utility Companies > Contracts for Service

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > Capacity Allocation

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Construction Standards

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Utility Companies > Ownership & Restructuring

Transportation Law > Interstate Commerce > Federal Powers

HN11[] **Antitrust & Trade Law, Clayton Act**

The natural gas market is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Federal Power Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN12[] Antitrust & Trade Law, Clayton Act

Admittedly the Federal Power Commission possesses a ratemaking power and this power is designed to protect the consumers of natural gas. Sections 4 and 5 of the Natural Gas Act, *15 U.S.C.S. §§ 717c* and *717d (1964)*. But it is clear that this power is largely a negative one. Thus the Commission may set a selling rate for a supplier only after it has been demonstrated that the present charge is unjust, unreasonable, unduly discriminatory or preferential, Section 5(a) of the Natural Gas Act, *15 U.S.C.S. § 717d(a) (1964)*, a heavy burden even for specialists as intimately familiar with the natural gas industry as is the Commission. On the other hand, if competition exists, albeit in a limited area, there would be incentives for innovation by the regulated companies themselves and for their coming forward with proposals for better services, lower prices, or both.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Certificates of Need

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN13[] Natural Gas Act, Certificates of Need

The Federal Power Commission has the power to maximize the effectiveness of limited competition by specifying the service area in which the certified pipeline may compete. Section 7(e)(f) of the Natural Gas Act, *15 U.S.C.S. § 717f(e)(f) (1964)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Law > Joint Ventures > Formation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Business & Corporate Law > Joint Ventures > General Overview

HN14[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The rule where a corporation seeks to protect its market by acquiring a potential competitor applies to a joint venture where the same intent is present in the organization of the new corporation.

Energy & Utilities Law > Pipelines & Transportation > Certification & Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > Marketability

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Certificates of Need

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN15[] **Pipelines & Transportation, Certification & Licenses**

Although Congress has limited entry into natural gas markets by providing that new pipelines may not be built without prior certification of public convenience and necessity, *15 U.S.C.S. § 717f(c) (1964)*, it has not evinced an intention to restrict competition among qualified operators or a preference for monopoly service.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Certificates of Need

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN16[] **Natural Gas Act, Certificates of Need**

A certificate shall be issued to any qualified applicant if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the relevant law and regulations and that the proposed service is or will be required by the present or future public convenience and necessity. Section 7(e), Natural Gas Act, *15 U.S.C.S. § 717f(e) (1964)*.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Certificates of Need

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN17[] **Natural Gas Act, Certificates of Need**

Nothing contained in this section shall be construed as a limitation upon the power of the Federal Power Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company. Section 7(g) of the Natural Gas Act, *15 U.S.C.S. § 717f(g) (1964)*.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN18[] **Natural Gas Industry, Distribution & Sale**

Nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

HN19[] **Natural Gas Industry, Distribution & Sale**

Comparative proceedings before regulatory agencies are sensitive mechanisms for weighing the relative merits of rival projects and one of the main competitive arenas of the natural gas industry since it is there that the sellers challenge one another for the favor of the Federal Power Commission. This process could easily be distorted if the Commission permitted potential applicants to get together to decide how a market would be divided before submitting their proposals to the Commission, for then private parties rather than the Commission would be determining what means of meeting a market demand is most closely in accord with the public interest. Courts cannot permit such an abrogation of administrative responsibility.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Public Improvements > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN20[] **Utility Companies, Rates**

One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions. The utility is not relieved from this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business.

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Energy & Utilities Law > Antitrust Issues > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Energy & Utilities Law > Financing > Grants & Reservations > Joint Ventures & Partnerships

Mergers & Acquisitions Law > Antitrust > Joint Ventures

HN21[] **Cooperatives, Formation**

The joint venture puts the parents, particularly if they are competitors, in dangerous proximity to discuss and act jointly on aspects of their business apart from the joint venture and creates an aura of cooperative team spirit which is apt to dampen competitive fires between the firms involved.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN22[] **Energy & Utilities Law, Antitrust Issues**

The duty imposed upon the Federal Power Commission by Section 7 of the Natural Gas Act, *15 U.S.C.S. § 717f*, is not merely to determine which of the submitted applications is most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest better than any of the projects outlined in the applications.

Judges: Bastian, Senior Circuit Judge, and Wright and Robinson, Circuit Judges.

Opinion by: WRIGHT

Opinion

[*957] WRIGHT, Circuit Judge:

This is a petition by Northern Natural Gas Company (Northern) and its subsidiary, Northern Natural Gas Transportation Company (Northern Transportation), to review an order of the Federal Power Commission. The challenged order, issued June 20, 1967, authorized the Great Lakes Gas Transmission Company, a Delaware corporation owned jointly by Trans-Canada Pipe Lines Limited and American Natural Gas Company, to construct and operate a 989-mile, 36-inch, natural gas pipeline extending from the Canadian border in northern Minnesota through northern Wisconsin and the Upper Peninsula of Michigan, across the straits of Mackinac, and through the lower Michigan peninsula to the Canadian border at Sarnia, Ontario. [1] **[**2]** By the fifth year of operation, the

[1] Besides certificating the construction and operation of the Great Lakes facilities, the Commission issued certificates of public convenience and necessity for construction and operation of facilities to Midwestern Gas Transmission Company and Michigan Wisconsin Pipe Line Company, authorized the transportation, sale, importation and exportation above described, and issued

pipeline is expected to be delivering 734,000 Mcf of gas per day, with approximately 57,000 Mcf per day being purchased by Michigan Consolidated Gas Company [2] and the remainder going to Trans-Canada in eastern Canada.

Simultaneously with the approval of the Great Lakes proposal, the Commission rejected a competitive application by Northern and Northern Transportation which proposed that the Canadian gas imported into northern Minnesota be utilized by Northern in its northern Minnesota markets and that Northern Transportation fulfill the needs of Michigan Consolidated and Trans-Canada by transporting domestic gas, originating in southwestern United States, from Northern's terminal at Ogden, Iowa, through Michigan to the Canadian border at Sarnia, Ontario. To accomplish this exchange-displacement, Northern Transportation would have constructed a 285-mile, 36-inch pipeline from Emerson, Manitoba, to Sandstone, Minnesota, and a 731-mile, 36-inch line from Ogden, Iowa, to Sarnia, Ontario.

Both proposals contemplated exportation of gas from northern Michigan to Sault Sainte Marie **[**3]** (in each case this would entail construction of a short lateral line) and additional importation of 116,000 Mcf per day of Canadian gas by Midwestern Gas Transmission Company and sale of this gas to Michigan Wisconsin Pipe Line Company. Thus the essential difference between the proposals was that Great Lakes would utilize an entirely new pipeline to transport Canadian gas from western Canada to eastern Canada whereas Northern and Northern **[*958]** Transportation would utilize both existing and new facilities to effect an exchange of Canadian gas for United States production.

The principal question raised by this petition is whether the Great Lakes joint venture substantially lessened actual or potential competition and, if so, whether the Commission adequately took account of this factor. ***HN1***[] Although the Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy. *California v. F.P.C., 369 U.S. 482, 484-485, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962)*; **[**4]** *United States v. Borden Co., 308 U.S. 188, 198-199, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*; *Lynchburg Gas Co. v. F.P.C., 119 U.S. App. D.C. 23, 27, 30-31, 336 F.2d 942, 946, 949-950 (1964)*; *City of Pittsburgh v. F.P.C., 99 U.S. App. D.C. 113, 126, 237 F.2d 741, 754 (1956)*; *Pennsylvania Water & Power Co. v. F.P.C., 89 U.S. App. D.C. 235, 240, 193 F.2d 230, 235 (1951)*, *affirmed*, *343 U.S. 414, 96 L. Ed. 1042, 72 S. Ct. 843 (1952)*. [3] This much is conceded by the Commission and the intervenors. We think that implementation of the Commission's

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Presidential Permits for the border connections. The requested authorizations are contained in interdependent applications of Great Lakes, Michigan Wisconsin, and Midwestern.

These actions are required by § 7(c) of the Natural Gas Act, *15 U.S.C. § 717f(c) (1964 ed.)*:

> "No natural-gas company * * * shall engage in the transportation or sale of natural gas * * * or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *."

[2] In addition, Michigan Consolidated has an option to take another 50,000 Mcf per day in the fifth year. S.E.C. opinion, March 7, 1966 (Holding Company Act Release No. 15422), reprinted in Appendix B of intervenors' brief, pp. 4a, 6a.

[3] Just last year the Supreme Court summarized the responsibility of the regulatory agencies in this regard:

> "* * * Both the ICC and this Court have read terms such as 'public interest' broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applications only if 'consistent with the public interest.' *McLean Trucking Co. v. United States, 321 U.S. 67 [88 L. Ed. 544, 64 S. Ct. 370]*. And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E.g.*, *National Broadcasting Co. v. United States, 319 U.S. 190, 224 [87 L. Ed. 1344, 63 S. Ct. 997]*; *FCC v. RCA Communications, Inc., 346 U.S. 86, 94 [97 L. Ed. 1470, 73 S. Ct. 998]*; *California v. FPC, 369 U.S. 482, 484-485 [8 L. Ed. 2d 54, 82 S. Ct. 901]*."

Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485, 492-493, 18 L. Ed. 2d 905, 87 S. Ct. 1754 (1967).

order will have serious anticompetitive effects and that, in issuing it, the Commission gave inadequate consideration to the antitrust policy of the United States. We therefore remand the case to the Commission for further consideration.

[5]** I.

Petitioners have challenged the Commission's handling of the antitrust issues on three basic grounds: (1) the refusal by Trans-Canada either to deliver Canadian gas to petitioners or to purchase domestic gas from petitioners, the refusal by Michigan Consolidated to purchase gas from petitioners, and Midwestern's refusal to participate in petitioners' project constituted an illegal group boycott which contaminated the comparative proceeding conducted by the Commission and prejudiced petitioners' application; (2) the Commission's finding that the potential benefits from competition between Great Lakes and Northern in the taconite region of northern Minnesota outweighed the possible benefits afforded by the entry of Northern Transportation into the lower Great Lakes region was not supported by substantial evidence; and (3) the joint venture resulted in an illegal division of the consumer market between Trans-Canada and American Natural, substantially lessened competition between United States distributors for the supply of Canadian gas, and illegally eliminated competition between independent applicants (Trans-Canada *versus* American Natural and Midwestern) in a Commission comparative **[**6]** proceeding.

It is the latter ground which is most troubling. The group boycott, though undesirable, did not overtly affect this proceeding because the Commission weighed petitioners' proposal as if the threatened boycott did not exist. As **[*959]** for the relative benefits of Great Lakes competition in the taconite region and Northern Transportation competition in the lower Great Lakes region, we believe there is sufficient evidence to support the finding in favor of competition in the taconite region. Thus the principal question to which we address ourselves is whether there is sufficient evidence to support the Commission's conclusion that "from the standpoint of enhanced competition, we do not think it very significant whether or not the American Natural system participates in the Great Lakes proposal."

A. *The Relevance of **Antitrust Law** to Regulatory Agencies*.

Even though the Commission concedes that it must consider the antitrust implications of its action, in order to determine the required extent of that consideration we think it helpful to examine the overall relationship between ***antitrust law*** and regulatory agencies. Despite a continuing debate, [4] **[**8]** it appears **[**7]** that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of ***antitrust law*** is the same -- to achieve the most efficient allocation of resources possible. [5] For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. [6] Another example of their common purpose

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[4] *See Symposium on Regulated Industries and Antitrust*, 32 A.B.A. Antitrust L.J. 215 (1966). Much of this debate seems to center on the objection of practicing lawyers to dealing with two heads of United States agencies on a single problem. That is, they complain that there are unnecessary complications when an antitrust question arises in a regulated industry because it often requires them to deal with not only the relevant regulatory agency but also the Department of Justice. It appears that this problem could be alleviated if the regulatory agencies were conscientiously to examine the antitrust implications of their actions, thereby taking much of the burden from the Department of Justice. This may have been one of the objectives of the recent Savings and Loan Holding Company Amendments, Pub. L. 90-255, § 408(e), 90th Cong., 2d Sess., 36 U.S.L. Week 77 (February 6, 1968).

[5] *See* *Lynchburg Gas Co. v. F.P.C., 119 U.S. App. D.C. 23, 31, 336 F.2d 942, 950 (1964)*; *California v. F.P.C., 111 U.S. App. D.C. 226, 231-232, 296 F.2d 348, 353-354 (1961)*, *reversed*, *369 U.S. 482, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962)*; *Symposium, supra* Note 4, at 239-242 (Zimmerman).

[6] In the original enactment, Congress stated that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible

is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other.

This theory of complementary regulation appears to be borne out by the Supreme Court cases holding that ***HN2***[] regulated industries must, to some degree at least, accommodate the antitrust laws. *F.M.C. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 19 L. Ed. 2d 1071, 88 S. Ct. 1005 (1968)* **[**9]** (ocean carriers); *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (labor union); *United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)* (natural gas distributors); *United States v. Philadelphia National Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* (banking); *Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)* (stock exchange); *United States v. Radio Corporation of America, 358 U.S. 334, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)* (television communication); *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct.* ***[*960]*** *716, 89 L. Ed. 1051 (1945)* (railroads); *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)* (insurance); *McLean Trucking Co. v. United States, 321 U.S. 67, 88 L. Ed. 544, 64 S. Ct. 370 (1944)* (trucking); *United States v. Borden Co., 308 U.S. 188, 84 L. Ed. 181, 60 S. Ct. 182 (1939)* (agricultural cooperatives). Moreover, the Court has held that **[**10]** ***HN3***[] even where there are specific statutory exemptions for regulated industries from the antitrust laws, such exemptions are to be very narrowly construed. *See, e.g.*, *California v. F.P.C., supra, 369 U.S. at 485-486*; *Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*.

The complementary regulation theory is also supported by ***HN4***[] congressional directives requiring certain regulatory agencies to enforce portions of the antitrust laws. [7] ***HN5***[] The Federal Power Commission, while not included on the list of enforcement agencies, has been instructed to "transmit * * * evidence * * * concerning apparent violations of the Federal antitrust laws to the Attorney General." [8] ***HN6***[] Congress has also explicitly advised certain agencies to consider basic issues of competition while regulating the **[**11]** industries within their jurisdiction. [9] **[**13]** For other agencies the obligation to act in favor of "public convenience and necessity" has been construed as implying a duty to recognize and weigh traditional antitrust concepts. [10] For example, the Federal Maritime Commission has formulated a rule that acts of shipping conferences interfering with the policies of antitrust laws will be approved only if the conferences can '"bring forth such facts as would demonstrate that the * * * [act] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'" *F.M.C. v. Aktiebolaget Svenska Amerika Linien, supra, 390 U.S. at 243*. In approving this standard the Supreme Court noted that "by ***HN7***[] its very nature an

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reasonable rate consistent with the maintenance of adequate service in the public interest." Natural Gas Act, 52 Stat. 825 (1938).

[7] Section 11 of the Clayton Act, *15 U.S.C. § 21(a) (1964 ed.)*, rests authority to enforce compliance with § 7 by the persons subject thereto

> "in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce * * *."

[8] Section 20(a) of the Natural Gas Act, *15 U.S.C. § 717s(a) (1964 ed.)*.

[9] Savings and Loan Holding Company Amendments, *supra* Note 4; Bank Merger Act, *12 U.S.C. § 1828(c) (1964 ed.)*; Civil Aeronautics Act, 49 U.S.C. § 488(b) (1964 ed.); Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1964 ed.).

[10] ***F.M.C. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243-246, 19 L. Ed. 2d 1071, 88 S. Ct. 1005 (1968)***; *California v. F.P.C., 369 U.S. 482, 484-485, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962)*; *United States v. Radio Corporation of America, 358 U.S. 334, 351-352, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*; *National Broadcasting Co. v. United States, 319 U.S. 190, 222-224, 87 L. Ed. 1344, 63 S. Ct. 997 (1943)*.

illegal restraint of trade is in some ways 'contrary to the public interest.'" *Id. at 244*. And while the Supreme Court did not say that the F.M.C. was obliged to display the degree of deference for antitrust laws suggested by its rule, the Court did conclude that "the **[**12]** antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." *Id. at 246*.

HN8[] This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust laws. *See* *California v. F.P.C., supra, 369 U.S. at 490*; *United States v.* ***[*961]*** *Radio Corporation of America, supra, 358 U.S. at 350 n. 18*; *National Broadcasting Co. v. United States, 319 U.S. 190, 223-224, 87 L. Ed. 1344, 63 S. Ct. 997 (1943)*; *Mansfield Journal Co. v. F.C.C., 86 U.S. App. D.C. 102, 107, 180 F.2d 28, 33 (1950)*. Nor are the agencies strictly **[**14]** bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. [11] In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" *F.M.C. v. Aktiebolaget Svenska Amerika Linien, supra, 390 U.S. at 244*. But because competitive considerations are an important element of the "public interest," we believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations. *Johnston Broadcasting Co. v. F.C.C., 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949)*. *See also* *Baltimore & Ohio R. Co. v. United States, 386 U.S. 372, 402-403, 436-437, 18 L. Ed. 2d 159, 87 S. Ct. 1100 (1967)* (Mr. Justice Brennan concurring); *Scenic Hudson Preservation Conference v. F.P.C., 2 Cir., 354 F.2d 608 (1965)*, **[**15]** *cert. denied*, *384 U.S. 941, 86 S. Ct. 1462, 16 L. Ed. 2d 540 (1966)*.

B. *Background of the Joint Venture*.

In 1961 Trans-Canada concluded that the growing demand for gas in eastern Canada necessitated additional facilities to supplement the gas then being carried by its Canadian pipeline. Trans-Canada subsequently determined that it would be advantageous to build the new pipeline through the United States because: (1) it would be more economical than "looping" (building a parallel line) its existing line and again traversing the solid granite of the pre-Cambrian shield **[**16]** in Ontario, and (2) a United States line offered the potential of expanding Trans-Canada's export sales. This interest in marketing gas to United States distributors while moving additional gas to eastern Canada [12] prompted Trans-Canada to hold meetings in 1962 with several United States gas distributing companies to determine whether any of them might be interested in a joint project.

As a result of these preliminary discussions, American Natural and Trans-Canada carried on joint studies to determine the feasibility of a joint project. The parties were unable, however, to reach an agreement on the division of ownership and the amount of gas to be purchased by Michigan Wisconsin, the American Natural subsidiary. Consequently, Trans-Canada decided to have Great Lakes, a wholly owned subsidiary incorporated in Delaware, construct and operate a 36-inch pipeline following the route now planned for the **[**17]** joint venture. In accord with Section 7 of the Natural Gas Act, *15 U.S.C. § 717f (1964 ed.)*, Trans-Canada sought the approval of the Commission.

Shortly thereafter American Natural and Midwestern formulated an alternative to the transportation proposed by Trans-Canada, whereby Midwestern would take gas from Trans-Canada and transport it to Wisconsin, to be utilized there by Michigan Wisconsin in its domestic market, and Michigan Wisconsin would transport domestic gas from its Michigan storage fields to the Canadian border. Before submitting this alternative **[*962]** to the Commission as a competitive application, American Natural and Midwestern proposed to Trans-Canada that it utilize the American

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[11] *See* *Seaboard Air Line R. Co. v. United States, 382 U.S. 154, 15 L. Ed. 2d 223, 86 S. Ct. 277 (1965)*; *Pan American World Airways, Inc. v. United States, 371 U.S. 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963)*; *McLean Trucking Co. v. United States, 321 U.S. 67, 88 L. Ed. 544, 64 S. Ct. 370 (1944)*. Also note the exceptions mentioned above which the F.M.C. has written into its policy.

[12] Trans-Canada now exports gas into Minnesota at Emerson, Manitoba, and into Vermont east of Lake Champlain.

Natural-Midwestern alternative. Trans-Canada rejected this proposition because it believed its own proposal was more economical and offered it greater flexibility. American Natural and Midwestern then filed their alternative proposal with the Commission.

Before the Commission had an opportunity to conduct competitive hearings on these mutually exclusive proposals, Trans-Canada and American Natural, subsequently joined by Midwestern, reopened their negotiations **[**18]** for a joint venture. As a result of these negotiations, the three companies withdrew their previous competitive proposals and in their places filed the joint Great Lakes proposal which has been certificated by the Commission. Different reasons were expressed for the withdrawals of the three parties and their concurrence in the Great Lakes joint venture which was to be owned equally by American Natural and Trans-Canada: Mr. E.H. Holstead, a vice president of Trans-Canada and vice president and general manager of Great Lakes, stated that Midwestern withdrew its prior application on the condition that Trans-Canada would sell to it, and Michigan Wisconsin would buy from it, an additional 113,000 Mcf of gas. Mr. Holstead further stated that Trans-Canada would not have withdrawn its original proposal unless Michigan Consolidated agreed to purchase 57,000 Mcf of gas, and, although no direct statements were discovered in the record which revealed the thinking of American Natural, other statements made therein and its oral argument make it clear that it was willing to withdraw its prior application and make additional purchases of Canadian gas under the subsequent joint proposal in order **[**19]** to guarantee itself a portion of the ownership of Great Lakes and a more direct link with the Canadian supply.

C. *The Standards for Determining Whether the Joint Venture Was Contrary to Antitrust Policies*.

The ***antitrust law*** most relevant to these facts is ***HN9***[] Section 7 of the Clayton Act:

> "No corporation engaged in commerce shall acquire * * * the whole or any part of the stock or other share capital * * * 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, or to tend to create a monopoly." *15 U.S.C. § 18 (1964 ed.)*.

The Supreme Court has emphasized many times that the purpose of Section 7 is "to arrest * * * the *tendency* to monopoly, before the consumer's alternatives disappeared through merger * *." *United States v. Philadelphia National Bank, 374 U.S. 321, 367, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. In determining the applicability of Section 7 in specific cases, the judiciary has considered various elements. We **[**20]** may quickly dispose of several of these. First, the natural gas industry is obviously a "line of commerce," *United States v. El Paso Natural Gas Co., supra, 376 U.S. at 657*, and the pipelines are in interstate commerce. Second, the relevant geographic market is easily defined by reference to the disputed pipelines. Also, it is no longer questioned that Section 7 applies to the acquisition of newly formed companies, such as this joint venture, as well as to the acquisition of companies already engaged in commerce. *United States v. Penn-Olin Co., 378 U.S. 158, 167-168, 12 L. Ed. 2d 775, 84 S. Ct. 1710 (1964)*. Thus the only unanswered question is whether the *probable effect* of the joint venture is substantially to lessen competition.

The Commission concluded that American Natural's purchase of a 50 per cent interest in Great Lakes would not have a detrimental effect on competition because "there cannot be competition for * * * the transportation of western **[*963]** Canadian gas to eastern Canadian markets." Furthermore, the Commission found "that the Great Lakes line may well serve as a competitive stimulus" in the taconite region, a market **[**21]** previously dominated by Northern. We do not dispute either of these findings. We do believe, however, that the joint venture will have substantial anticompetitive effects on the marketing of gas in the upper Midwest, since the joint venture appears to have effectively prevented competition from arising among natural gas suppliers selling to distributors in Michigan and Wisconsin, and between the supplier of Canadian gas and those suppliers seeking to market domestic gas.

1. *Competition Among Suppliers in the Michigan-Wisconsin Market*.

In considering the first of these anti-competitive effects, two facts should be recalled: (1) American Natural is the dominant supplier in Michigan and Wisconsin, supplying over 50 per cent of the gas utilized in both states [13] **[**22]** ; and (2) as originally proposed the wholly-owned subsidiary of Trans-Canada contemplated substantial sales of gas in the United States in addition to transporting gas to eastern Canada. [14] From this we may conclude that, had the Trans-Canada subsidiary been certified by the Commission, the accessible Michigan-Wisconsin market, now dominated by American Natural, would have been open to competition.

In determining **[**23]** whether the formation of the joint venture precluded this competition and, if it did, whether this competition would have been substantial, two questions must be considered: (1) Was Great Lakes, as a wholly-owned subsidiary of Trans-Canada, a probable entrant to the Michigan-Wisconsin market -- that is, was Great Lakes a true potential competitor? (2) Could competition between Great Lakes and American Natural have a substantial effect on the marketing of natural gas in Wisconsin and Michigan?

The Supreme Court has suggested that, ***HN10***[] in deciding whether one is a true potential competitor, consideration should be given to "the nature or extent of [the] market, the nearness of the absorbed company to it, that company's eagerness to enter the market, its resourcefulness, and so on." [15] *United States v. El Paso Natural Gas Co., supra, 376 U.S. at 660*. *See also* *F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967)*. The nature of the natural gas market was accurately described by Mr. Justice Douglas in *El Paso*:

[24]**

> "This ***HN11***[] is not a field where merchants are in a continuous daily struggle **[*964]** to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. * * * Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas*." *376 U.S. at 659-660*.

In this case the additional demand in the eastern Canadian market made a new pipeline feasible. Because this market is reached most easily by traversing a part **[**25]** of the large lower Michigan market, now dominated by

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[13] Petitioners allege that American Natural supplies over 50 per cent of the gas used in Wisconsin and over 78 per cent of Michigan's gas. American Natural contends that it supplies just over 50 per cent.

[14] Great Lakes Gas Transmission Company's Application for Certificate of Public Convenience and Necessity, Docket No. CP65-171. Petitioners have alleged that Trans-Canada proposed to serve in the United States 93 communities, four major iron ore producing areas, an extensive pulp and paper industry and public and privately-owned power generating plants, and that Trans-Canada estimated that the gas sold in the United States would produce revenues of more than $23,000,000 a year.

The Commission found that by the fifth year of operation (1970-71) the certificated Great Lakes pipeline, which is essentially the same as the one proposed originally, would carry approximately 734,000 Mcf/day, and be capable of carrying an additional 86,000 Mcf/day merely by increasing the compression of the system. It further found that by the fifth year of operation approximately 224,000 M2cf/year (about 612,000 Mcf/day) would be transported to eastern Canada. Therefore, approximately 248,000 Mcf/day, or 30 per cent of the capacity of the system, would be available for marketing in the United States.

[15] Professor Brodley has criticized this mode of analysis as being too dependent on subjective factors and has argued that a superior test for determining potential entrants would be one resting primarily on the nearness of the market to the potential entrant. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts -- From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 335 (1967).

American Natural, and also the as yet undeveloped Upper Peninsula, there was additional incentive for Trans-Canada to seek the right to construct a pipeline to eastern Canada. In fact, every application made for the right to carry gas to eastern Canada contemplated the construction of a pipeline with a capacity in excess of the amount of gas needed to meet the Canadian demands since each hoped to market the excess gas in Michigan. Thus the nature and extent of the market would have been attractive to the Trans-Canada subsidiary.

The second consideration **[**26]** -- the nearness of the absorbed company to the market -- also suggests that the Trans-Canada subsidiary was a true potential competitor. Trans-Canada has a market and pipelines on both sides of the Michigan-Wisconsin market and, therefore, a link between the two was reasonable and practicable from a business viewpoint. This is obvious in light of Trans-Canada's conclusion that a pipeline traversing the United States would be a more economical means of transporting gas to eastern Canada than looping its existing line in Canada.

Finally, it appears that Trans-Canada possessed the desire and resources to enter the market. Its intent is clearly demonstrated by its original application. And the mere size of its present operation would suggest that financing would not hinder its entry. Thus all factors indicate that a wholly-owned Trans-Canada subsidiary could have entered the Michigan-Wisconsin market.

If a wholly-owned subsidiary of Trans-Canada would have become an actual competitor of suppliers in Michigan and Wisconsin, we believe that the effect would have been substantial and that the northern Wisconsin and Michigan markets could have expected significant benefits. This is **[**27]** so, in large part, because competition, even in a regulated industry, secures benefits which might otherwise be unattainable. ***HN12***[] Admittedly the Commission possesses a rate-making power and this power is designed to protect the consumers of natural gas. [16] **[**28]** But it is clear that this power is largely a negative one. [17] Thus the Commission may set a selling rate for a supplier only after it has been demonstrated that the present charge is unjust, unreasonable, unduly discriminatory or preferential, [18] a heavy burden even for specialists as intimately familiar with the natural gas industry as is the Commission. On the other hand, if competition exists, **[*965]** albeit in a limited area, there would be incentives for innovation by the regulated companies themselves and for their coming forward with proposals for better services, lower prices, or both. And once innovations or proposals are forthcoming by a supplier, the Commission could more easily act to universalize these benefits than it could have acted to extract them initially.

Consider the types of natural gas markets which exist. There are some markets which are natural monopolies -- that is, where the most efficient allocation of resources results in a single supplier. [19] In such markets, competition is sacrificed to avoid wasteful duplication of services and investment, and hence regulation by the Commission is the only protection a consumer has. In virtually all other natural gas markets, there is a tight oligopoly or partial monopoly. [20] **[**30]** In these markets the fortunes of the few sellers are highly dependent, [21] and therefore there is

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[16] Sections 4 and 5 of the Natural Gas Act, *15 U.S.C. §§ 717c* and *717d (1964 ed.)*.

[17] *See Symposium, supra* Note 4, 32 A.B.A. Antitrust L.J. at 240 (Zimmerman).

[18] Section 5(a) of the Natural Gas Act, *15 U.S.C. § 717d(a) (1964 ed.)*.

[19] Professors Kaysen and Turner defined a natural monopoly as follows:

> "In the economic sense, natural monopoly is monopoly resulting from economies of scale * * * such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business."

C. Kaysen & D. Turner, Antitrust Policy 191 (1959).

[20] A tight oligopoly market is one which is highly concentrated and which has been defined as a market in which eight or fewer firms supply over 50 per cent of the market, with the largest firm at least 20 per cent. A partial monopoly is defined as a market in which one supplier controls 60 per cent of the market and no other single seller has a significant proportion. C. Kaysen & D. Turner, *supra* Note 19, at 72. As noted earlier, American Natural supplies over 50 per cent of the Wisconsin and Michigan

an incentive for the sellers to arrive at a price which will offer the highest return to all of them. [22] Such a uniform price, whether arrived at by formal agreements or merely through price leadership, is in essence a monopoly price and yields monopoly profits. [23] Where the few sellers strive for and attain a uniform monopoly price the only **[**29]** significant difference between a tight oligopoly market and a monopoly market is that in the former the monopoly profits are shared among several sellers. [24] Thus direct rate regulation is as necessary for the protection of the consumer in these markets as it is in monopoly markets.

The above analysis suggests what might happen in a tight oligopoly market. But in practice it appears that firms selling in such a market do not always seek a uniform monopoly price and, if sought, do not always attain it. Among the reasons why uniform monopoly prices are not sought or attained is that one seller may believe he can maximize his profits by expanding his total sales rather than by taking a maximum profit on each sale. Also, even the mere addition of one seller **[**31]** to an oligopoly market makes the market more complex and less predictable. [25] Therefore, there may **[*966]** be competitive actions and reactions in an oligopoly market.

One instance of such activity in a tight oligopoly market within the natural gas industry **[**32]** was noted by the Supreme Court in *United States v. El Paso Natural Gas Co., supra, 376 U.S. at 654-655*. There Pacific Northwest Pipeline Corporation, a potential supplier to the California natural gas market, sought, in an attempt to gain entrance to that market, to attract a major customer from El Paso. Pacific Northwest offered lower prices and an uninterruptible supply to this customer whose El Paso supply was then subject to interruption during peak demands. Although El Paso was able to hold this customer and thereby prevent Pacific Northwest from entering the California market, it was able to do so only by giving the customer a firm supply and by dropping its selling price 25 percent. It is significant that these benefits were initially the result, not of Commission regulation to which El Paso had always been subjected, but rather of the competition of a single potential entrant to the market. Thereafter, since Section 4 (b) of the Natural Gas Act, *15 U.S.C. § 717c(b) (1964 ed.)*, prohibits suppliers of natural gas from maintaining preferential and unreasonable rates and Section 5(a), *15 U.S.C. § 717d(a) (1964* ***[**33]*** *ed.)*, empowers the Commission to set reasonable rates after it has established that the prior rates were unjust, it is probable that at least a portion of the 25 per cent drop in selling price enjoyed by this single customer who was the subject of the competition was subsequently extended to other customers of El Paso as well. Thus it appears that the competition and direct regulation would complement each other to the benefit of consumers generally.

This example demonstrates the important role competition can play as a complementary force in regulated industries. In the instant case, as the Commission recognized Trans-Canada's excess gas could have been marketed in the taconite area of northern Minnesota where Northern now enjoys a monopoly position. [26] On the

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markets. Two other suppliers compete with American Natural in lower Michigan, and Northern competes with it in a small corner of northern Michigan.

[21] Because the number of competitors is so small and because the demand is generally inelastic, one seller cannot significantly increase his market share without causing a significant decrease in the market shares held by his competitors. *See* Brodley, *supra* Note 15, 19 Stan L. Rev. at 289. *See generally* E. Chamberlin, Theory of Monopolistic Competition (8th ed. 1962).

[22] *See* Brodley, *supra* Note 15, 19 Stan. L. Rev. at 289-290.

[23] *Ibid.*; C. Kaysen & D. Turner, *supra* Note 19, at 25.

[24] Brodley, *supra* Note 15, 19 Stan. L. Rev. at 290.

[25] *See* Brodley, *supra* Note 15, 19 Stan. L. Rev. at 291 n. 20:

> "'[A] three-person game is very fundamentally different from a two-person game, a four-person game from a three-person game, etc. The combinatorial complications of the problem . . . increase tremendously with every increase in the number of players . . . Whenever the number of players, i.e., of participants in a social economy, increases, the complexity of the economic system usually increases too; e. g. the number of commodities and services exchanged, processes of production used, etc.' J. Von Neumann & O. Morgenstern, Theory of Games and Economic Behavior 13 (3d ed. 1953). *See also* [F.] Machlup, [The Economics of Sellers' Competition], at 429-30."

theory set out above, it is likely that, if there were competition in that region, the benefits of this competition would spread throughout the Northern system. Even more probable is that the wholly-owned Trans-Canada subsidiary would seek to sell its excess gas in that portion of northern Michigan which is not now served by any natural gas pipeline. [27] If American Natural's subsidiaries chose not to compete with the Trans-Canada **[**34]** subsidiary for this market, there would not be any additional benefits to consumers. But it is more likely that the American Natural subsidiaries would compete for this market and, once again, any benefits derived from that competition could spread throughout the American Natural system.

[35]** In its analysis of the joint venture in the instant case, the Commission ignored these potential benefits of increased **[*967]** competition. Indeed, by permitting American Natural to buy a half interest in the Great Lakes pipeline, the Commission enabled American Natural to protect its Michigan and northern Wisconsin markets from *any* competition by an independent competitor, even though there were no apparent economies of scale to be gained. [28] **[**37]** It should be noted, moreover, that an acquisition tending to produce similar results was quite recently condemned by the Supreme Court as violative of the antitrust laws. Thus the Court held in *United States v. El Paso Natural Gas Co., supra*, a case brought by the Justice Department, that El Paso, the supplier of over 50 per cent of the California natural gas market, could not lawfully acquire Pacific Northwest, a pipeline that did not then supply the California market but had the potential for doing so in the future, since such a horizontal merger tended to lessen substantially competition in violation of Section 7 of the Clayton Act. [29] The fact that in the instant case this protection of the market was accomplished **[**36]** through a joint venture in which American Natural owned only a half interest, whereas in *El Paso* there was a complete merger, is not significant for, as the Supreme Court observed in *United States v. Penn-Olin Co., supra, 378 U.S. at 168*, "realistically, the parents would not compete with their progeny." According to the corporate agreement creating the joint venture, American Natural is permitted

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[26] ***HN13***[] The Commission has the power to maximize the effectiveness of limited competition by specifying the service area in which the certified pipeline may compete. *See* § 7(e)(f) of the Natural Gas Act, *15 U.S.C. § 717f(e)(f) (1964 ed.)*.

[27] It seems that competition would be more likely to develop sooner here than in the taconite region because it is a virgin market which a wholly-owned Trans-Canada subsidiary could seek immediately without waiting for the expiration of long-term contracts which encumber the taconite market. The development of this northern Michigan market was a factor which contributed to the Commission's conclusion that the route of the joint venture pipeline was more in the public interest than was the proposal of the petitioners.

[28] American Natural is not utilizing excess capacity or making possible other economies of scale. It is merely paying one-half the cost of the new line. In fact, American Natural may be sacrificing economies of scale in order to protect its market from an independent competitor. *See* § 1, C, 2 of text, *infra*. Although the certifications granted by the Commission would result in Midwestern's utilizing some of its excess capacity to bring Canadian gas to the Michigan Wisconsin Pipe Line Company, this was technically unrelated to the joint venture project after the second year.

If on remand Michigan Wisconsin and Midwestern choose to file their original proposal and Great Lakes again files an independent application, the Commission may find it necessary to weigh, along with other factors, the advantages of the limited competition offered by an independent Great Lakes against the economies of scale which Michigan Wisconsin and Midwestern might be able to demonstrate. A recent opinion of the Supreme Court indicates that the former is entitled to substantial weight. *See* *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 141-142, 17 L. Ed. 2d 814, 87 S. Ct. 932 (1967)*, wherein the Court overturned the District Court divestiture decree ordered in *United States v. El Paso Natural Gas Co., 376 U.S. 651, 662, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*, thereby indicating its preference for some overlapping facilities in order to obtain meaningful competition between the parent company and the divested company.

[29] El Paso sought to accomplish the merger by purchasing the stock of Pacific Northwest and later acquiring the assets. After the Department of Justice had challenged the stock acquisition, El Paso sought to immunize the merger from § 7 of the Clayton Act by obtaining the approval of the Power Commission for the asset transfer and arguing that the proviso in § 7 was intended to preclude the Department of Justice from attacking a merger receiving the approval of the Commission. The Supreme Court rejected this argument. *California v. F.P.C., supra* Note 10. The effect of the proviso need not be considered here as this case only raises the question what the Commission must examine before approving an acquisition, not the question what significance this approval has.

to name the chief executive officer of the joint venture and to elect half of the members of the board of directors. Consequently, it is clear that American Natural will have a veto power over at least those matters which the corporate agreement requires the board to approve, such as changes in rate schedules, contracts for the purchase, sale or transportation of gas, construction contracts, and applications submitted to governmental authorities. We believe that this degree of control by American Natural will not only lessen competition between Great Lakes and American Natural, but will actually foreclose it. *See* *United States v. Penn-Olin Co., supra, 378 U.S. at 168*.

It should also be noted that the fact situation in the instant case presents the **[*968]** most clear example of a joint venture lessening competition, since the half-owner of the joint venture, American Natural, was already the dominant force in the market which the joint venture planned to enter. In *Penn-Olin* the Supreme **[**38]** Court noted that joint ventures should not always be analyzed in the same manner as mergers because a merger eliminates an existing market participant whereas the joint venture might create a new competitive force therein. *378 U.S. at 168*. This distinction was crucial in *Penn-Olin* because the District Court had found that neither of the owners of the joint venture would have entered the market and that the market in which entry was contemplated was then divided between two other companies. [30] In spite of these considerations, however, the Supreme Court reversed the District Court's finding that the joint venture would not substantially lessen competition and remanded the case for a determination of whether "one would have built 'while the other continued to ponder.'" *378 U.S. at 173*. [31] But before reaching this conclusion, the Court hypothesized a situation wherein a joint venture would enter a market already dominated by one of the participants of the joint venture, which is the situation presented by this case. The Court dismissed this hypothesis as an obvious violation of Section 7:

> "* * * **[**39]** ***HN14***[] The rule of *United States v. El Paso Natural Gas Co., 376 U.S. 651 [12 L. Ed. 2d 12, 84 S. Ct. 1044]* (1964), where a corporation sought to protect its market by acquiring a potential competitor, would, of course, apply to a joint venture where the same intent was present in the organization of the new corporation." *378 U.S. at 170*. [32]

[40]** Finally, we note that, ***HN15***[] although Congress has limited entry into natural gas markets by providing that new pipelines may not be built without prior certification of public convenience and necessity, *15 U.S.C. § 717f(c) (1964 ed.)*, it has not evinced an intention to restrict competition among qualified operators or a preference for monopoly service. To the contrary, the language of the Natural Gas Act carefully guards against such inferences. Thus the provision relating to the granting of certification is stated positively:

> "* * * [***HN16***[] A] certificate shall be issued to any qualified applicant * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the [relevant law and regulations] * * * and that the proposed service * * * is or will **[*969]** be required by the present or future public convenience and necessity * * *." Section 7(e), Natural Gas Act, *15 U.S.C. § 717f* **[**41]** *(e) (1964 ed.)*.

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[30] In such a market, the entry of the joint venture would actually decrease market concentration. Contrast the instant case, where the joint venture increases American Natural's share of the market and thereby decreases market competition.

[31] After remand to the District Court for a determination of this question, the District Court found that neither participant in the joint venture would have entered the market by itself and, therefore, again gave judgment to the defendants. The Department of Justice has again appealed to the Supreme Court. *Affirmed, 389 U.S. 308, 88 S. Ct. 502, 19 L. Ed. 2d 545 (1967)*.

[32] *See generally* Brodley, *supra* Note 15, 19 Stan. L. Rev. 329-337. After recognizing that some joint ventures may be in the public interest for a variety of reasons, *id.* at 333, none of which are applicable to this case, Professor Brodley comments:

> "* * * Thus, to suggest the scope of the problem, if (1) the parents' market is highly concentrated, (2) at least one of the parents has a significant market share, and (3) the joint venture is horizontal, then any supposed advantage from the increase in the number of competitors in the market as a result of the joint venture seems wholly illusory. Indeed, the most probable result of the formation of the joint venture would be to add to the already excessive market share of the parent or parents. It must be assumed that parent and progeny will not compete, but will work together to extract a joint maximum return from the market they influence together." *Id.* at 335.

And ***HN17***[] Section 7(g) of the Natural Gas Act provides:

> "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." *15 U.S.C. § 717f(g) (1964 ed.)*.

In accord with this statutory language, this court approved the Commission's certification of an American Natural subsidiary seeking to invade the territory previously monopolized by Panhandle Eastern Pipe Line Company, and in so doing made the following observation:

> "* * * ***HN18***[] Nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply. * * *" *Panhandle Eastern Pipe Line Co. v. F.P.C., 83 U.S. App. D.C. 297, 300, 169 F.2d 881, 884*, **[**42]** *cert. denied*, *335 U.S. 854, 93 L. Ed. 402, 69 S. Ct. 81 (1948)*.

And in *Lynchburg Gas Co. v. F.P.C., supra, 119 U.S. App. D.C. at 30-31, 336 F.2d at 949-950*, [33] Judge Washington, joined by Judge Burger, responded to an assertion that a certain rate schedule was in violation of the antitrust laws as follows:

> "* * * Investors in the natural gas industry, although granted an *opportunity* for a 'fair return', are by no means guaranteed freedom from risk or competition. Such assurance would, in a case such as this, deprive competitors of the right to compete, inhibit efficient allocation of resources and deny ultimate consumers the lowest prices to which they are entitled."

[43]** In sum, Congress, the Supreme Court, and this court have concurred in the belief that competition has a role to play in the natural gas industry. Both **[*970]** courts have recognized specific instances where the goals of direct regulation and the antitrust laws have coalesced. This would seem to be increasingly true as the natural gas markets grow, often demanding new facilities because existing pipelines have reached their ultimate capacity. And

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[33] *But see* *Pennsylvania Water & Power Co. v. F.P.C., 89 U.S. App. D.C. 235, 193 F.2d 230 (1951)*, *affirmed*, *343 U.S. 414, 96 L. Ed. 1042, 72 S. Ct. 843 (1952)*, where a divided panel of this court affirmed a Commission proceeding approving certain rates even though foundation contracts upon which the rates depended had previously been found to be in violation of the antitrust laws. The majority there concluded:

> "* * * But where a statute provides for comprehensive and detailed regulation of a particular industry, as to the Interstate Commerce Act * * * and the Federal Power Act, there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions." *89 U.S. App. D.C. at 240, 193 F.2d at 235*.

The underlying rationale of this case seems to have been eroded by subsequent decisions in this court and in the Supreme Court and, therefore, does not appear to be controlling. *See, e.g.*, ***F.M.C. v. Aktiebolaget Svenska Amerika Linien, supra*** Note 10; *California v. F.P.C., supra* Note 10. Furthermore, within a few months of the decision in *Pennsylvania Water & Power*, the Fourth Circuit considered a related case and rejected the above reasoning. *Consolidated Gas Electric Light & Power Co. v. Pennsylvania Water & Power Co., 4 Cir., 194 F.2d 89*, *cert. denied*, ***343 U.S. 963, 72 S. Ct. 1056, 96 L. Ed. 1360 (1952)***. *See also* *Pennsylvania Water & Power Co., 4 Cir., 184 F.2d 552*, *cert. denied*, ***340 U.S. 906, 71 S. Ct. 282, 95 L. Ed. 655 (1950)***. Finally, even in *Pennsylvania Water & Power* the court recognized that "regulated industries are not *per se* exempt from the antitrust laws and repeals by implication are not favored," and therefore the court only said that "the antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them." *89 U.S. App. D.C. at 240, 193 F.2d at 235*. For the reasons already set out, we believe that to a large degree the objectives of the Natural Gas Act and antitrust laws are not repugnant but rather complementary.

when new facilities must be built, the competitive advantages afforded by a new entrant might often be more meaningful than any economies of scale which could be attained by permitting the present monopolist, or dominant market force, to construct the new facilities and fulfill the increased demand. Even limited competition would seem to encourage suppliers of natural gas to become more aggressive in proposing new rates and services, and thereby increase the effectiveness of regulation by the Commission. The joint venture approved in this case had the effect of foreclosing this development and, therefore, tended to lessen competition substantially among suppliers in the Wisconsin and Michigan markets. This effect should have been **[**44]** appraised by the Commission along with other relevant considerations.

2. *Competition Between Canadian Source Gas and United States Source Gas*.

In addition to the effect on suppliers marketing gas to consumers and distribution companies in Michigan and Wisconsin, the joint venture appears to have eliminated competition between Trans-Canada, the only source of Canadian gas east of the Rocky Mountains, and United States sources of supply. That is, the joint venture agreement gave Trans-Canada an assured outlet for additional sales of 170,000 Mcf of gas per day without having to compete with United States sources. [34] And these sales were agreed to, not because the Canadian gas was cheaper or because these sales were necessary to accomplish the transfer of western Canadian gas to eastern Canada, but rather because American Natural, the parent of the buying subsidiaries, seemed willing to sacrifice the interests of its consumers in order to protect its markets and enhance economically the joint venture in which it owned a half interest.

[45]** From the beginning, it was obvious that the major reason Trans-Canada sought a United States partner in its venture to transport gas from western to eastern Canada was to help Trans-Canada market gas in the United States. Thus E.H. Holstead, the general manager of Trans-Canada, testified that one of the principal reasons Trans-Canada preferred a United States pipeline over a second Canadian line was to afford Trans-Canada greater access to United States markets. He further said that Trans-Canada was "particularly" interested in combining with United States companies which were "distributor-oriented" and that Trans-Canada "would not have entered into [the joint venture] agreement [with American Natural] without [the] sales [to Michigan Consolidated]."

American Natural agreed to purchase this gas despite the fact that its system had an excess capacity of 300 to 350 Mcf of gas per day which could be utilized with greater flexibility to transport United States gas to its markets at prices equal to or less than the cost of the Canadian gas delivered at Marshfield, Wisconsin. When Karl E. Schmidt, vice president and chief engineer for American Natural, was asked why American **[**46]** Natural agreed to the purchase when it had this excess capacity, the only answer which was forthcoming was:

> "Well * * * as you know * * * we are a partner in the Great Lakes Transmission Company and the gas which we purchase and make a market for, as far as Great Lakes is concerned, enhances Great Lakes' economics and that certainly was a consideration given in our incentive in being a purchaser at this time."

[*971] Furthermore, American Natural flatly stated that if the joint venture were not certificated it would have no desire to take this Canadian gas from Midwestern. That these sales are not necessary to facilitate the transfer of western Canadian gas to eastern Canada is demonstrated by the fact that, after the exchange-displacement method of transferring ends in 1969, the agreement requires Michigan Wisconsin to continue purchasing, via Midwestern, 113,000 Mcf of Canadian gas per day. [35]

[47]** From the above it is clear that Trans-Canada will be able to market an additional 170,000 Mcf of gas per day in the United States without having to meet or beat the competition provided by United States source gas, and that American Natural's agreement to purchase this gas through its subsidiaries was part of the bargaining price it

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[34] 113,000 Mcf of gas per day was to be purchased by Michigan Wisconsin from Midwestern, which in turn purchased an additional 113,000 from Trans-Canada. Michigan Consolidated agreed to take 57,000 Mcf of gas per day from Great Lakes, whose gas was also supplied by Trans-Canada.

[35] One of the main purposes of tying this sale -purchase into this proceeding seems to have been to avoid a Commission rejection of the Great Lakes project because Midwestern's excess capacity was not being utilized.

had to pay in order to obtain a half interest in the joint venture. This had an effect not only on those who market United States gas at its source, but ultimately on the consumers in the American Natural system. The staff of the Commission detected this and commented:

> "* * * Thus the consumers of Michigan Wisconsin and Michigan Consolidated, to whom service could be rendered more readily and more economically through the combined American Natural System, are the sacrificial pawns by which American Natural received (1) half ownership in Great Lakes and (2) Midwestern's quiet acquiescence in the withdrawal of their joint competitive proposal."

To conclude this discussion of the antitrust issues, we believe that the joint venture substantially lessened competition among suppliers in the Michigan-Wisconsin consumer market and between Trans-Canada **[**48]** and suppliers of gas from United States sources. Unless the Commission finds that other important considerations militate in favor of the joint venture and that these considerations are more beneficial to the public than additional competition, the antitrust policies should be respected and the joint venture set aside.

D. *Other Undesirable Effects of the Joint Venture*.

The joint venture has two other undesirable effects which should have been weighed by the Commission. The first of these relates to its effects on administrative proceedings in general; the second to the opportunity it provides for future anticompetitive activities.

Petitioners have aptly noted that ***HN19***[] comparative proceedings before regulatory agencies are "sensitive mechanism[s] for weighing the relative merits of * * * rival * * * projects" and one of the "main competitive arenas" of the natural gas industry since it is there that the sellers challenge one another for the favor of the Commission. This process could easily be distorted if the Commission permitted potential applicants to get together to decide **[**49]** how a market would be divided before submitting their proposals to the Commission, for then private parties rather than the Commission would be determining what means of meeting a market demand is most closely in accord with the public interest. We cannot permit such an abrogation of administrative responsibility.

The danger of allowing parties to agree among themselves prior to submitting their proposals to the Commission becomes all the more apparent when it is remembered that the Commission's power is largely a negative one; it must rely heavily on private initiative to propose projects to meet consumer needs. Indeed, the judiciary has many times emphasized the importance of maintaining free and vital proposals. Thus the **[*972]** Fourth Circuit, whose views were later endorsed by this court, [36] stated:

> ***HN20***[] "One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions; and the utility is not relieved from **[**50]** this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business. * * *" [37]

Because independent proposals are so important to the administrative process, the Commission as well as this court must be chary about permitting corporate agreements which limit the nature of the proposals submitted to the Commission. There are few opportunities for consumers **[**51]** of natural gas to choose among the several suppliers offering a variety of services and prices. It is therefore extremely important that a competitive edge be maintained in Commission proceedings. This will increase the chance that the public will be given better service at a lower price. If the Commission determines, after reviewing individual proposals, that a joint project would be more advantageous, it can at that time refuse to certify the individual plans and itself suggest a joint application.

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[36] *Pennsylvania Water & Power Co. v. F.P.C., supra* Note 33, *89 U.S. App. D.C. at 241, 193 F.2d at 236*.

[37] *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co., supra* Note 33, *184 F.2d at 567*. *See also Baltimore & Ohio R. Co. v. United States, 386 U.S. 372, 437, 18 L. Ed. 2d 159, 87 S. Ct. 1100 (1967)* (Mr. Justice Brennan concurring); *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 458-460, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*.

A second undesirable aspect of the joint venture is that it increases the risk of joint action between the parents in future endeavors. This increased risk was recognized in *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 600, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*, where Mr. Justice Black said, with respect to an international joint venture, that if it were "not severed, the intercompany relationships will provide in the future, as they have in the past, the temptation and means to engage in the prohibited conduct." Commentators considering this aspect of joint ventures have concurred in this analysis, explaining the phenomenon as follows:

> "* * * **[**52]** ***HN21***[] The joint venture puts the parents, particularly if they are competitors, in dangerous proximity to discuss and act jointly on aspects of their business apart from the joint venture and creates an aura of cooperative team spirit which is apt to dampen competitive fires between the firms involved. * * *" [38]

There is certainly the opportunity for such joint action from the parents in the instant case since here the officers of the joint venture are not only named by the parent companies but also serve as officers of those companies. There are many forms which this joint action may take. One form has already made its appearance: the threatened joint boycott of Northern and Northern Transportation if their proposals had been certificated. A second possibility is **[**53]** reciprocal dealing -- that is, American Natural may continue to buy from Trans-Canada only if Trans-Canada promises not to sell to any competitors of American Natural, [39] or **[*973]** only if Trans-Canada promises to fill its short-term demands for United States gas, such as that now being supplied by the Tennessee Gas Transmission Company, by purchasing from American Natural subsidiaries. Another possible form of joint conduct is that Trans-Canada and American Natural could plan cooperative expansion programs which would divide future markets. Thus it seems that numerous undesirable joint anticompetitive actions may spring from this joint venture relationship.

[54]** E. *Prior Agency Orders of the Federal Power Commission and the Securities and Exchange Commission*.

Intervenors, not the Commission, have suggested that the prior Commission order dated August 6, 1965, permitting Trans-Canada and Michigan Wisconsin and Midwestern to withdraw their competitive proposals, and the order of the Securities and Exchange Commission authorizing American Natural to acquire 50 per cent of the stock of the joint venture, should be respected, and that accordingly we are precluded from requiring the Power Commission to weigh the joint venture against antitrust policies. We disagree.

As for the prior order of the Power Commission, it should be recognized that it was merely an "order granting withdrawal of [the competitive] applications and terminating [the] proceeding" for weighing the original Trans-Canada proposal and the Michigan Wisconsin and Midwestern proposal against the public interest. In issuing the order, the Commission clearly did not intend to put a stamp of approval on the joint venture, for, apart from the fact that the parties anticipated submitting a joint proposal, the Commission had no knowledge of the joint venture. And it must **[**55]** be assumed that its order was made in the belief that any future proposal would have to endure a full certification proceeding.

Moreover, ***HN22***[] the duty imposed upon the Commission by Section 7 of the Natural Gas Act is not merely to determine which of the submitted applications is most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest *better* than any of the projects outlined in the applications. [40] *Udall v. F.P.C., 387 U.S. 428, 18 L. Ed. 2d 869, 87 S. Ct. 1712 (1967)*; *City of Pittsburgh v. F.P.C., supra, 99*

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[38] Brodley, *supra* Note 15, 19 Stan. L. Rev. at 333-334. *See also* C. Kaysen & D. Turner, *supra* Note 19, at 138; Comment, 26 Ohio L.J. 439, 441 (1965).

[39] The temptation to apply this type of pressure is made obvious by the following testimony of Ray J. Lynch, vice president of Michigan Wisconsin:

> "We know that each day gas is getting tighter here in the States * * *. And we feel very strongly that the long-range gas supply for our area, and, indeed, for many areas in the U.S. will be Western Canadian gas. And we want to be there to protect ourselves, and our customers."

U.S. App. D.C. at 123 n. 28, 237 F.2d at 751 n. 28; Scenic Hudson Preservation Conference v. F.P.C., supra, 354 F.2d at 617-620. See *generally* Reich, *The Law of the Planned Society*, 75 Yale L.J. 1227, 1248-1251 (1966). Therefore, the Commission was obliged in its examination of the joint venture to give some consideration to the first set of applications, even though they had been withdrawn. Indeed, the Commission, recognizing this duty, **[**56]** pointed out in its brief that consideration was implicitly given to the original Trans-Canada proposal since, except for ownership, the joint venture and the original Trans-Canada proposal are essentially the same. Since the prior Commission order granting withdrawal did not foreclose the Commission from considering the original proposals, we cannot accept the intervenors' contention that the prior order bars our remanding this case to the Commission for further consideration of antitrust policies.

The Securities and Exchange Commission order permitting American Natural to acquire the joint venture stock is more troublesome. The S.E.C. order was sought and obtained because American Natural is a registered public utility holding company and, as such, requires S.E.C. approval before extending its holdings. Although some of the factors which are relevant to the Power **[**57]** Commission's **[*974]** determination of the public interest may have been considered by the S.E.C. and, therefore, the order is perhaps deserving of some weight, there is nothing in either the Public Utility Holding Company Act or the Natural Gas Act which requires one agency to defer to the judgment of the other. In this case even limited comity is not practical because the S.E.C., before concluding that the proposed acquisition was "appropriate in the public interest and in the interest of investors and consumers," merely recounted the content of American Natural's application. American Natural Gas Co., No. 3-349, Holding Company Act Release No. 15422, March 7, 1966. The S.E.C. held no hearings and made no findings to support its conclusion. Therefore, there is little to compel either the Power Commission or this court to give substantial weight to the order of the S.E.C. [41]

[58]** II

A second question raised on appeal is whether there is substantial evidence in the record to support the conclusions of the Commission with respect to cost analysis, expansibility of the proposed pipelines, and supply analysis. We find substantial evidence to support all conclusions other than two aspects of the cost analysis.

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[40] The Commission noted this duty in its brief and gave partial recognition to it in its opinion by considering the merits of the staff proposal.

[41] This S.E.C. approval conceivably may prohibit the courts from ever determining if this joint venture violates § 7 of the Clayton Act. The proviso to § 7 states: "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission, * * * the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j [the Public Utilities Holding Company Act], * * * or the Secretary of Agriculture * * *." *15 U.S.C. § 18 (1964 ed.)*. Although none of the parties attempted to do so, it is possible to argue that if the Power Commission denied the joint venture application on the basis of policy underlying the broad prohibition of § 7 of the Clayton Act, then the Commission would be frustrating the policy of the proviso. That is, if the Department of Justice could not attack the joint venture on the basis of § 7, after the S.E.C. approved it, how can the Power Commission utilize § 7 for defining public policy?

In the first place it is far from clear that the approval of the S.E.C. would immunize the joint venture from a § 7 violation since this proviso has been restrictively interpreted in favor of the broader policy of § 7. *California v. F.P.C., supra* Note 10 (Power Commission approval of acquisition does not immunize agreement from pending Justice Department antitrust suit); *cf. Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)* (acquisition is not immune from antitrust suit since authority of Secretary of Agriculture to approve marketing arrangements is narrowly construed). Secondly, even if the S.E.C. approval of American Natural's acquisition of the Great Lakes stock prevented the courts from finding American Natural in violation of § 7 of the Clayton Act, neither statutory language nor policy would prohibit the Power Commission from relying on § 7 policy in determining the public interest. The Power Commission is obliged to take those steps most likely to accomplish an efficient allocation of natural gas resources and give consumers better service at a lower price. To find that prior approval by the S.E.C. precludes the Power Commission from relying on the general policy underlying § 7 would permit the limited exception to § 7 to not only frustrate the broader § 7 prohibition but also the broader policy of the Natural Gas Act.

The Commission's initial opinion stated that in final analysis the costs of the joint venture were less than the costs of petitioners' project:

> "* * * We are convinced * * that the alleged rate savings to Trans-Canada and Michigan Consolidated under [the Northern] proposal would be but short-run."

But in the opinion following the rehearing, the Commission stated:

> "* * * We are fully aware of the cost savings intrinsic in an exchange **[*975]** transaction and the benefits that may result to consumers. However, here we find, as set out in our original opinion, that Northern Natural will incur significant costs which in a rate case would appear allocable to Northern Transportation's proposed service to Trans-Canada and Michigan Consolidated. Such an allocation does not deny that savings might arise from the exchange transaction; **[**59]** but it would alter the economics of the Northern proposal by increasing the costs allocable to Trans-Canada and Michigan Consolidated to the point where those costs would exceed the cost of the Great Lakes proposal. * * *"

The Commission's conclusion is unfounded. In the initial opinion the Commission found that Northern Transportation's costs were understated because: (1) it failed to add the additional $14,000,000 investment Northern would have to make in Minnesota in order to accommodate the Canadian gas; and (2) it failed to attribute to Northern Transportation any of the costs of transporting gas from its United States source to Ogden, Iowa, which the Commission alleged was necessary under its rolled-in-costs system of determining rates.

While it may be true that Northern would have to invest $14,000,000 to handle the Canadian gas, Northern also claimed that by utilizing the Canadian gas in Minnesota it would save an additional expenditure of $29,000,000 which was otherwise necessary to meet the Minnesota market demand with gas from United States sources. Since this claimed saving was not disputed by the Commission, it seems that Northern would in fact experience **[**60]** a $15,000,000 saving in investment costs. [42]

As for allocating to Northern Transportation part of the transportation cost incurred by Northern in transporting the gas to Ogden, Iowa, this would not detract from the overall savings of petitioners' project. True, it would effect a rise in the costs of the Northern Transportation project which would be reflected in higher rates for its customers. But such a shift in costs would produce a corresponding decrease in costs allocable to Northern, thereby permitting lower rates for its customers. Since the public interest which the Commission is obliged to consider includes all natural **[**61]** gas resources and consumers, this overall saving should have been treated as a beneficial aspect of petitioners' exchange-displacement project. [43]

The second aspect of the cost analysis which is faulty relates to the Commission's justification of the cost estimates of the joint venture. The staff's minimum [44] **[**63]** **[*976]** **[**62]** adjustments brought the total cost estimates for the joint venture project to $214,000,000 from the $211,000,000 estimated by the joint venture. $5,000,000 was

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[42] The staff of the Commission, while recognizing many other drawbacks to petitioners' proposal, concluded:

> "Northern Natural, by including in its application a means whereby its customers could profit through an avoidance of construction costs, has injected that single instance in the combined applications which contemplates a positive benefit to United States consumers. * * *"

[43] The Commission contends that it would be fallacious reasoning to recognize this saving because "the Commission * * * would be burdened with the impossible task of determining to what service or customers the cost of any particular new facility should be attributed." We reject this contention. First, petitioners' claimed savings do not require such an allocation; rather, they merely ask the Commission to recognize a total saving, irrespective of whether it is enjoyed by the customers of Northern or Northern Transportation. Second, the "impossible task" of allocating the costs of a common service between petitioners is precisely what the Commission performed to defeat petitioners' proposals.

[44] The staff prefaced its adjustments with this statement:

> "* * * These adjustments were made only where the record fully supported the new figures. When certain cost estimates were the subject of contradictory statements, as between those of witnesses for Great Lakes and those of Northern Natural, the staff utilized the Great Lakes figures. * * *"

added by the staff to reflect the cost of installing 36-inch pipe. [45] Great Lakes never made a detailed study of the costs of laying 36-inch pipe; rather its study related to 30-inch pipe and the costs so computed were later increased by a factor of 1.135, thereby adding 13.5 per cent to the costs arrived at for 30-inch pipe. The Commission staff, relying on a 1965 report of the Commission, said that "actual industry experience indicates a differential, between 30- and 36-inch laying costs, ranging from 32 to 39 percent." By using the minimum 32 per cent differential, the staff estimated the installation costs for Great Lakes to be $5,000,000 more than was estimated by the joint venture.

The Commission rejected this adjustment by its staff, saying that "the Great Lakes estimate * * * was not only substantiated by the testimony of Mr. David Williams, Jr., of the Williams Brothers Construction Co., but that company offered to complete the major construction effort within the Great Lakes estimate." Careful review of Mr. Williams' testimony in the joint appendix does not reveal any testimony attempting to justify a 13.5 per cent adjustment for raising cost figures to obtain an approximation of the costs of installing 36-inch pipe. Nor were we able to discover any "offer" by Williams to complete the Great Lakes project within his estimates. [46] The closest he came to making an "offer" was the following conditional statement:

> "Q. Does Williams Brothers intend to submit a bid to Great Lakes should they get certificated? A. Well, it depends upon the prior commitments that we may have. * * * We would be prepared to submit a proposal for the work **[**64]** in 1967 -- that is, the remaining eight hundred-some-odd miles -- within our estimate, with possibly the contingency that applies strictly to the construction alone. * * * I doubt if we would submit on individual sections."

This statement does not foreclose Williams from declining to bid for the work altogether or, if a bid is made, from adjusting his costs; it is not an offer to complete the job within the previous cost estimates. We do not mean to suggest that the Commission could not have accepted a lower adjustment factor than was indicated by its 1965 study, but only that it was imprudent to do so for the reasons it has advanced.

Thus we believe that the Commission did not have sufficient evidence to accept the Great Lakes cost estimate in its entirety, and that the estimated cost saving of petitioners' proposal has not been adequately explored.

III

The final question raised **[**65]** by petitioners is whether the corporate structure of Great Lakes, which gives each owner a veto power over the principal actions of the corporation, renders Great Lakes incapable of discharging its responsibilities as a regulated natural gas company. We find this contention without merit. As the Commission has noted, in most instances there would be a sufficient community of interest between **[*977]** the parties so that an agreement could be reached on policy issues. And in those few instances in which agreement would not be reached, the arbitration provisions of the corporate agreement seem sufficient to resolve any deadlocks. See Ringling v. Ringling Bros. -- *Barnum & Bailey Com. Shows, 29 Del. Ch. 610, 53 A.2d 441, 447 (1947)*.

IV

To conclude, we find that the Commission failed to apply proper standards to determine relevant antitrust policy and consequently ignored significant anticompetitive effects of the joint venture. We therefore remand this case for further consideration in accord with this opinion. On reconsideration the Commission should weigh the foreseeable gains from limited competition along with other economic, social and political factors **[**66]** encompassed within the "public interest" concept. [47] Furthermore, unless it is determined that other considerations, such as gas quality,

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[45] Certain adjustments were made which were favorable to the joint venture so that the total upward adjustment was only $3,000,000.

[46] He did say that his firm would be willing to construct the Mackinac Straits crossing for the amount of his estimate.

[47] We note in passing that the Commission attached significant weight to the national security interests promoted by having a United States company participate in the management of the Great Lakes pipeline. Recognizing that in any event the supply for this pipeline will be controlled solely by Canadian interests and that Great Lakes will be a Delaware corporation subject to

greater expansibility and convenience afforded by a new line running directly from western Canada through the upper Great Lakes region to eastern Canada, outweigh any cost advantages of an exchange-displacement project, then the Commission must also reconsider those elements of its cost analysis which we have found to be unsupported by sufficient evidence.

[67]** In remanding this case, we are fully aware of the pressures under which the Commission was working. But, as Mr. Justice Holmes once noted, cases such as this often result in "bad law" because they "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. United States, 193 U.S. 197, 400-401, 24 S. Ct. 436, 48 L. Ed. 679 (1904)* (dissent). The judiciary and administrative agencies must strive to resist such pressures.

Remanded.

End of Document

Commission regulation, we find it less than obvious how national security is advanced. If the Commission again chooses to rely on this factor, the reasons should be explained more fully.

[Chicago Title Ins. Co. v. Great Western Financial Corp.]

Supreme Court of California

August 28, 1968

L. A. No. 29499

Reporter

69 Cal. 2d 305 *; 444 P.2d 481 **; 70 Cal. Rptr. 849 ***; 1968 Cal. LEXIS 242 ****; 1968 Trade Cas. (CCH) P72,557

[*] CHICAGO TITLE INSURANCE COMPANY et al., Plaintiffs and Appellants, v. GREAT WESTERN FINANCIAL CORPORATION et al., Defendants and Respondents

Prior History: [**1]** APPEAL from an order of the Superior Court of Los Angeles County dismissing an action for unfair trade practices and combinations in restraint in trade after demurrers to fourth amended complaint were sustained without leave to amend. Shirley M. Hufstedler, Judge.

Disposition: Affirmed.

Core Terms

conspiracy, allegations, antitrust, counts, cause of action, appellants', title company, Cartwright Act, damages, restraint of trade, title insurer, title insurance, constitutes, demurrers, policies, boycott, title policy, Sherman Act, conspired, general demurrer, escrow company, combinations, monopoly, cases, special demurrer, overt act, accomplished, customers, commerce, rebate

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[] **Defenses, Demurrers & Objections, Demurrers**

The court on appeal will not consider the sufficiency of a superseded complaint where plaintiff has amended it after demurrer sustained.

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[*] Reporter's Note: This case was previously entitled, "Southern California Title Company et al. v. Great Western Financial Corporation et al."

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

The California law of antitrust, commonly known as the Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700- 16800*, is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. In 1961 California incorporated in essence also *§ 3* of that federal legislation known as the Clayton Act, *Cal. Bus. & Prof. Code §16727*, which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations thereof are similarly persuasive.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Within the present Sherman Act there is no place for a doctrine of intra-enterprise conspiracy.

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

HN4[] Monopolies & Monopolization, Actual Monopolization

There is substantial justification for intercorporate divisions and affiliated corporations to do business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

HN5[] Monopolies & Monopolization, Conspiracy to Monopolize

The gist of an action charging civil conspiracy is not the conspiracy but the damages suffered. A conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage. The conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

HN6[] Monopolies & Monopolization, Conspiracy to Monopolize

To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. General allegations of agreement have been held sufficient and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. Significantly, however, the activities condemned by the ***antitrust law*** are contracts, combinations, or conspiracies in restraint of trade or commerce. Such contracts, combinations or conspiracies in restraint of trade or commerce cannot be alleged generally in the words of the statute but the facts must be set forth which indicate the existence of such contracts, combinations or conspiracies.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN7[] **Monopolies & Monopolization, Conspiracy to Monopolize**

While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action for damages based upon the Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700- 16800*, the California anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN8[] **Intentional Interference, Defenses**

An action for interference with prospective business advantage lies on common law principles where the right to pursue a lawful business is intentionally interfered with either by unlawful means, or by means otherwise lawful when there is lack of sufficient justification, but only if it appears that the business advantage would otherwise have been realized. One with a financial interest in the business of another is privileged however, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party.

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

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

HN9[] **Standing, Sherman Act**

Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes such as the Cartwright Act, *Cal. Bus. & Prof. §§ 16700- 16800*. The Cartwright Act, *Cal. Bus. & Prof. Code §§ 17040- 17051*, however, follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices.

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

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The term "tying-in" contract has been applied judicially to those agreements whereby the seller or lessor of patented, or unpatented, equipment requires the purchaser or lessee to use only those unpatented accessory items manufactured or sold by the seller or lessor. A tying arrangement may be defined as 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. A lending institution, however, has been traditionally entitled to require for its protection and as a condition of making the loan, a specific type of title policy from a particular source; the debtor-purchaser is free to obtain a policy to protect his equity from whatever source he chooses, though most frequently he relies upon the lender's policy.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Monopolies & Monopolization, Attempts to Monopolize**

Where complainants are unsuccessful in establishing an action for conduct which may tend to create a monopoly, they are a fortiori doomed to failure with respect to the full blown conduct they must allege to come within acts proscribed by statutes patterned on the Sherman Act. *Cal. Bus. & Prof. Code § 16720*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

HN12[] **Defenses, Demurrers & Objections, Defects of Form**

Defendants in an antitrust suit are entitled to know what acts constitute the alleged violations so that the time and expense involved in conducting an investigation and pursuing discovery may be reasonably limited, for the complaint might otherwise be construed as a blanket license to indulge in interrogatories, depositions, and motions to produce ad infinitum, ad nauseam.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN13[] **Defenses, Demurrers & Objections, Defects of Form**

Leave to amend further is properly denied when plaintiff fails to amend to correct defects on the basis of which special demurrers to a previous complaint were sustained, or as directed by the court when sustaining such demurrers.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN14[] **Pleadings, Amendment of Pleadings**

Abuse of discretion by the trial court is not shown where it is not indicated as to the manner in which it is proposed to amend nor the nature of the proposed amendment to pleadings.

Headnotes/Summary

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Pleading—Amendment—Effect—As Superseding Pleading.

--A court, on appeal, will not consider the sufficiency of a superseded complaint where the plaintiff has amended it after demurrer is sustained.

CA(2)[] **(2)**

Appeal—Determination—When Court Will Affirm.

--Unless at least one cause of action is clearly stated in a complaint, an appellate court will sustain an order of dismissal where the court below has sustained a general demurrer to the complaint and denied leave to amend after representation by plaintiff's counsel that no further facts could be alleged.

CA(3)[] **(3)**

Id.—Review—Scope—Demurrer.

--On appeal from an order of dismissal after the trial court has sustained general demurrers to the complaint, the appellate court will determine only whether plaintiffs state a cause of action, not whether they might have been able to do so.

CA(4)[] **(4)**

Id.—Determination—When Court Will Affirm.

--In granting an order of dismissal after sustaining general demurrers to a complaint alleging unfair trade practices and combinations in restraint of trade, and denying leave to amend, the trial court must be held, on appeal, not to have abused its discretion, where the complaint, evolved over a period of more than two years of argument through law and motion, was presented to the appellate court without a showing by brief that plaintiff could or would be willing to amend further, and where the pleadings were not susceptible to the construction that might have entitled plaintiffs either to injunctive relief or to damages.

CA(5)[] **(5)**

Monopolies—Under Cartwright Act: Sherman Act.

--The California ***antitrust law***, commonly known as the Cartwright Act (*Bus. & Prof. Code, §§ 16700-16800*) is patterned upon the federal Sherman Act (*15 U.S.C.A. §§ 1-7*), both having their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.

CA(6)[] **(6)**

Id.—Under Cartwright Act.

--California has incorporated in essence, under *Bus. & Prof. Code, § 16727*, *section 3* of the federal Clayton Act (*15 U.S.C.A. §§ 12-27*) which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations of such section are persuasive.

CA(7)[] **(7)**

Id.—Particular Agreements and Combinations—Sherman Act.

--In the context of the present Sherman Act, there is substantial justification for intercorporate divisions and affiliated corporations doing business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se.

CA(8)[] **(8)**

Conspiracy—When Action Will Lie—Damage as Gist of Action.

--A conspiracy, in and of itself, however atrocious, does not give rise to a cause of action. The gist of an action charging civil conspiracy is not the conspiracy itself but the damages suffered.

CA(9)[] **(9)**

Id.—Significance of Conspiracy—Liability of Parties.

--The advantage to the pleader in charging a conspiracy is to implicate all participating in the common design and thus fasten liability on him who agreed to the plan to commit the wrong as well as on him who actually carried it out.

CA(10)[] **(10)**

Id.—Evidence.

--A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.

CA(11)[] **(11)**

Id.—Pleading.

--To state a cause of action for civil conspiracy, the complaint may *generally* allege the formation and operation of the conspiracy, but must sufficiently allege the wrongful act or acts done pursuant thereto, and the damage resulting from such act or acts.

CA(12)[] **(12)**

Monopolies—Under Cartwright Act—Pleading and Proof.

--Activities condemned by the ***antitrust law*** are contracts, combinations or conspiracies in restraint of trade or commerce, and in a civil action for damages based on the California antitrust statute (*Bus. & Prof. Code, § 16750*), it is incumbent on the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination.

CA(13a)[] **(13a)** *CA(13b)*[] **(13b)**

Conspiracy—Pleading: Interference—With Contract Relations: With Trade.

--Allegations to the general effect that one defendant corporation formed a second corporation at the instance of a third corporation in order to divert business from plaintiffs, and that a fourth corporation had prevailed on two other corporations to send their business to the third corporation which did business with yet another corporation, to plaintiffs' damage, were insufficient to constitute causes of action for conspiracy to interfere with plaintiffs' contractual relationships and prospective business advantages, where the conspiracy itself was insufficiently stated, and where, as to purported averments of specific overt acts, there was no allegation that plaintiffs had a contract with anyone which was breached as the result of the activities of defendants, or any of them, or that there was any interference by unlawful means.

CA(14)[] **(14)**

Interference—With Trade.

--One with a financial interest in the business of another is privileged to induce the other not to enter a business relationship with a third party, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare.

CA(15)[] **(15)**

Escrows—Regulation of Escrow-holder Business.

--The owners of a corporate escrow company are authorized by statute to incorporate a separate title company which may then receive from the title insurer with which it does business a portion of the posted premium in exchange for its search and abstract services (*Ins. Code, § 12396 et seq*).

CA(16)[] (16)

Monopolies—Under Cartwright Act—Remedies of Individuals.

--While private individuals, businesses or corporations have in the absence of express authority no standing to enforce regulatory statutes, the Cartwright Act follows federal policy which expressly contemplates private civil litigation based on statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices (*Bus. & Prof. Code, §§ 17040-17051*).

CA(17)[] (17)

Id.—Under Cartwright Act: Insurance—Corporations—Regulation.

--The common law and the Cartwright Act which once constituted the protection of the public against combinations in restraint of the insurance trade have been expressly superseded and contravened by the specific provisions of the Insurance Code.

CA(18)[] (18)

Id.—Under Cartwright Act—Remedies of Individuals—Pleading.

--The pleading of a cause of action charging a title insurance company with transmitting secret rebates to an escrow company and based on a statute aimed at preventing a distributor from discriminating between customers (*Bus. & Prof. Code, § 17045*), was defective, where it failed to allege facts from which a court might properly infer that prices charged differed from customer to customer.

CA(19)[] (19)

Insurance—Agents and Brokers—Unlawful Rebates.

--A court is not the appropriate initial arbiter of factors involved in insurance costs, and thus a cause of action was not stated by alleging that a title insurance company, by transmitting secret rebates to an escrow company, engaged in discriminatory pricing in violation of *Bus. & Prof. Code, §§ 17043*, *17049*.

CA(20)[] (20)

Id.—Agents and Brokers—Unlawful Rebates.

--The statutory framework regulating title insurance specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used renders such fee divisions illegal (*Ins. Code, §§ 12412*, *12404.5*, *12405.7*), and a complaint was insufficient, where, although it implied that an escrow company acted as agent for real property owners with whom title insurers and title companies were prohibited from splitting fees, and that because a title company was controlled by identical interests of the escrow company the receipt of a title policy from an interrelated title insurance company constituted an illegal rebate, it was not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates or engaging in an unreasonably low or discriminatory pricing policy was followed by the defendants or any of them.

CA(21)[] **(21)**

Monopolies—Under Cartwright Act—Agreements and Combinations Prohibited: Pleading.

--Vertical distribution agreements are contemplated by the Insurance Code, and vertical integration, as such without more, cannot be held violative of the Sherman Act; thus, a complaint alleging that the operations of defendant title insurance companies in association with their financial holding companies constituted a boycott of plaintiff title insurance company in violation of *Bus. & Prof. Code, § 17046*, was insufficient, where it failed to state that defendant companies or their superior interests had agreed on or accomplished by threat or violent means their alleged aim to coerce third parties not to deal with plaintiff.

CA(22a)[] **(22a)** *CA(22b)*[] **(22b)**

Id.—Under Cartwright Act—Pleading.

--A complaint by a title insurance company that the operations of defendant title insurance companies in association with their financial holding companies constituted exclusive sales agreements and "tying-in" contracts substantially lessening competition or tending to create a monopoly (*Bus. & Prof. Code, § 16727*) was insufficient, where it failed to state facts from which it might be inferred that defendants controlled the title insurance market in their county or that they could substantially exclude plaintiff from such market or limit the availability of title insurance to the public.

CA(23)[] **(23)**

Words and Phrases—"Tying Arrangement."

--A tying arrangement may be defined as 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.

CA(24)[] **(24)**

Monopolies—Under Cartwright Act—Pleading.

--Where allegations in a complaint were insufficient to establish a cause of action for conduct tending to create a monopoly (*Bus. & Prof. Code, § 16727*), the same allegations were *a fortiori* insufficient to support a cause of action for conduct creating a trust or combination in restraint of trade proscribed by statutes patterned on the Sherman Act (*Bus. & Prof. Code, § 16720*).

CA(25a)[] **(25a)** *CA(25b)*[] **(25b)**

Pleading—Demurrer to Complaint—Amendment After Demurrer Sustained—Refusal to Amend.

--In an action seeking injunctive relief and damages for unfair trade practices and combinations in restraint of trade, leave to amend the complaint further was properly denied, and there was no abuse of discretion in ordering a dismissal, where, in spite of special demurrers being sustained on the grounds that each count was ambiguous, unintelligible and uncertain, and that certain counts either united or failed to state separately the alleged causes of action, plaintiffs continued to deal solely in broad generalities, legal conclusions and unsupported speculation, and at no time showed that they were willing or even able to cure the defects specified.

CA(26)[] **(26)**

Id.—Demurrer to Complaint—Matters Not Admitted.

--A demurrer does not admit contentions, deductions or conclusions of facts or law which may be alleged in a complaint.

Counsel: Tremaine & Shenk and Jerrold A. Fadem for Plaintiffs and Appellants.

Hastings & Lasker, Edward Lasker, Milton Davis, McKenna & Fitting, Les Weinstein, Jones & Maupin, James C. Maupin, Milo V. Olson, H. Bradley Jones, Adams, Duque & Hazeltine, Lawrence T. Lydick, and Richard W. Luesebrink for Defendants and Respondents.

Thomas C. Lynch, Attorney General, Wallace Howland, Assistant Attorney General, Robert E. Murphy, Michael I. Spiegel and Harold J. Tomin, Deputy Attorneys General, as Amici Curiae.

Judges: In Bank. Sullivan, J. Traynor, C. J., McComb, J., Peters, J., Tobriner, J., and Burke, J., concurred. Mosk, J., dissents.

Opinion by: SULLIVAN

Opinion

[*310] [484] [***852]** In this action seeking injunctive relief and damages for unfair trade practices and combinations in restraint of trade, plaintiffs appeal from an order of dismissal entered after the court sustained without leave to amend **[****2]** defendants' several demurrers to plaintiffs' fourth amended complaint and granted defendants' motions to dismiss as to portions of said complaint.

The fourth amended complaint contains 11 counts and 78 paragraphs. Like its predecessors it has fallen to five separate general demurrers, each filed by a group of defendants jointly. Unlike the orders sustaining the previous demurrers, the last demurrers were sustained without leave to amend, the court noting in some instances that counsel for plaintiffs had represented that they could add nothing to the fourth amended complaint. Special demurrers, filed with the general demurrers in all cases, were not ruled upon by the court. Motions to dismiss all or portions of the complaint were variously granted in whole or in part as to defendants designated individually or by groups. [1]

[**3] [*311] [**485] [***853]** After decision by the Court of Appeal, Second Appellate District, Division One, which affirmed the order of dismissal, this court on its own motion granted a hearing to give further study to the problems presented. After such study, we have concluded that the Court of Appeal has correctly disposed of the

[1] The "fourth amended complaint" was amended by plaintiffs prior to attack thereon. As denoted herein, the "fourth amended complaint" is the fourth amended complaint as amended. The general demurrers were sustained and motions to strike granted as to various groups of defendants as parenthetically indicated: (1) Great Western Financial Corporation, Great Western Savings and Loan Association and 25 individual escrow companies referred to herein as Liberty Escrow (general demurrer sustained without leave to amend as to each count alleged, motion to strike complaint granted); (2) Sherwood Escrow Co., and Summit Title Company (general demurrer sustained without leave to amend as to each count alleged upon representations that no further facts could be added, motion to strike granted as to 10 specifications and denied as to 5 specifications); (3) American Title Company (general demurrer sustained without leave to amend as to each count alleged); (4) Security Title Insurance Company and Financial Corp. of America (demurrer of Financial Corp. sustained without leave to amend, general demurrer of Security Title Insurance sustained without leave to amend as to each count alleged upon representations that no further facts can be added, motion to strike granted as to 17 of 78 paragraphs); (5) Lehman Brothers (general demurrer sustained without leave to amend as to each count, motion to strike granted).

cause. Accordingly the opinion of the Court of Appeal, authored by Justice Fourt and concurred in by Presiding Justice Wood and Justice McCoy, is adopted (with some minor deletions and additional discussions of our own) as and for the opinion of this court. Such portion of the opinion (with appropriate deletions and additions as indicated) is as follows: [2]

[**4]** ***CA(1)***[] **(1)** We confine our attention herein to the most recently filed fourth amended complaint since "***HN1***[] The court on appeal will not consider the sufficiency of a superseded complaint where the plaintiff has amended it after demurrer sustained." (*Rolley, Inc. v. Merle Norman Cosmetics, Inc., 129 Cal.App.2d 844, 852 [278 P.2d 63, 282 P.2d 991]*.) We are, moreover, not concerned with the grounds for special demurrer urged upon the trial court since the general demurrer was **[*312]** sustained without leave to amend and the complaint was stricken upon appellants' representation that no further facts could be alleged. [[3]] ***CA(2)***[] **(2)** We shall consider primarily the merits of that decision and, unless at least one cause **[**486]** **[***854]** of action is clearly stated, sustain the order of dismissal. (*Southall v. Security Title Ins. etc. Co., 112 Cal.App.2d 321, 323 [246 P.2d 74]*; *Morris v. National Federation of the Blind, 192 Cal.App.2d 162, 164 [13 Cal.Rptr. 336]*.) ***CA(3)***[] **(3)** We are constrained to determine only whether appellants state a cause of action, not whether they might have been able to do so. (*Lemoge Elec. v. County of San Mateo, 46 Cal.2d 659, 664 [297 P.2d 638]*; **[****5]** *Levinson v. Bank of America, 126 Cal.App.2d 122, 125 [271 P.2d 632]*.) ***CA(4)***[] **(4)** The unverified fourth amended complaint, evolved over a period of more than two years of argument through law and motion, is presented to us without showing by brief that appellants could or would be willing to amend further. We conclude that the court did not, by the action **[*313]** taken, abuse its discretion since the pleadings are not susceptible of a construction that might entitle appellants either to injunctive relief or to damages.

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[2] Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (*People v. Lyons (1956) 47 Cal.2d 311, 314, fn. 1 [303 P.2d 329]*; *Simmons v. Civil Service Emp. Ins. Co. (1962) 57 Cal.2d 381, 383, fn. 1 [19 Cal.Rptr. 662, 369 P.2d 262]*; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal.2d 536, 540, fn. 1 [63 Cal.Rptr. 21, 432 P.2d 717]*; *Smith v. Anderson (1967) 67 Cal.2d 635, 637, fn. 1 [63 Cal.Rptr. 391, 433 P.2d 183]*; *Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 517, fn. 3 [67 Cal.Rptr. 761, 439 P.2d 889]*.)

[3] On the record presented we are unable to evaluate the motions to dismiss granted by the trial court as to various defendants. Our examination of the record available persuades us that in major part the motions were granted on the ground that plaintiffs had consistently failed to allege factual matters with the particularity required to sustain a cause of action under the Cartwright Act and other acts on which plaintiffs relied. Accordingly, motions to dismiss all or portions of plaintiffs' fourth amended complaint were granted as to various defendants on grounds which appear to be related to those for sustaining the general demurrers. Although the instant record does not fully advise us of matters identical to those in *Lavine v. Jessup (1957) 48 Cal.2d 611 [311 P.2d 8]*, plaintiffs assert that a "duplicate situation" exists. The following observations from that case are pertinent here: "This case presents an unusual situation in that the court simultaneously sustained general demurrers without leave to amend and granted motions to strike the complaint as sham and to dismiss the action. The motions were not supported by affidavits setting up any extrinsic matters and obviously were made upon the assumption that the complaint failed to state a cause of action and was merely repetitious of prior complaints which had been ruled insufficient. Defendants thus made their challenge solely on the fact of the pleadings, and it seems clear that the questions presented by the motions were identically the same as those presented by the demurrers, i.e., did the complaint state a cause of action and, if not, could the defects be cured by amendment. The normal method of resolving such issues in favor of a defendant is by ruling upon a demurrer and thereafter rendering a judgment based upon the ruling. It is, of course, unnecessary for the court, in addition, to grant a motion to dismiss. As we have seen, the court subsequently signed and filed a judgment of dismissal which, after reciting that the demurrers had been sustained and the motions had been granted, adjudged that the action be dismissed." (*48 Cal.2d at p. 614*.) As indicated, the court equated the *Lavine* order granting the motion to dismiss with the order sustaining the general demurrer.

[For the foregoing reasons we do not pass upon the merits of the motions to dismiss or the propriety of the orders thereon as raising independent issues.]

[**6]** Appellants attempt by their complaint to impose upon respondents treble damages for asserted violations of the antitrust, price discrimination and unfair trade practices sections of the Business and Professions Code, and also accuse respondents of the common law tort of interference with advantageous business or contractual relations. The issues as framed by appellants' brief are (1) whether parties allegedly damaged by the wrongdoing of competitors in violation of the subject statutes are entitled to the civil remedies of injunction and/or indemnity, and (2) whether the allegedly injured parties are entitled to damages from certain competitors who, by a conspiracy to provide rebates, intentionally induce a prime customer to transfer its business to the wrongdoers. We must determine, more particularly, whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. The latter finding, which is determinative, is in the negative.

The complaint alleges that Lehman Brothers, an investment firm and a partnership, owns a major **[****7]** or controlling interest in Great Western Financial Corporation (hereinafter sometimes referred to as Great Western) and in Financial Corporation of America (hereinafter sometimes referred to as Financial) both of which are financial holding companies. Great Western, in turn, owns Great Western Savings and Loan (hereinafter sometimes referred to as Great Western S&L) and a group of 25 individually named escrow companies hereinafter referred to collectively as Liberty. Financial owns title insurer Security Title Insurance Company (hereinafter sometimes referred to as Security); Financial and Great Western together own American Title Company (sometimes hereinafter referred to as American). All of these interrelated businesses are named as defendants together with two other companies operating under the same, but distinct and independent, ownership known as Summit Title Company (hereinafter sometimes referred to as Summit) and Sherwood Escrow Company (hereinafter sometimes referred to as Sherwood).

[*314] The complaint further alleges that appellants are corporations, each qualified to do business in California as an "underwritten title company." The "underwritten title company" **[****8]** (hereinafter sometimes called "title company") is described by code as a "person engaged in the business of preparing title searches, title examinations, certificates or abstracts of title upon the basis of which a title insurer regularly writes title policies . . . ." (*Ins. Code, § 12402*.) Title insurance, which is a customary incident of practically every **[**487]** **[***855]** California real estate transaction, may be sold either by a title insurer or a title company, and both are regulated by the Insurance Commissioner, must be licensed, meet certain minimum capital requirements, submit to examination and audit, and may have licenses seized or revoked for financial instability or other regulatory infractions. (*Ins. Code, §§ 12396* and *12411*.) The title insurer is entitled to perform the search and abstract functions, as well as to issue the policy. The title company, which performs only search and abstract work, may engage in the escrow business within statutory limitations. It is specifically contemplated that the title company shall contract to do the preliminary work for a title insurer and then distribute the policy of insurance, the risk of which is underwritten by the **[****9]** title insurer, in return for an appropriate division of fees. (*Ins. Code, § 12412*.)

Appellant title companies, therefore, compete directly with both Summit and American in Los Angeles County. All three either must do business with or compete with Security, and it is common knowledge that all compete with the long dominant Title Insurance and Trust Company and every other concern qualified to transact title business in this county.

It is appellants' theory that all respondents, including the powerful Lehman Brothers investment banking company, have conspired under the impetus of common interest to violate statutory prohibitions and intentionally interfere with appellants' business to their financial damage. Appellants contend that by virtue of this combination respondents, all and variously, have interfered with their business relationships, violated the California law of antitrust and unfair trade practices, and the Insurance Code. In appellants' words, they charge that defendants "conspired to pay an illegal rebate to lure away customers of the Plaintiffs, and to boycott the Plaintiffs, along with a battery of other acts forbidden by statute." It is the thrust of these allegations **[****10]** that **[*315]** the acts of the various respondents constitute a fraud on appellants which justifies and, indeed, compels the piercing of corporate veils to disclose an identity of interests between the Lehman-owned companies on the one hand and the Sherwood and Summit shareholders on the other. The facts, however, are sparse and incomplete.

CA(5)[] **(5)** *HN2*[] The California law of antitrust, commonly known as the Cartwright Act (*Bus. & Prof. Code, §§ 16700- 16800*) is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. (*Milton v. Hudson Sales Corp., 152 Cal.App.2d 418 [313 P.2d 936]*; *Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844*.) *CA(6)*[] **(6)** In 1961 California incorporated in essence also *section 3* of that federal legislation known as the Clayton Act (*Bus. & Prof. Code, § 16727*) which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations thereof are similarly persuasive. (*Milton v. Hudson Sales Corp., supra.*) We are persuaded by California and federal authorities **[****11]** that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination.

Indeed, as to Lehman Brothers, the only ultimate facts alleged are that Lehman Brothers is a partnership, that it owns stock in Great Western and Financial and that at times it has had two or more directors concurrently on the boards of Great Western and Financial, respectively. Thus, Lehman Brothers stands at the investment apex of a pyramid of control which can be reached only by means of factual allegations of conduct on the part of related defendants from which a conspiracy or combination with the intent to jeopardize appellants' business may be inferred. The same analysis applies to Great Western and Financial in their passive administrative role as holding companies, **[**488]** **[***856]** Great Western S & L as a lender relatively remote from the scene, and even Security which, as title insurer, merely issues title policies which constitute the subject matter of appellants' claims.

The corporate interrelationship alleged is not a wrong per se. *CA(7)*[] **(7)** *HN3*[] "Within the present Sherman Act there is no place for a doctrine of intra-enterprise conspiracy. **[****12]** No logical stopping point exists short of giving a prosecutor carte blanche to attack virtually all multicorporate enterprises." McQuade, **[*316]** *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 1955*, 41 Va.L.Rev. 183, 216.) *HN4*[] There is substantial justification for intercorporate divisions and affiliated corporations to do business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se (*United States v. Yellow Cab Co., 338 U.S. 338 [94 L.Ed. 150, 70 S.Ct. 177]*; *United States v. Columbia Steel Co., 334 U.S. 495, 523, 527 [92 L.Ed. 1533, 1551, 1554, 68 S.Ct. 1107]*.) Since the mere existence of the Lehman power complex is not the evil under attack, nor its proper subject, we must require that appellants allege [] [the specific facts] constituting unfair competition or a conspiracy to engage in such unfair practices and the [] nature of the damages inflicted.

CA(8)[] **(8)** "*HN5*[] The gist of an action charging civil conspiracy is not the conspiracy but the damages suffered. [Citations.] It is the long established rule that a conspiracy, in and of itself, however atrocious, does not give **[****13]** rise to a cause of action unless a civil wrong has been committed resulting in damage. [Citations.] . . . *CA(9)*[] **(9)** The advantage to the pleader in charging a conspiracy is to implicate all participating in the common design and thus fasten liability on him who agreed to the plan to commit the wrong as well as on him who actually carried it out. [Citations.] *CA(10)*[] **(10)** The conspiracy 'may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.' [Citations.]

CA(11)[] **(11)** "*HN6*[] To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citations.]" (*Wise v. Southern Pac. Co., 223 Cal.App.2d 50, 64-65 [35 Cal.Rptr. 652]*.) General allegations of agreement have been held sufficient (*Farr v. Bramblett, 132 Cal.App.2d 36, 47 [281 P.2d 372]*), and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. (*Hege v. Worthington, Park & Worthington, 209 Cal.App.2d 670, **[****14]** 678 [26 Cal.Rptr. 132]*.) *CA(12)*[] **(12)** Significantly, however, "[the] activities condemned by the anti-trust law are contracts, combinations, or conspiracies in restraint of . . . trade or commerce. Such contracts, combinations or conspiracies in restraint of . . . trade or commerce cannot be alleged generally in the words of **[*317]** the statute but the facts must be set forth which indicate the existence of such contracts, combinations or conspiracies." (*Westor Theatres v. Warner Bros. Pictures, Inc., 41 F.Supp. 757, 762*.) [General allegations of a conspiracy, without a statement of the facts constituting the conspiracy, its object and accomplishment in the restraint of trade in civil actions are held by the federal courts to be but allegations of legal conclusions, insufficient to constitute a cause of action under the federal statutes. (*Nelson Radio & Supply Co. v. Motorola, Inc. (1952) 200 F.2d 911, 913, 914*;

Floyd v. Gage (1951) 192 F.2d 137, 138-139; *Feddersen Motors v. Ward (1950) 180 F.2d 519, 522*; *Beegle v. Thomson (1943) 138 F.2d 875, 880*; *Black & Yates v. Mahogany Assn. (1941) 129 F.2d 227, 231-232 [148 A.L.R. 841]*; *Encore* **[****15]** *Stores, Inc. v. May Dept. Stores Co. (1958) 164 F.Supp. 82, 84-85*; *Leonard v. Socony-Vacuum Oil Co. (1942) 42 F.Supp. 369, 370*; *Bader v. Zurich General Acc. & Liab. Ins. Co. (1952) 12 F.R.D. 437, 438-439*; 1 Toulmin, Anti-trust **[**489]** **[***857]** Laws (1949), § 2019, p. 850; 1968 Supplement, § 20.7, pp. 42, 43, 44.)]

Appellants themselves concede that they have not alleged facts but contend by reference to *Business and Professions Code, section 16756* [4] and a criminal decision (*People v. Sacramento Butchers' etc. Assn., 12 Cal.App. 471, 481 [107 P. 712]*), that general allegations of statutory violations are sufficient. The California and federal authorities, however, are contrary where plaintiffs base a civil action for damages upon antitrust legislation. ***HN7***[] "While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action **[****16]** for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and **[*318]** prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination." (*Munter v. Eastman Kodak Co., 28 Cal.App. 660, 664-665 [153 P. 737]*.) General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof. "Conceding the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement in the bill as to any specific overt acts done by defendants in pursuance of that design and purpose." (*Davitt v. American Bakers' Union, 124 Cal. 99, 101 [56 P. 775]*.)

[**17]** ***CA(13a)***[] **(13a)** Since the conspiracy allegations are insufficient in and of themselves, we turn to the purported averments of specific acts contained in the complaint and find them similarly lacking. The first count is directed primarily against Summit and Sherwood (hereinafter sometimes referred to as the Sherwood group), but the opening paragraphs allege appellants' corporate existence, Lehman Brothers' ownership of certain respondents and the conspiracy of those defendants to carry out the acts therein described for the purpose of unlawfully restraining trade and destroying competitors. There follow allegations that title insurance policies are customarily procured to insure buyer or lender upon the "transfer and encumbrancing" of real property; that title insurance business in Los Angeles County originates primarily with lenders or buyers of real property and those who perform escrow services; that Liberty is first and Sherwood second in volume of title activity generated by independent escrow companies; and that "[all] title companies and title insurance companies . . . compete for title insurance orders from lenders and escrow companies in Los Angeles County." Appellants then aver further **[****18]** that after American "approached" Sherwood, its stockholders incorporated Summit and competition has been lessened because all of Sherwood's title insurance business now goes to Summit; that Security furnishes Summit "all search data needed to insure title" and that Summit issues only Security title policies; that Summit pays one-half the posted rates for such policies to Security but charges Sherwood and its customers the full rates; that Summit performs no substantial function in the issuance of title policies and was created to "'mask' the illegality of the acts herein described." Finally, it is **[**490]** **[***858]** alleged that all the above was **[*319]** accomplished "with the intent and with the result of interfering with [appellants'] business relationship with Sherwood," that actual damages resulted, and that Security and American currently seek others "with whom to extend the scope of the kinds of activity described herein" which will further injure appellants so that "the remedy at law will thereby be inadequate." The second count merely incorporates the first and alleges that appellants used to receive most of Sherwood's business

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[4] The following footnote appears in the opinion of the Court of Appeal as footnote No. 1.] *Section 16756 of the Business and Professions Code* provides as follows:

"[] Statements declared sufficient. In any indictment, information or complaint for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."

but that now it all goes to Summit **[****19]** "which issues only Security's policies." The gravamen of these two counts is that Sherwood formed Summit at the instance of American in order to divert to Summit and Security business which formerly went to appellants.

Each of these counts fails to state a cause of action for interference with contractual relationships because there is no allegation alleged that appellants had a contract with anyone which was breached as a result of the activities of defendants or any of them. (*Allen v. Powell, 248 Cal.App.2d 502, 505-506 [56 Cal.Rptr. 715]*.)

Appellants similarly fail in either count to state ***HN8***[] an action for interference with prospective business advantage which will lie on common law principles where the right to pursue a lawful business is intentionally interfered with either by unlawful means, or by means otherwise lawful when there is lack of sufficient justification (*Willis v. Santa Ana etc. Hospital Assn., 58 Cal.2d 806 [26 Cal.Rptr. 640, 376 P.2d 568]*), but only if it appears that the business advantage would otherwise have been realized. (*Perati v. Atkinson, 213 Cal.App.2d 472 [28 Cal.Rptr. 898]*.) ***CA(14)***[] **(14)** One with a financial interest in the business **[****20]** of another is privileged however, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party. (*Rest., Torts, §§ 769*, 770, 771.) The conduct of Sherwood and Summit is patently justified.

Appellants compete with Summit; Sherwood which owns Summit naturally sends it business there. Summit buys policies from Security and since appellants are not title insurers the business Security receives in this manner presumably does them no damage. ***CA(15)***[] **(15)** We reiterate that the owners of a corporate escrow company, such as Sherwood, are authorized by statute to incorporate a separate title company which may then receive from the title insurer with which it does business **[*320]** a portion of the posted premium in exchange for its search and abstract services. (*Ins. Code, § 12396 et seq.*)

CA(13b)[] **(13b)** While it is difficult to isolate from the complaint the specific elements of any given legal action and virtually impossible to determine from each count the nature of the purported cause of action, a second category of circumstances is described in count eight. The gist **[****21]** of this count is that Great Western Financial has prevailed upon Great Western Savings & Loan and the Liberty escrow companies to send their title business to American, which buys policies from Security, and this has damaged appellants. This count realleges the Lehman ownership and control of various defendants, the existence of their conspiracy, and the nature of the title insurance business in Los Angeles County. Thereafter, the complaint alleges generally that savings and loan associations are substantial sources of title business resulting from purchase money loans, refinancing, and the financing of their direct sales of real estate; that buyers of real property frequently select the title company before they know who their lender will be; that when Great Western makes purchase money loans it refuses appellants' policies and favors Security or American; that for this reason escrow officers, when uncertain as to who the lender ultimately may be, are reluctant to deal with appellants; that escrow officers influence buyers who have no preferences; that the Liberty escrow companies, which formerly requested title policies from appellants, now conspire with Great Western to refuse **[****22]** to deal with appellants; **[**491]** **[***859]** that these companies instead divert business to American; that as a result, only in exceptional cases when the buyer demands appellants' services and the loan is not by Great Western, do appellants receive this business; and that Great Western prohibits the use of appellants' policies when it refinances or engages in direct sales of real estate. Count eight further alleges that "competition within Los Angeles County has thereby been substantially reduced"; that "refusal to accept the policies of . . . [appellants] constitutes a boycott," that "this was done" with the intent and result of interfering with appellants' business relationship with Liberty, and this "concerted refusal" violates *Business and Professions Code section 17046*. Count nine incorporates all allegations of counts one and eight and further alleges that "until the acts of Financial" appellants received Liberty's title business which now goes to Security.

[*321] Insofar as appellants attempt to state an action against the Lehman-controlled defendants for interference with contract, they fail, by reference to authorities previously cited, because they allege **[****23]** no prior existing contract. The action for interference with prospective business advantage fails because they do not disclose wherein it is wrongful for Great Western, Great Western S&L, or Liberty to send business to American, any more than it is wrongful for Sherwood to purchase policies through Summit, since appellants had no reasonable assurance that their advantageous relations with Liberty would otherwise continue. They relate no facts from which we might find it improper for Summit or American to purchase title policies from Security. Since Great Western and Financial allegedly own various interests in Great Western S&L, Security, American and Liberty, it is merely prudent business practice for the other companies to request title policies from American and Security just as we heretofore established that the common ownership of Sherwood and Summit justifies a similar business practice. (*Rest., Torts, §§ 769*, 770, 771, and cases cited, *supra*.)

While Security, Summit and American all compete with appellants for title business, only Summit and American compete on precisely the same business plane and, by purchasing Security's title insurance, these companies do not inhibit **[****24]** appellants' access to the market. Appellants fail to join or allege the identity of the title insurer or insurers with whom they do business, and since they do not complain that they have been denied similar privileges or that Security refuses to sell them policies on terms equivalent to those tendered American and Summit, we must assume that appellants are not deprived of a competitive commodity. The only respondents, therefore, who might be accused of directly diverting business from appellants are Sherwood and Liberty, while the other defendants can be involved only by way of conspiracy. Appellants allude to no reasonable basis for assuming they enjoyed any prior right to do business with the customers of these escrow companies. Since the overt acts alleged are inadequate to establish an action for business interference against Sherwood and Liberty, respectively, the conspiracy allegations also fail.

The remaining counts incorporate successively the principal allegations of the first two counts, and final counts ten and eleven incorporate those of counts eight and nine as well. **[*322]** These miscellaneous counts charge defendants with various allegedly unfair competitive **[****25]** business practices. All except count seven, which deals with unlawful rebates (*Ins. Code, § 12404*), refer to the Cartwright Act (*Bus. & Prof. Code, §§ 16700-16800*). Count three charges that Security transmitted to Sherwood through Summit a secret rebate (*Bus. & Prof. Code, § 17045*). Count four suggests Security and Summit engaged in unreasonably low or discriminatory pricing (*Bus. & Prof. Code, §§ 17043* and *17049*). Counts five and ten charge defendants, acting through the Sherwood and **[**492]** **[***860]** Great Western groups, respectively, with tying-in contracts which lessen competition and tend to create a monopoly (*Bus. & Prof. Code, § 16727*). Counts six and eight charge a boycott or concerted refusal to deal with appellants on the parts of the Sherwood and the Great Western groups, respectively (*Bus. & Prof. Code, § 17046*). Count eleven incorporates the allegations of all prior counts and alleges that thus defendants entered an illegal combination (*Bus. & Prof. Code, § 16720*) with the intention to (1) restrict commerce, (2) prevent competition in the sale of a commodity, (3) establish prices which prevent free competition in Los Angeles County, and (4) reduce prices **[****26]** to Sherwood by one-half.

CA(16)[] **(16)** The Cartwright Act, as previously mentioned, is similar in spirit and substance to that federal legislation encompassed by the Sherman (*15 U.S.C.A. §§ 1-7*) and Clayton Acts (*15 U.S.C.A. §§ 12-27*). ***HN9***[] Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes. (Cf. *Show Management v. Hearst Publishing Co., 196 Cal.App.2d 606, 612-616 [16 Cal.Rptr. 731]*; *West Coast Poultry Co. v. Glasner, 231 Cal.App.2d 747 [42 Cal.Rptr. 297]*; *Hudson v. Craft, 33 Cal.2d 654 [204 P.2d 1, 7 A.L.R.2d 696]*.) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. (*Bus. & Prof. Code, §§ 17040- 17051*.)

CA(17)[] **(17)** These statutes and the common law which once constituted the "protection of the public against combinations in restraint of the insurance trade" (*Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 45 [172 P.2d 867]*) are now expressly superseded and contravened by the specific provisions of the Insurance **[****27]** Code. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) **[*323]** clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied to controlled industries. (*Ins. Code, §§ 12404- 12412*; *County of Placer v. Aetna Cas. etc. Co., 50 Cal.2d 182 [323 P.2d 753]*; *Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344 [170 P.2d 3]*.) ***CA(18)***[] **(18)** Count three, for instance, is based upon a statute (*Bus. & Prof. Code, § 17045*) aimed at preventing a distributor from discriminating between customers, but fails to allege facts from which a court might properly infer that the prices charged by Security or Summit differ from customer to customer, and is thus defective. (*Federal Automotive Services v. Lane Buick Co., 204 Cal.App.2d 689 [22 Cal.Rptr. 603]*.) ***CA(19)***[] **(19)** Count four, presumably based on the same facts, charges that the discount constitutes a sale of title insurance below cost which is an infraction only if done "for the purpose of injuring competitors" (*Bus. & Prof. Code, §§ 17043*, *17049*), but a court is not the appropriate initial **[****28]** arbiter of factors involved in insurance costs. ***CA(20)***[] **(20)** Count seven implies that Sherwood (an escrow company) acts as "agent" for real property owners with whom title insurers and title companies are prohibited from splitting fees and that because Summit is controlled by identical interests, the receipt of a title policy from Security at a discount constitutes an illegal rebate (*Ins. Code, § 12404*) to Sherwood. The statutory framework, however, specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used constitutes such fee divisions "illegal." (*Ins. Code, §§ 12412*, *12404.5*, *12405.7*.) It is not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates, or engaging in unreasonably low or discriminatory pricing policy is followed by the defendants, or any of them. []

[The] factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state **[**493]** **[***861]** facts insufficient to establish proscribed conduct on the parts of the alleged actors and **[****29]** thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons. []

CA(21)[] **(21)** Appellants contend in counts six and eight that the conduct of the Sherwood and Great Western groups, respectively, **[*324]** infringes *Business and Professions Code section 17046*. The attempted application of this section to the facts evidences appellants' misinterpretation of the nature of a boycott. The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply. (*Bus. & Prof. Code, § 17042*; *A.B.C. Distributing Co. v. Distillers Distributing Corp., 154 Cal.App.2d 175, 189 [316 P.2d 71]*.) There is not, and could not be an allegation that it is unreasonable for Sherwood to buy through Summit, or for Great Western Financial to require its subsidiaries in the savings and loan or escrow business to engage the services of the title company in which it likewise has an interest. Not only are vertical distribution agreements in this instance contemplated by the Insurance Code, but "[it] seems clear to us that vertical integration, as such without more, **[****30]** cannot be held violative of the Sherman Act." (*United States v. Columbia Steel Co., supra, 334 U.S. 495, 525 [92 L.Ed. 1533, 1553, 68 S.Ct. 1107]*.) Neither do exclusive dealing arrangements constitute boycotts (*Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844*), which consist, instead, of horizontal alliances between persons at the same level of distribution, who agree not to deal with some third person (*Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 [3 L.Ed.2d 741, 79 S.Ct. 705]*; *Eastern States etc. Assn. v. United States, 234 U.S. 600 [58 L.Ed. 1490, 34 S.Ct. 951*, L.R.A. 1915A 788].) [] [No impropriety is alleged in the agreement of Sherwood to purchase from Summit and of Liberty to purchase from American.] An agreement between and among Sherwood and Liberty not to deal with appellants might, under proper circumstances, constitute a boycott, but there is no allegation that these parties or their superior interests agreed or accomplished by threat or violent means their alleged aim to coerce third parties not to deal with appellants. [(*Bus. & Prof. Code, § 17046*.)] [] Once again, the claimed statutory **[****31]** infraction is vague, conclusionary, and factually unsupported by the complaint.

[We have heretofore concluded that because plaintiffs' vague and conclusionary pleadings fail to allege sufficient facts, the complaint fails to state a violation of the Cartwright Act based on conduct, including boycotts, prohibited thereunder. (*Bus. & Prof. Code, §§ 16720*, *16727*.)] ***CA(22a)***[] **(22a)** While the boycott statute (*Bus. & Prof. Code, § 17046*) referred to in count eight makes it unlawful to use threats, **[*325]** intimidation or boycott to effect a violation of the unfair trade practices laws, the complaint implies rather that respondents used the boycott to effect a restraint of trade (*Bus. & Prof. Code, § 16727*). Counts five and ten allege that the facts of count one as to the activities of Sherwood and Summit, and of count eight with respect to the Lehman enterprises, respectively, constitute exclusive sales agreements and "tying-in" contracts which "may . . . substantially lessen competition or tend to create a monopoly. . . . (*Bus. & Prof. Code, § 16727*.)

Again the allegations are inadequate. ***HN10***[] The term "tying-in" contract has been applied judicially to those agreements whereby the seller or **[****32]** lessor of patented, or unpatented, equipment requires the purchaser or lessee to use only those unpatented accessory items manufactured or sold by the seller or lessor. (*International Salt Co. v. United States, 332 U.S. 392 [92 L.Ed. 20, 68 S.Ct. 12]*; *International Business Machines Corp. v. United States, 298 U.S. 131 [80 L.Ed. 1085, 56 S.Ct. 701]*.)

CA(23)[] **(23)** "[A] tying arrangement may be defined as an agreement by a party to sell **[**494]** **[***862]** 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 Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 [2 L.Ed.2d 545, 549-550, 78 S.Ct. 514]*.) A lending institution, however, has been traditionally entitled to require for its protection and as a condition of making the loan, a specific type of title policy from a particular source; the debtor-purchaser is free to obtain a policy to protect his equity from whatever source he chooses, though most frequently he relies upon the lender's policy.

CA(22b)[] **(22b)** Appellants fail to define the market by subject matter, total volume, proportion **[****33]** controlled by defendants, availability to appellants of the subject matter or a competing subject matter, and availability to the public of the subject matter or a competing subject matter. (*Apex Hosiery Co. v. Leader, 310 U.S. 469 [84 L.Ed. 1311, 60 S.Ct. 982, 128 A.L.R. 1044]*; *Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844, 851-852*.) They fail to state facts from which it may be inferred that respondents control the title insurance market in Los Angeles County and can substantially exclude appellants from such market or limit the availability of title insurance to the public, and these matters are **[*326]** essential to antitrust actions in which either monopoly or the attempt to create a monopoly in restraint of trade is charged. (*A.B.C. Distributing Co. v. Distillers Distributing Corp., supra, 154 Cal.App.2d 175, 180, 190*; *Milton v. Hudson Sales Corp., supra, 152 Cal.App.2d 418, 443-444*; *Rolley. Inc., v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844*.) We find no allegation that Security enjoys such a dominant position in the title industry that it can or does tie the sale of any other commodity to **[****34]** the policies it sells. Presumably this the appellants cannot allege in view of the dominant position long occupied by Title Insurance and Trust Company in Los Angeles County, of which we may take judicial notice. Hence, there can be no unlawful tying agreement, and appellants do not allege that their rights to purchase freely on the open market have been thus infringed.

CA(24)[] **(24)** Finally, count eleven in grand finale incorporates all prior counts and concludes that by reason of everything so stated respondents have formed a trust or combination in restraint of trade (*Bus. & Prof. Code, § 16720*), again a mere legal conclusion drawn from generalities. (*Abouaf v. J. D. & A. B. Spreckels Co., 26 F.Supp. 830, 834*; *Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 887*.) ***HN11***[] Where complainants are unsuccessful in establishing an action for conduct which "may . . . tend to create a monopoly" (*Bus. & Prof. Code, § 16727*), they are *a fortiori* doomed to failure with respect to the full blown conduct they must allege to come within acts proscribed by statutes patterned on the Sherman Act (*Bus. & Prof. Code, § 16720*); *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 335* ***[****35]*** *[5 L.Ed.2d 580, 591, 81 S.Ct. 623]*; cf. *Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844*.) There is a dangerous vice inherent in the complaint with which we are herein presented because it is ambiguous and investigatory in nature. ***HN12***[] Respondents are entitled to know [] what acts constitute the alleged violations so that the time and expense involved in conducting an investigation and pursuing discovery may be reasonably limited, for the complaint might otherwise be construed as a blanket license to indulge in interrogatories, depositions, and motions to produce ad infinitum, ad nauseam. (*Beegle v. Thompson, supra, 138 F.2d 875*; *Leonard v. Socony-Vacuum Oil Co., supra, 42 F.Supp. 369*; See: Yankwich, Leon R., "*Short Cuts" in* *Long Cases, 13 F.R.D. 41*, and Committee Report of the Judicial Conference of the United States, "Procedure in Antitrust **[*327]** and Other Protracted Cases" *13 F.R.D. 62*.) This count which fails because of inadequate allegations of **[**495]** **[***863]** monopoly or monopoly power and lack of factual allegations of specific conduct in furtherance of a conspiracy or combination, is therefore insufficient as **[****36]** to each of the defendants charged with conspiracy.

CA(25a)[] **(25a)** Appellants, by their conduct, demonstrate that they are unable or unwilling to amend to cure the defects specified in various special demurrers to their complaint which were sustained on similar grounds designated by two different trial judges. These include the ground that certain counts unite and fail to separately state several causes of action, that certain counts improperly unite several causes of action, and that each count is ambiguous, unintelligible and uncertain. We find each of these grounds well taken. ***HN13***[] Leave to amend further is properly denied when a plaintiff fails to amend to correct defects on the basis of which special demurrers to a previous complaint were sustained, or as directed by the court when sustaining such demurrers. (*Aitken v. Southwest Finance Corp., 131 Cal.App. 95, 106 [20 P.2d 1000]*; *Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 401 [194 P.2d 775]*.)

By irresponsible pleading containing unrestrained and unverified allegations, appellants attempt to secure the right by discovery to explore at random and at enormous expense to respondents, several large and important businesses **[****37]** and their relationships with one another, namely, the savings and loan, escrow, title insurance and title businesses. The method used by appellants has been aptly characterized by Judge Kaus as a "shotgun" technique where plaintiffs deal solely in broad generalities and otherwise indulge in factual and legal conclusions, unsupported speculation and argumentative allegations. (*Lesperance v. North American Aviation, Inc., 217 Cal.App.2d 336, 342-343 [31 Cal.Rptr. 873]*.) ***CA(26)***[] **(26)** "A demurrer does not . . . admit contentions, deductions or conclusions of facts or law which may be alleged in a complaint [citation]." (*Marin v. Jacuzzi, 224 Cal.App.2d 549, 552 [36 Cal.Rptr. 880]*.) As earlier signified by Judge Kaus, where the complaint is thus devoid of facts to support its legal conclusions of conspiracy "it is just as possible that the difficulty of the pleader arises from the fact that the events and relationships which would give rise to a cause of action never took place, as it is that they did take place but that the defendants did not tell plaintiffs about them" and the conclusion is inescapable **[*328]** that "[the] failure to make a good pleading probably arises **[****38]** in a lack of facts rather than in the fault of the pleader." (*Dukes v. Kellogg, 127 Cal. 563, 565 [60 P. 44]*.)

CA(25b)[] **(25b)** "***HN14***[] Abuse of discretion [by the trial court] is not shown where it is not indicated as to the manner in which it is proposed to amend nor the nature of the proposed amendment. [Citations.] Neither before the trial court nor before this court has plaintiff indicated the nature of a proposed amendment or the manner in which he would amend his complaint. Plaintiff has therefore failed to establish reversible error in the dismissal of the action. . . ." (*Starbird v. Lane, 203 Cal.App.2d 247, 262 [21 Cal.Rptr. 280]*.) []

The order is affirmed.

Dissent by: MOSK

Dissent

MOSK, J. I dissent.

This case should not be decided on the pleadings; plaintiffs are entitled to a day in court in which to prove, if they can, the economic loss they allegedly suffered and continue to suffer as a result of the purported illegal acts of defendants. The court below, and now a majority of this court, impose upon plaintiffs a pleading straitjacket neither compelled by precedent nor consistent with the design of antitrust statutes.

After two demurrers were sustained, plaintiffs **[****39]** filed a third amended complaint **[**496]** **[***864]** in which they comprehensively described the conduct of the defendants asserted to be unlawful. The complaint in essence charged that all of the activities were part of a single combination designed to injure plaintiffs. The trial court again sustained a demurrer, on the special ground that several causes of action were not separately stated.

Attempting to comply with the trial court's directions, plaintiffs divided their fourth amended complaint into 11 counts, and it is those counts which the trial court and the Court of Appeal dissected on general demurrer with the deft touch of a scalpel ordinarily reserved for a special demurrer or motion to strike. An order of dismissal was subsequently entered, and this appeal follows.

It is elementary that if a complaint can withstand a general demurrer, an order sustaining demurrers without leave to amend is erroneous even though special demurrers should be sustained and motions to strike granted. (*Wennerholm v. **[*329]** Stanford University School of Medicine (1942) 20 Cal.2d 713, 718-719 [128 P.2d 522, 141*

A.L.R. 1358].) I am convinced the complaint here states a cause **[****40]** of action under the Cartwright Act and that regardless of infirmities in form revealed by the special demurrers, the general demurrer should not have been sustained without leave to amend. Even if all others failed, counts 1, 5, 10 and 11 effectively charge violations of the Cartwright Act when the complaint is viewed pursuant to the rules of liberal pleading permissible thereunder.

The Cartwright Act, generally proscribing combinations in restraint of trade, is patterned after the federal Sherman and Clayton Acts, and California decisions consistently rely on federal decisions in interpreting our act. (People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 724 et seq. [264 P.2d 31]; Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 43 et seq. [172 P.2d 867]; People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 232 [47 Cal.Rptr. 570]; People v. Inlaid Bid Depository (1965) 233 Cal.App.2d 851, 860-861 [44 Cal.Rptr. 206]; Shasta Douglas Oil Co. v. Work (1963) 212 Cal.App.2d 618, 625 [28 Cal.Rptr. 190].) Although Cartwright is couched in terms of prohibited conduct with criminal sanctions and **[****41]** the Attorney General is charged with its public enforcement, private enforcement is also authorized, deemed in the public interest, and encouraged. (Radovich v. National Football League (1957) 352 U.S. 445, 453-454 [1 L.Ed.2d 456, 462-463, 77 S.Ct. 390]; Lawlor v. National Screen Service (1955) 349 U.S. 322, 329 [99 L.Ed. 1122, 1128, 75 S.Ct. 865]; Mach-Tronics, Inc. v. Zirpoli (9th Cir. 1963) 316 F.2d 820, 828.) Thus in Bruce's Juices v. American Can Co. (1947) 330 U.S. 743, 751-752 [91 L.Ed. 1219, 1225-1226, 67 S.Ct. 1015]. Justice Jackson emphasized the desirability of private enforcement of antitrust laws: "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement which relieves the Government of cost of enforcement. **[****42]** . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private **[*330]** means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fees." As in the federal acts, the California statute provides that a private party injured because of an antitrust violation may recover treble damages and attorney fees, as well as costs. (Bus. & Prof. Code, § 16750, subd. (a).)

Pleading poses no unique problems under the Cartwright Act. By its express provisions, violations under the act may be **[**497]** **[***865]** pleaded in general terms: "In any indictment, information *or complaint* for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created." (Italics added.) (Bus. & Prof. Code, § 16756.) In reviewing the sufficiency of an information in People **[****43]** v. Sacramento Butchers' etc. Assn. (1910) 12 Cal.App. 471, 484-485 [107 P. 712], the court said: "While in no manner vitiating the information, there was, in our opinion, no real necessity for alleging the acts constituting the actual accomplishment of the object or purpose of the combination or conspiracy. They constitute mere probative facts, since the gist of the crime of conspiracy is in its formation for an unlawful purpose, . . . Therefore, the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of such conspiracy, which is the ultimate fact to be proved in order to establish the wrongful act against which the statute inveighs." (See also United States v. Patten (1913) 226 U.S. 525 [57 L.Ed. 333, 33 S.Ct. 141, 44 L.R.A. N.S. 325].)

Although the code section does not qualify the word "complaint" as civil or criminal, defendants urge that the provisions for general pleading relate only to criminal charges and that one seeking treble damages in a civil action must allege with specificity the particular conduct constituting the claimed conspiracy in restraint of trade, the overt acts thereunder, and **[****44]** the precise nature of the damages resulting therefrom. Thus, it is asserted, the instant complaint fails to allege a violation of the Cartwright Act because it avers only generally that the defendants conspired with the intent of unlawfully restraining trade and competition, without describing with particularity or clarity facts which are **[*331]** descriptive of the claimed times, places, and other circumstances of the formation of the alleged illegal combinations, the role played therein by each defendant, or the specific overt acts committed in furtherance thereof.

I find no justification to hold that a private plaintiff, in seeking to assert an antitrust violation, must plead his cause with greater particularity than the state in an enforcement action. Although some earlier federal decisions held to a contrary view (*Beegle v. Thomson (7th Cir. 1943) 138 F.2d 875, 881*; *Leonard v. Socony-Vacuum Oil Co. (W.D. Wis. 1942) 42 F.Supp. 369, 370-371*; *Westor Theatres v. Warner Bros. Pictures (D.N.J. 1941) 41 F.Supp. 757, 762)*, the more recent and prevailing federal cases hold that a private plaintiff need state no more than ultimate facts which, if true, would **[****45]** entitle him to recovery. (*Niagara of Buffalo, Inc. v. Niagara Mfg. & Distributing Corp. (2d Cir. 1958) 262 F.2d 106, 107*; *New Home Appliance Center, Inc. v. Thompson (10th Cir. 1957) 250 F.2d 881, 883-884*.) The question was considered in detail in *Nagler v. Admiral Corp. (2d Cir. 1957) 248 F.2d 319*. In rejecting the contention that an antitrust complaint must set out a detailed factual exposition, the court stated (at p. 325): "In testing whether this is a sufficient statement of claim upon which to base a lawsuit, we ought practically to consider the alternatives, both what can be expected and asked of antitrust plaintiffs and what can be accomplished by compulsive orders. Here seems to be the rock upon which attempts below to achieve more particularized pleading have definitely foundered; for the judges' directions double the bulk without increasing enlightenment, while they delay the cause and exhaust the time of several judges. . . ."

There is no basis for distinguishing between the nature of the prohibited conduct on the ground that the act is enforced in civil rather than criminal proceedings. The *Sacramento Butchers* case (1910) *supra*, *12 **[****46]** Cal.App. 471*, has been relied upon in support of the proposition in civil cases that "The gravamen of the offense **[**498]** **[***866]** against the Cartwright Act is the *mere formation of the combination or conspiracy for the unlawful purpose of restraining trade*. . . ." (Italics in original.) (*People* v. *Santa Clara Valley Bowling etc. Assn*. (1965) *supra*, *238 Cal.App.2d 225, 238*; cf. *Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542 (1958) 163 Cal.App.2d 771, 783-784 [330 P.2d 53]*.) It is clear that the precise nature of the combination or conspiracy need not be alleged **[*332]** or ultimately proved with particularity. "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." (*American Tobacco Co. v. United States (1946) 328 U.S. 781, 809 [90 L.Ed. 1575, 1594, 66 S.Ct. 1125]*; see also *Eastern States Lbr. Assn. v. United States (1914) 234 U.S. 600, 614 [58 L.Ed. 1490, 1500, 34 S.Ct. 951*, L.R.A. 1915A 788].) Federal decisions, like the state **[****47]** cases of *Santa Clara Valley* and *Alfred M. Lewis, Inc*., make it abundantly clear that the conspiracy alone constitutes the actionable conduct. (*United States v. Socony-Vacuum Oil Co. (1940) 310 U.S. 150, 225, fn. 59 [84 L.Ed. 1129, 1168-1170, 60 S.Ct. 811]*.)

Defendant's contention that the complaint is insufficient because it fails to allege public injury resulting from the alleged restraints is not meritorious. "Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred. . . . Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted . . . allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." (*Radiant Burners v. Peoples Gas Co. (1961) 364 U.S. 656, 660 [5 L.Ed.2d 358, 361, 81 S.Ct. 365]*.) A contention similar to that of defendants here was rejected in *Klor's v. Broadway Hale Stores (1959) 359 U.S. 207, 213-214 [3 L.Ed.2d 741, 745-746, 79 S.Ct. 705]*, **[****48]** as follows: "Monopoly can as surely thrive by the elimination of such small businessmen, one at the time, as it can be driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations which 'tend to create a monopoly,' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co. v. United States, 332 U.S. 392, 396 [92 L.Ed. 20, 26, 68 S.Ct. 12]*." (See also *People* v. *Santa Clara Valley Bowling etc. Assn*. (1965) *supra*, *238 Cal.App.2d 225, 235*; *People* v. *Inland Bid Depository* (1965) *supra*, *233 Cal.App.2d 851, 860*.)

In requiring specificity of allegations, the majority are apparently adapting classic conspiracy and fraud concepts to the Cartwright Act. In so doing, they improvidently muddy **[*333]** the antitrust waters. While *section 1* of the Sherman Act outlaws every "contract, combination in the form of trust or otherwise, or conspiracy" in restraint of trade (*15 U.S.C., § 1*), the Cartwright Act makes no reference whatever to conspiracy. It outlaws, rather, every "trust" (*Bus. & Prof. Code, § 16726*); and the term "trust" **[****49]** is defined as "a combination of capital, skill or acts by two or more persons" for a number of specified purposes deemed by the Legislature to be detrimental to the economy of the state (*Bus & Prof. Code, § 16720*).

Unstudied use of the term "conspiracy" in numerous Cartwright Act pleadings (see, e.g., *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal.2d 806, 808 [26 Cal.Rptr. 640, 376 P.2d 568]*; *People* v. *Santa Clara Valley Bowling etc. Assn*. (1965) *supra*, *238 Cal.App.2d 225, 227)* may be the cause of misleading the defendants here and the courts below into insisting upon the pleading elements of an ordinary conspiracy charge in an antitrust complaint. Thus while **[**499]** **[***867]** such cases as *Wise v. Southern Pac. Co. (1963) 223 Cal.App.2d 50, 65 [35 Cal.Rptr. 652]*, demand not merely a conspiracy but also a "civil wrong producing damage to the plaintiff," the United States Supreme Court has made it abundantly clear that in reality no such requirement exists in the antitrust field: "It is not the form of the combination or the particular means used but the result to be achieved that the [antitrust] statute condemns. It is not of importance **[****50]** whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. . . ." (*American Tobacco Co. v. United States (1946) 328 U.S. 781, 809 [90 L.Ed. 1575, 1594, 66 S.Ct. 1125]*.)

Such has always been the law of antitrust, in both public and private actions. Justice Day spoke for the Supreme Court to the same effect years ago in what is now the leading case on this question: "'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 public or to the individual against whom the concerted action is directed.'

[*334] "When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce . . . he exceeds his lawful rights, and such action brings **[****51]** him and those acting with him within the condemnation of the act of Congress. . ." (*Eastern States Lbr. Assn.* v. *United States* (1914) *supra*, *234 U.S. 600, 614 [58 L.Ed. 1490, 1500]*.)

Any act, be it legal or illegal, when done pursuant to an agreement or combination the purpose or effect of which is to restrain trade in violation of the statute, is an act upon which relief can be granted to a private plaintiff as well as to a public agency. (*Simpson v. Union Oil Co. (1964) 377 U.S. 13 [12 L.Ed.2d 98, 84 S.Ct. 1051]*; *Lessig v. Tidewater Oil Co. (9th Cir. 1964) 327 F.2d 459, 466*.)

The distinction which the courts below failed to grasp is that, regardless of any need to allege overt acts in stating a cause of action for conspiracy under other statutes (cf. *Pen. Code, §§ 182*, *184*, *1104*), there is no such requirement in alleging an actionable antitrust violation. Fully applicable to a combination violative of the Cartwright Act is this summary of significant characteristics of federal requirements: "And it is likewise well settled that conspiracies under the Sherman Act are not dependent upon an overt act other than the act of conspiring. [Citations.] **[****52]** It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which *§ 1* of the Act strikes down, whether the concerted action be wholly nascent or abortive on the one hand, or successful on the other. [Citations.] And the amount of interstate or foreign trade involved is not material [citation] since *§ 1* of the Act brands as illegal the character of the restraint not the amount of commerce affected. [Citations.] In view of these considerations a conspiracy to fix prices violates *§ 1* of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." (*United States* v. *Socony-Vacuum Oil Co*. (1940) *supra*, *310 U.S. 150, fn. 59, at p. 225 [84 L.Ed. at p. 1169*].)

California practice unquestionably conforms to the foregoing rule, as indicated in *Alfred M. Lewis, Inc.* v. *Warehousemen etc. Local No. 542* (1958) *supra*, *163 Cal.App.2d 771, 783-784*: **[*335]** "Under the Cartwright Act and similar antitrust **[**500]** **[***868]** legislation, **[****53]** the combination for a particular purpose constitutes the unlawful act. [Citations.] The prohibited combination comes into being through an agreement of two or more persons for the purpose of restraining trade or preventing competition. Conduct used to effect such an agreement may result in actionable damages or be the subject of an injunction, even though such conduct if not used to effect the agreement would be lawful."

In construing application of the federal Clayton Act, Justice Stone wrote in *Arrow-Hart & Hegeman Co. v. Commissioners (1934) 291 U.S. 587, 607 [78 L.Ed. 1007, 1018, 54 S.Ct. 532]* (dissenting opinion), "there must be a balance between the general and the particular. When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation. In carrying such schemes into operation the function of courts is constructive, not destructive, to make them, wherever reasonably possible, effective agencies for law enforcement and not to destroy them."

For the **[****54]** foregoing reasons, and in order to provide an effective means for implementing the state Cartwright Act, neither a private plaintiff nor the state need plead a cause of action thereunder with the particularity required in a conspiracy or fraud action. (*People* v. *Sacramento Butchers' etc. Assn*. (1910) *supra*, *12 Cal.App. 471, 484-485*.)

The instant complaint alleges in count 1, and incorporates into all the remaining counts, the following: "Defendants have jointly conspired to and in the execution of the goals of the conspiracy carried out the acts herein set forth with the intent and result of unlawfully restraining trade and competition by preventing [plaintiffs] from selling their title policies, with the intent and result of unlawfully injuring competitors and destroying competition and which constitute unfair methods of competition." While perhaps it could be phrased more artfully, this allegation, under settled rules of liberal construction (*Speegle* v. *Board of Fire Underwriters* (1946) *supra*, *29 Cal.2d 34, 42)* sufficiently states the "purpose or effects of the trust or combination," and avers that each defendant "is a member of, acted with, or in pursuance **[****55]** of" the combination. (*Bus. & Prof. Code,* ***[*336]*** *§ 16756*.) Although the allegation may be conclusionary in nature, the inclusion of such conclusionary matters with ultimate facts is permissible in certain situations *Burks v. Poppy Constr. Co. (1962) 57 Cal.2d 463, 473-474 [20 Cal.Rptr. 609, 370 P.2d 313]*).

It thus appears that plaintiffs have stated a cause of action under the Cartwright Act, a cause which has been incorporated into each of the 11 counts. The complaint may be specially demurrable, but it states at least one cause of action beyond the reach of a general demurrer. The sustaining of the general demurrers without leave to amend was therefore error. (*Wennerholm* v. *Stanford University School of Medicine* (1942) *supra*, *20 Cal.2d 713, 718-719*; *Eustace v. Dechter (1938) 28 Cal.App.2d 706, 710-711 [83 P.2d 523]*.)

I would reverse the judgment with directions to the trial court to vacate the orders sustaining the demurrers and granting the motions to strike, to overrule the general demurrers, and to rule on the points presented by the special demurrers and the motions **[****56]** to strike.

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Premier Electrical Constr. Co. v. Miller-Davis Co.

United States District Court for the Northern District of Illinois, Eastern Division

September 16, 1968

No. 68 C 407

Reporter

292 F. Supp. 213 *; 1968 U.S. Dist. LEXIS 12560 **; 1969 Trade Cas. (CCH) P72,710

Premier Electrical Construction Company , Plaintiff, v. Miller-Davis Company and St. Arnaud Electric Co. , Defendants

Core Terms

bid, antitrust, treble damages, electrical, general contractor, res judicata, pari delicto, sub-contract, competitors, illegal scheme, allegations, illegality, pleadings

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN1[] **Preclusion of Judgments, Res Judicata**

It is the facts in each case, not the theories, which are crucial in determining the applicability of res judicata.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2[] **Preclusion of Judgments, Res Judicata**

A litigant may not split his claim and have two trials on the same alleged breach of duty.

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3[] **Pleading & Practice, Joinder of Claims & Remedies**

A plaintiff must plead his entire case on all theories at one time.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN4[] Preclusion of Judgments, Res Judicata

Nor will a change in parties necessarily affect the applicability of res judicata.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN5[] Preclusion of Judgments, Res Judicata

A new charge of conspiracy in a second suit brought by plaintiff against defendant was not sufficient to preclude the application of res judicata in the second case.

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN6[] Pleading & Practice, Joinder of Claims & Remedies

Concurrent duplicate litigation is no less undesirable than successive duplicate litigation. In either situation, a second suit violates principles of comity between judges, creates administrative inefficiencies in the federal courts, and imposes an unfair burden on the defendant. Thus, the public policies in favor of a single suit in a single controversy and against contentious litigation remain viable. The pendency of a prior action in the same jurisdiction, between the same parties, and arising out of the same transaction constitutes good grounds for abating the subsequent suit.

Contracts Law > Defenses > Illegal Bargains

Public Contracts Law > Bids & Formation > Mutual Obligation

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

Contracts Law > Defenses > Public Policy Violations

Public Contracts Law > Bids & Formation > General Overview

HN7[] Defenses, Illegal Bargains

A bargain not to bid at any public competition for a contract, having as its primary object to stifle competition, is illegal. The falsification of a bid, in itself and by effectively excluding others from competition, stifles the unfettered operation of the market place. A restraint on price competition and on meaningful access to the market is illegal per se. Rigging competition on a public contract, whether done directly or indirectly, is simply a restraint of trade in violation of public policy and void.

Judges: **[**1]** Marovitz, District Judge.

Opinion by: MAROVITZ

Opinion

[*215] Memorandum Opinion

MAROVITZ, District Judge.

This is a civil antitrust action in which plaintiffs seek to recover treble damages for injuries resulting from an alleged violation of the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*, *15*.

Plaintiff, Premier Electrical Construction Company and defendant St. Arnaud Electrical Company are direct corporate competitors engaged in the electrical construction business. Defendant Miller-Davis is in the general contracting business. On February 3, 1966, the Atomic Energy Commission sent invitations to various general contractors, including defendant Miller-Davis, to submit bids for an addition to the Argonne National Laboratory, Argonne, Illinois. The project was known as the Accelerator Improvement ZGS, FY-65 Meson Building Addition. In order to prepare their bids, the general contractors, including Miller-Davis, then sent invitations to various electrical sub-contractors, including Premier Electrical Construction Company, requesting bids on the electrical work to be performed on the Argonne project.

Plaintiff alleges that sometime between January 15, 1966, and March 3, 1966, a conspiracy **[**2]** arose between Miller-Davis and St. Arnaud such that Miller-Davis would induce St. Arnaud's competitors, including plaintiff, to submit inflated bids to the competitors of Miller-Davis, thereby insuring a successful bid by Miller-Davis and a sub-contract for St. Arnaud. Plaintiff claims that on March 3, 1966, it submitted its bid by telephone to Miller-Davis, was advised that it was the low bidder and, assuming that Miller-Davis was awarded the prime contract, that it, Premier, would be awarded the electrical sub-contract on the condition that it would "protect" Miller-Davis by submitting artificially inflated bids to other general contractors.

In its complaint (para. 12), plaintiff acknowledges that it agreed to "protect" Miller-Davis if Miller-Davis would inform plaintiff of its receipt of a lower bid by a third party so that plaintiff could rebid to defendant's competitors. Miller-Davis did not advise plaintiff of any competitive bid on the electrical sub-contract. Plaintiff did submit high bids to general contractors other than Miller-Davis. The Atomic Energy Commission awarded the contract to Miller-Davis who then gave the sub-contract to defendant St. Arnaud.

On October **[**3]** 13, 1966, in another District Court for the Northern District of Illinois, Eastern Division, plaintiff filed a suit against Miller-Davis entitled Premier Electrical Construction Co. v. Miller-Davis Co., Civil Action No. 66 C 1850. Plaintiff's amended complaint in that case set forth basically the same facts alleged in the present suit, save for the purported involvement of St. Arnaud. The language of the amended complaint in the first suit is virtually identical to that recited in the instant issue, especially in those paragraphs which relate to the agreement to "protect" Miller-Davis. The original action sought $40,000 for breach of contract. Trial ended on March 27, 1968, and the case was taken under advisement. A decision is expected to be rendered shortly. [1] In the present

[1] *Premier Electrical Construction Company v. Miller-Davis Company, 291 F. Supp. 295 (N.D. Ill. 1968)*.

complaint, filed March 4, 1968, plaintiff claims deprivation of profits amounting to $65,000 as its damages and seeks an award of treble damages under 15 U.S.C. § 15.

[4]** Defendant Miller-Davis has moved to dismiss the present suit on the grounds of *res judicata* and *in pari delicto*. Defendant St. Arnaud seeks a judgment on the pleadings based on the doctrine of *in pari delicto*. Defendants admit plaintiff's factual allegations regarding the contract and sub-contract negotiations **[*216]** for the limited purpose of making their motions.

Because its first suit is based on contract while the present case stems from an alleged violation of the Sherman Act, plaintiff suggests that the respective causes of action are "totally separate and distinct in every respect." (Brief at 3). This argument is not well taken. ***HN1***[] It is the facts in each case, not the theories, which are crucial in determining the applicability of *res judicata*. *Wolcott v. Hutchins, 245 F. Supp. 578 (S.D.N.Y. 1965)*, aff'd *365 F.2d 833 (2d Cir. 1966)*. Both of plaintiff's suits arise out of the same operative facts and disputed transactions the end result of which was the failure of plaintiff to secure the electrical sub-contract from Miller-Davis. The mere addition of a new, federal theory will not support new litigation.

The closest case in point to the one at bar is **[**5]** *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961)*. In that case as here, plaintiff first filed a contract action and later sought relief in a civil antitrust suit. Both cases were based on the same refusal of defendant to deal with the plaintiff. The Court of Appeals for the Fifth Circuit held the former case to be *res judicata* of the later one. The Court said at 363-364,

> "It is settled, contrary to appellant's contention, that ***HN2***[] a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed the same 'right' in both suits - the right to purchase Gillette products directly from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the antitrust laws as the basis for the alleged breach. But there was but one breach and one only and appellant has had its day in court and has lost. **[**6]** It cannot litigate this same breach again. "

Plaintiff relies on *Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964)* and *Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 71 L. Ed. 1069, 47 S. Ct. 600 (1927)*. In *Engelhardt*, however, a decision in an earlier suit under Missouri ***antitrust law*** was held to be *res judicata* in the later suit brought under federal antitrust statutes despite the incorporation of more specific allegations of interference in interstate commerce and a prayer for a different amount of damages. ***HN3***[] A plaintiff must plead his entire case on all theories at one time. *Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320, 71 L. Ed. 1069, 47 S. Ct. 600 (1927)*; *Engelhardt v. Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964)*. This plaintiff has not done. In fact, Premier filed the present suit within a few weeks prior to the trial of its original suit against Miller-Davis.

HN4[] Nor will a change in parties necessarily affect the applicability of *res judicata*. See, e.g., *Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 71 L. Ed. 1069, 47 S. Ct. 600 (1927)*. In *Koblitz v. Baltimore and Ohio Railroad Co., 164 F. Supp. 367 (S.D.N.Y. 1958)*, the Court held that **[**7]** ***HN5***[] a new charge of conspiracy in a second suit brought by plaintiff against defendant was not sufficient to preclude the application of *res judicata* in the second case. The Court said, at 372,

> "Here the wrongs complained of, the harm to the plaintiff and the recovery sought are substantially identical. The same witnesses and the proof of the same facts would be necessary to establish the allegations of the prior complaint and would support both actions. * * *
> "To the extent, if at all, that the allegations of the present complaint are dissimilar to those in the prior action, all the facts now pleaded were known to the plaintiff and could have been presented in the first action."

[*217] As to defendant Miller-Davis, *res judicata* would be a good defense if there were a final judgment in the first suit. While a decision is expected in a few days, such a final judgment has not yet been handed down. However, ***HN6***[] concurrent duplicate litigation is no less undesirable than successive duplicate litigation. In either situation, a second suit violates principles of comity between judges, creates administrative inefficiencies in the federal courts, and imposes an unfair burden **[**8]** on the defendant. *Eastern States Petroleum & Chemical Corp. v. Walker, 177 F. Supp. 328, 333 (S.D. Tex. 1959)*; *Emerson Electric Manufacturing Co. v. Emerson Radio and Phonograph Co., 140 F. Supp. 588, 589 (D.N.J. 1956)*. Thus, the public policies in favor of a single suit in a single controversy and against contentious litigation remain viable. *Asbury v. Chesapeake & Ohio Railway Co., 264 F. Supp. 437, 438 (D. Col. 1967)*; *Paluchowska v. United States Lines Co., 93 F. Supp. 751, 752 (S.D.N.Y. 1950)*. The pendency of a prior action in the same jurisdiction, between the same parties, and arising out of the same transaction constitutes good grounds for abating the subsequent suit. *Commerce Oil Refining Corp. v. Miner, 303 F.2d 125 (1st Cir. 1962)*. Consequently, the motion to dismiss of defendant Miller-Davis is granted.

Defendant St. Arnaud was not a party in the original action brought by Premier and may not now plead *res judicata* or take advantage of abatement. St. Arnaud's motion for judgment on the pleadings is based on the defense of illegality. Miller-Davis has adopted the arguments of St. Arnaud as additional support for its motion to dismiss. The Court is faced with two **[**9]** questions: whether plaintiff's agreement with Miller-Davis is illegal and, if illegal, whether plaintiff is barred from recovery of treble damages in a civil antitrust suit.

Defendants claim that Premier is seeking to collect on an illegal bid-rigging agreement. Plaintiff, in his complaint, affirmatively pleaded that, as consideration for a promise of business, it agreed to "protect" Miller-Davis by submitting higher bids to other general contractors, but now suggests that such conduct is not illegal because the agreement was not between direct competitors. Premier even asserts that its agreement "could only promote competition between the various contractors removed itself from competition." (Brief at 9).

That Premier's conduct is illegal is clear. In accord with a secret agreement with one of the defendants, plaintiff presented artificially inflated bids to all general contractors who were competitors of Miller-Davis. By failing to submit the same low bid on the sub-contract to all general contractors, plaintiff intended to insure the success of one favored party. ***HN7***[] "A bargain not to bid at . . . any public competition for a . . . contract, having as its primary object to stifle **[**10]** competition, is illegal." *Restatement, Contracts § 517* (1932). The falsification of a bid, in itself and by effectively excluding others from competition, stifled the unfettered operation of the market place. A restraint on price competition and on meaningful access to the market is illegal *per se*. *United States v. General Motors Corp., 384 U.S. 127, 145-147, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Rigging competition on a public contract, whether done directly or indirectly, is simply a restraint of trade in violation of public policy and void. See generally, Corbin, Contracts § 1468 (1962).

Plaintiff attempts to avoid the impact of these clear rules, claiming that it was not a direct competitor with the other party to the protection agreement. However, the particular form taken by the agreement, whether price fixing or profit sharing, horizontal or vertical, is really immaterial. *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207,* ***[*218]*** *3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. **[**11]** Thus, in *Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965)*, cert. denied, *384 U.S. 918, 16 L. Ed. 2d 439, 86 S. Ct. 1365 (1966)*, it was held that foreclosure of a subcontractor's competitive bid to general contractor by repressive rules of a bid depository association was illegal.

Given, then, that plaintiff's conduct is illegal, may he nevertheless recover treble damages in a civil antitrust suit? Plaintiff submits that the recent Supreme Court decision in *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*, precludes defendants' use of the doctrine of *in pari delicto*, under which a court will not entertain a suit brought by a party in equal fault with the defendant(s). At first blush, plaintiff seems correct for Mr. Justice Black, in announcing the Court's decision, held "that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *392 U.S. at 140*.

A closer look at the opinion, however, suggests that the quoted statement neither deserves nor was intended to have universal application. The Court's **[**12]** opinion rests on two pillars: one, mere participation in an illegal scheme is not a sufficiently serious wrong to warrant denial to plaintiff of his chance in court and, two, the public policy in favor of competition is furthered by allowing private suits for treble damages. The opinion stresses and must be read in light of the facts. In the Court's view, plaintiff's lack of initiative and commitment to the illegal scheme was crucial. Thus, "their (petitioner's) participation was not voluntary in any meaningful sense," "many of the clauses were quite clearly detrimental," "acquiescence was necessary," and "plaintiff did not aggressively support . . . the scheme." Rather, the arrangement was "formulated and carried out by others" and "thrust upon them" by defendants. *392 U.S. at 139-141*. On these facts, Mr. Justice Black held that plaintiffs could maintain their action.

However, the Court refused to go farther, to extend its decision to cover cases involving a more tainted petitioner. Mr. Justice Black, at 140, said:

> "We need not decide, however, whether such truly complete involvement and participation in (a) monopolistic scheme could ever be a basis, wholly apart from **[**13]** the idea of *pari delicto*, for barring a plaintiff's cause of action . . . ."

That the defense of illegality is still viable in civil antitrust actions is further supported by the other four opinions in the case. Mr. Justice White, in his concurring opinion, stated that a condition precedent to allowing a tainted plaintiff to proceed with a treble damages suit was that plaintiff's participation was coerced or thrust upon him. He cautioned, however, that a moving force "should not be rewarded for his efforts to further an unlawful price arrangement" and take from defendant treble damages. *392 U.S. at 145*. The approach of Mr. Justice Fortas was similar for he said that a co-adventurer, one who "originated and insisted" upon the illegal scheme could not recover damages. *392 U.S. at 147-148*, Mr. Justice Marshall would allow the defense of illegality against a plaintiff who "actively participated in the formulation and implementation" of the illegal scheme. *392 U.S. at 149*. Justices Harlan and Stewart agree that *in pari delicto* has its place in antitrust cases. *392 U.S. at 153*.

Thus, in each of the five opinions in the case, the door was left open for a limited application **[**14]** of a defense of illegality in civil antitrust actions. The distinctions drawn throughout the various opinions are particularly relevant here. Premier is not a mere participant **[*219]** or unwilling victim of the transaction out of which this case arose. Rather, Premier was an originating, moving, active and aggressive party to the illegal bid-rigging scheme. There is no indication that the Supreme Court sought to protect a plaintiff so intensely involved in an illegal restraint on trade.

Moreover, it is difficult to see how allowing a suit for treble damages, under the facts in this case, would be consistent with the purposes of the antitrust laws, the second main rationale advanced by Mr. Justice Black for his decision in *Perma Life*. Discussing an example similar to the present case, Mr. Justice White noted, at 146:

> "To permit him a recovery may be a counter-deterrent. By assuring him illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent."

Conversely, if allowing relief would be counterproductive, and possibly add an undesirable incentive to violate the law, denial **[**15]** of relief to plaintiff, as the Supreme Court has recognized for many years will, more probably, discourage involvement in illegal schemes.

> "The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law . . . the less inclined will they be to enter into them. In that way the public secures the benefit of rigid adherence to the law." *McMullen v. Hoffman, 174 U.S. 639, 670, 43 L. Ed. 1117, 19 S. Ct. 839 (1899)*.

Plaintiff in this case initially violated the law in an attempt to secure a public contract. Having failed, it now seeks not just refuge, but reward in this court. We find no sanctuary in the *Perma Life* decision for a plaintiff like this. If ever a party was to be barred from recovering treble damages, it is Premier. While we sanction the defense of illegality, call it *in pari delicto* if you will, in these circumstances, it is not, of course, because of our approval of defendants' actions, but because the law will not enforce what is forbidden, and "will leave the parties as it finds them." *McMullen v. Hoffman, 174 U.S. 639, 670, 43 L. Ed. 1117, 19 S. Ct. 839 (1899)*. Consequently, **[**16]** plaintiff will not be permitted, having attempted to avoid the burdens, now to reap the benefits of the law. The respective motions of Miller-Davis and St. Arnaud to dismiss and for judgment on the pleadings are granted.

Rader v. Balfour

United States District Court for the Northern District of Illinois, Eastern Division.

September 16, 1968.

No. 67 C 1118.

Reporter

1968 U.S. Dist. LEXIS 12145 *; 1969 Trade Cas. (CCH) P72,709

John C. Rader v. Lloyd G. Balfour, et al.

Core Terms

fraternities, suspended, diligence, insignia, Limitations, running of the statute, anti trust law, deposition, antitrust, monopoly, statute of limitations, Clayton Act, Federal Trade Commission Act, concealment, manufacture, fraudulent, commerce

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Clayton Act, Defenses**

The statute of limitations applicable to antitrust actions is § 4B of the Clayton Act, 15 U.S.C.S. § 15(b), which provides, any action to enforce any cause of action under §§ 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] **Antitrust & Trade Law, Clayton Act**

See 15 U.S.C.S. § 15(b).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Antitrust & Trade Law > Clayton Act > 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

Governments > Legislation > Statute of Limitations > Tolling

HN3[] **Entitlement as Matter of Law, Appropriateness**

Although fraudulent concealment of alleged anti-trust violations will suspend the running of the statute of limitations, tolling of the statute is not suspended where it is established that a plaintiff knew, or in the exercise of ordinary diligence, should have known of the alleged violation within the statutory period. Where lack of due diligence by the plaintiff in pursuing his claim is clearly shown on a motion for summary judgment, entry of summary judgment on the issue of statute of limitations is appropriate, notwithstanding the allegations of fraudulent concealment.

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

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

See 15 U.S.C.S. § 16(b).

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

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

HN5[] **Public Enforcement, US Federal Trade Commission Actions**

The meaning of the term "antitrust laws" was not left to judicial interpretation, but was defined by Congress in *§ 1* of the Clayton Act, *15 U.S.C.S. § 12*. The Federal Trade Commission Act is not one of the laws specified in *Section 1*.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN6[] **Public Enforcement, US Federal Trade Commission Actions**

A Federal Trade Commission proceeding brought solely to enforce the Federal Trade Commission Act will not suspend the running of the statute of limitations, under *15 U.S.C.S. § 16(b)*.

Opinion by: [*1] NAPOLI

Opinion

Memorandum Opinion

NAPOLI, D.J.: Plaintiff John C. Rader filed this action on June 28, 1967, seeking treble damages, pursuant to section 4 of the Clayton Act (*15 U.S.C.A. § 15*), for injuries alleged to have been caused by alleged violation by defendants of *sections 1* and *2* of the Sherman Act (*15 U.S.C.A. §§ 1* and *2*). Named as defendants herein are Lloyd G. Balfour, 3 corporations owned or controlled by Balfour interests, and 152 college fraternities and sororities. Plaintiff alleges that the Balfour companies, which are engaged in the business of manufacturing, distributing and selling insignia goods [1] in interstate commerce, have conspired among themselves and with the fraternity defendants, in order to limit and control the manufacture, distribution, and sale of insignia goods in Interstate Commerce; to regulate, control and increase the prices charged the public for insignia goods; to prescribe, regulate and control the relations between fraternities and manufacturers, distributors and vendors of insignia goods; to oppress and discriminate against smaller independent persons in the insignia goods business, such as plaintiff; to impose unreasonable restrictions **[*2]** upon the trade and business of the independents; and to substantially eliminate competition from the independents, including plaintiff, and to obtain a monopoly of the insignia goods business for the Balfour defendants. As a result, plaintiff alleges that he was forced to sell the business he operated from 1941 until September 1961, under the name Old Hickory Paddle Company, at a price far less than if he had been able to engage in the insignia goods business in a free and open market.

Several defendants have raised the defense of statute of limitations, either in their answers or by way of motion. **HN1[]** The statute of limitations applicable to antitrust actions in section 4B of the **[*3]** Clayton Act, *15 U.S.C. § 15(b)*, which provides,

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[1] Plaintiff defined the term "insignia goods" as follows: "The distinctive rings, badges, keys, pins, buttons, seals, emblems, and plaques and other miscellaneous items which all bear distinctive insignia, device, name, crest, emblem or initial, including but not limited to such items as wearing apparel, decorative items, ceramics, paper products, glasswork, wooden plastic products and other sundry items of personal property, all of which or some of which are used by fraternities and sororities.

HN2[] Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Since plaintiff went out of business in September of 1961, and this action was not filed until June of 1967, it is contended that the four year statute of limitations constitutes a bar to this action.

Plaintiff admits that the applicable period is four years, but contends that because the conspiracy has been fraudulently concealed, and because plaintiff allegedly did not learn of the conspiracy until March 27, 1967, that the statute of limitations does not bar his action. In the alternative plaintiff contends that the statute of limitations has been suspended since June 16, 1961, the date certain Federal Trade Commission proceedings against the Balfour defendants began.

On June 16, 1961, the Federal Trade Commission brought an administrative action pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, against L. G. Balfour Company Lloyd G. Balfour and Burr, Patterson & Auld Company, Docket 8435, charging these respondents with **[*4]** certain acts and practices having the tendency and capacity unlawfully to restrain, lessen, and eliminate competition and to create a monopoly in the manufacture, sale, and distribution of college and class rings and commercial jewelry, in commerce; with unlawfully restraining, lessening, and eliminating competition and creating a monopoly in the sale and distribution of "official" miscellaneous equipment bought by members of the national Greek-letter social fraternities and sororities, in commerce; with monopolizing the manufacture, sale, and distribution of fraternity insignia jewelry; and with monopolizing the sale and distribution of a full line of insignia-bearing products, particularly the jewelry and "official" miscellaneous equipment purchased by members of the national Greek-letter social fraternities and sororities, in commerce, within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

For the reasons which follow, this Court is of the opinion that plaintiff has not sufficiently shown that a genuine issue of material fact exists on the issue of fraudulent concealment; and that the proceedings before the Federal Trade Commission did not suspend **[*5]** the running of the applicable statute of limitations.

HN3[] Although fraudulent concealment of alleged anti-trust violations will suspend the running of the statute of limitations, Allis-Chalmers v. Commonwealth Edison Co. , 315 F.2d 558 (7th Cir., 1963), tolling of the statute is not suspended where it is established that plaintiff knew, or in the exercise of ordinary diligence, should have known of the alleged violation within the statutory period. Where lack of due diligence by plaintiff in pursuing his claim is clearly shown on a motion for summary judgment, entry of summary judgment on the issue of statute of limitations is appropriate, notwithstanding the allegations of fraudulent concealment. Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp. , 254 F.Supp. 855 (N.D. Ill. 1966).

The record on the pending motion for summary judgment, which includes plaintiff Rader's sworn testimony before the Federal Trade Commission on October 26, 1961, and his deposition taken in this action, shows positively that he had knowledge of sufficient facts more than four years prior to the filing of this suit, to put him on notice of his alleged claim, thereby giving rise to a duty **[*6]** of due diligence in its pursuit; and that plaintiff did not exercise due diligence.

Plaintiff's 1961 testimony before the Federal Trade Commission shows conclusively that at that time he was aware of these so-called "official jeweler contracts" between the Balfour companies and the fraternities; and that the existence of these exclusive dealing arrangements between the fraternities and the Balfour companies made it impossible for plaintiff or other independent insignia goods firms to sell to the fraternities. Plaintiff testified to several instances where price cutting tactics had been used to drive him out of the market. He testified to instances where his salesmen and he himself had not been permitted to display their merchandise in individual fraternity houses.

At his deposition, plaintiff specifically admitted that he knew, in 1961, that the Federal Trade Commission was investigating the Balfour monopoly:

Q. So you didn't know what you were going to testify about when you came to Chicago this morning?

A. I knew this, that it was an examination of the Balfour Company, and the monopoly the Balfour Company were supposed to have.

Elsewhere, plaintiff referred to "the **[*7]** situation that I felt the FTC was examining, which was whether or not the Balfour Company was setting up a monopoly to restrain trade." Plaintiff also testified at this deposition,

Well, I was pretty much annoyed with the L. G. Balfour Company. And, I believed been damaged. Not that I expected any brought documents setting forth that I had been damaged. Not that I expected any relief, but just because I felt that way.

In his deposition, plaintiff Rader further testified to his knowledge of circumstances connecting the fraternities with the alleged antitrust violations. He testified that he had received several letters from the various fraternities, saying that their individual "coat of arms" were "patented," and not to be used without their "okay." He testified that he was "stopped" from selling Christmas cards to the fraternities who said they had official contracts with Balfour. Plaintiff's knowledge of participation of the fraternities in the alleged conspiracy is further revealed in his deposition testimony that in 1961 he tried to dissuade eventual purchasers of his company, the Old Hickory Paddle Company, from making the purchase:

Q. What was one of the reasons you **[*8]** gave them as to why it wasn't a good buy?

A. The pressures from the contracted monopoly between the fraternities and two or three suppliers made it a rough business and it was too hard to make a profit in it.

Finally, plaintiff's lack of diligence in pursuing his claim is shown by his deposition testimony that after testifying before the Federal Trade Commission, plaintiff did nothing further until March of 1967, when he "came across" a file containing documents he had presented to the FTC back in 1961, along with the business card of his attorney, whom he had met during the FTC hearings back in 1961. Not until plaintiff was about to throw out these materials in 1967, did he finally decide to follow up and call this attorney. Thus plaintiff's decision to finally follow up his claim came over 5 years after he originally had access to the information sufficient to place upon him the duty of diligence.

Plaintiff's conclusory affidavit filed in opposition to the motion for a summary judgment, which states "That prior to on or about January 2, 1967, he had no personal knowledge of the particular relationships or facts as alleged in his complaint in the above described action, **[*9]** which alleges a conspiracy among the defendants', is insufficient to raise a genuine issue of fact for trial. It does not contradict the admissions of plaintiff in his FTC testimony and his deposition here, which show that he had knowledge of sufficient facts to place upon him a duty of exercising due diligence to make his own inquiry into the facts, and to diligently pursue his claim. The duty of exercising diligence in pursuit of a claim does not arise only after knowledge of every particular circumstance involved in the claim.

It is clear from the record that plaintiff slept on his rights. Accordingly, this Court holds that the running of the Statute of Limitations was not suspended by defendants' alleged attempts at fraudulent concealment of their alleged antitrust violations.

Plaintiff's alternate contention is that the running of the Statute of Limitations was suspended under section 5(b) of the Clayton Act, *15 U.S.C. § 16(b)*, which provides,

HN4[] Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws … the running of the statute of limitations in respect of every private right **[*10]** of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter …

Defendant contends that Section 5(b) does not suspend the running of the Statute of Limitations here, since the Federal Trade Commission proceeding was a proceeding to enforce Section 5 of the Federal Trade Commission Act, not a proceeding to enforce one of the "antitrust laws." ***HN5***[] The meaning of the term "antitrust laws" was not left to judicial interpretation, but was defined by Congress in *Section 1* of the Clayton Act, *15 U.S.C. § 12*. The Federal Trade Commission Act is not one of the laws specified in *Section 1*.

The Supreme Court in *Nashville Milk Co. v. Carnation Co. , 355 U.S. 373 (1958)* ruled that the definition in *Section 1* is "exclusive," thus preventing expansive judicial interpretation of the term as applicable to other laws, such as the Robinson Patman Act, which may be colloquially referred to as "antitrust" statutes.

It is clear from an examination of the complaint filed before the Federal Trade Commission against the Balfour defendants, that the Federal Trade Commission was **[*11]** not bringing its action under one of the anti-trust laws, such as the Sherman or Clayton Acts, but was proceeding exclusively under Section 5 of the Federal Trade Commission Act. It is this circumstance which distinguishes *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co. , 381 U.S. 311 (1965)* (hereinafter referred to as "3M"). In that case the Supreme Court held that a prior FTC proceeding had suspended the running of the Statute of Limitations as to a private antitrust suitor. However, the FTC in that case was seeking to enforce Section 7 of the Clayton Act. The Court found that suspension under Section 5(b) should not turn on whether it was the justice department or the Federal Trade Commission which was seeking to enforce an ***antitrust law***. In the case at bar, on the other hand, the FTC proceeding was not one to enforce an "***antitrust law***" as that term is specifically defined in *Section 1* of the Clayton Act; the FTC proceeding was an administrative proceeding dealing with a much broader category of regulation than what is forbidden in the "antitrust laws."

This Court accordingly recognizes the distinction made by the Court below in 3M, between an FTC proceeding **[*12]** brought to enforce some provision of the "antitrust laws", and an FTC proceeding brought to enforce only the Federal Trade Commission Act. See *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co. , 332 F.2d 346 (1964)*. I hold that ***HN6***[] a Federal Trade Commission proceeding brought solely to enforce the Federal Trade Commission Act will not suspend the running of the Statute of Limitations, under *15 U.S.C. § 16(b)*; and that all defendants here are accordingly entitled to entry of judgment in their favor. [2].

End of Document

[2] Because the Court has concluded that the Federal Trade Commission Docket 8435 was not a proceeding to enforce the anti-trust laws, it will be unnecessary to consider the fraternity defendants' alternative contention, that Section 5(b) of the Clayton Act could not possibly suspend the running of the Statute of Limitations as to them, since they were not named either as respondents or as co-conspirators in the FTC action.

Stanton v. Texaco, Inc.

United States District Court for the District of Rhode Island

September 18, 1968

Civil Action No. 3300

Reporter

289 F. Supp. 884 *; 1968 U.S. Dist. LEXIS 12563 **; 1968 Trade Cas. (CCH) P72,595

Daniel B. Stanton v. Texaco, Inc.

Core Terms

consignment, gasoline, retail, conspiracy, purchaser, dealers, prices, Robinson-Patman Act, Sherman Act, antitrust, petroleum product, treble damages, decisions, cases, restraint of trade, summary judgment, instant case, consignee, vertical, genuine, station, lease, recent decision, resale price, retroactively, purposes, asserts

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See 15 U.S.C.S. § 15.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN3[] **Antitrust & Trade Law, Robinson-Patman Act**

See 15 U.S.C.S. § 13(a).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN4[] Subject Matter Jurisdiction, Jurisdiction Over Actions

See *28 U.S.C.S. § 1337*.

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN5[] Summary Judgment, Supporting Materials

Fed. R. Civ. P. 56(b) states in pertinent part: a party against whom a claim is asserted may at any time move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Governments > Legislation > Effect & Operation > Prospective Operation

HN6[] Effect & Operation, Prospective Operation

Where the retrospective application of a newly declared doctrine would upset a party's justifiable reliance to the party's substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. There is no reason why the considerations which favor only prospective application should not be applied as well in the civil area, especially in a treble damage action.

Governments > Legislation > Effect & Operation > Prospective Operation

Patent Law > Remedies > Damages > Increased Damages

Torts > Business Torts > General Overview

HN7[] Effect & Operation, Prospective Operation

Because of the important social purposes sought to be effectuated by the antitrust laws, decisions upholding business practices which are arguably violative of the antitrust laws should be read narrowly, while decisions condemning business practices should be read broadly. The rule of non-retroactivity is dissatisfactory. Plaintiff, who takes the risk and cost of the litigation derives no benefit, even though there is a judicially recognized wrong, while all subsequent persons similarly situated take, parasite-like, the full benefit of the plaintiff's path breaking. Moreover, a rule of non-retroactivity totally ignores the compensatory aspect of a treble damages award. The purpose of a treble damages award is not solely to deter the violator, but also to compensate the injured party.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

HN8[ ] Antitrust & Trade Law, Sherman Act

Resale price maintenance is per se illegal under the Sherman Act, 15 U.S.C.S. § 1, because it constitutes an unjustifiable restraint on trader discretion in pricing practices, and because it tends to lessen horizontal competition at the retail level.

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

HN9[ ] Price Fixing & Restraints of Trade, Vertical Restraints

A supplier may not use coercion on its retail outlets to achieve resale price maintenance.

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

Contracts Law > Types of Contracts > Lease Agreements > General Overview

International Trade Law > General Overview

HN10[ ] Price Fixing & Restraints of Trade, Vertical Restraints

If a consignment agreement achieves resale price maintenance in violation of the Sherman Act, 15 U.S.C.S. § 1, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices. The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of the schemes condemned by the antitrust laws.

Judges: [1]** Pettine, District Judge.

Opinion by: PETTINE

Opinion

[*886] PETTINE, District Judge.

This is a private action seeking treble damages under 15 U.S.C. Sec. 15 [1] **[**2]** for alleged violation of the restraint of trade section of the Sherman Act, 15 U.S.C. Sec. 1 [2] and of the price discrimination section of the Robinson-

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[1] **HN1**[ ] 15 U.S.C. Sec. 15 states:

> 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 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.

The plaintiff also seeks injunctive relief under 15 U.S.C. Sec. 26. The relationship between the plaintiff and defendant has long since ceased, and injunctive relief is not appropriate here. The cases cited by plaintiff in his pretrial memorandum are inapposite.

[2] **HN2**[ ] 15 U.S.C. Sec. 1 states in pertinent part:

Patman Act, *15 U.S.C. Sec. 13*. [3] **[**3]** This court has jurisdiction under *15 U.S.C. Sec. 15* and *28 U.S.C. Sec. 1337*. [4]

The plaintiff, who did business as the Hoxie Four Corners Texaco Station, was a gasoline service station lessee and operator between August, 1961 and late June or early July, 1964. The plaintiff was located in an area of Warwick, R.I. densely populated with retail gasoline service stations. It is understatement to say that the competition is active among service station operators within this geographical **[*887]** zone for the gasoline business of the motoring public. The defendant is a major national oil corporation which leased the plaintiff his gasoline station properties, supplied him petroleum products, and consigned him gasoline, all in accordance with detailed and specific written agreements.

The plaintiff claims that the defendant distributed gasoline to him and, under the terms of the consignment agreement, fixed the minimum resale **[**4]** price of that gasoline in violation of *Sec. 1* of the Sherman Act; that his attempts to lower prices in order to remain competitive were thwarted by the termination of the consignment agreement and the cancellation of his lease, and that as a result of these practices by the defendant, he was injured in his business in the amount of $10,000. The plaintiff also claims that the defendant distributed gasoline to him at a price higher than that charged three other retail Texaco service stations in the same geographic area in violation of Sec. 2(a) of the Robinson-Patman Act.

The defendant has moved for summary judgment [5] pursuant to *Fed. R. Civ. P. 56(b)*, [6] stating that there is no genuine issue of material fact, and that under the law as applied to the allegedly non-disputed facts, it is entitled to judgment. [7] More specifically, the defendant states (1) that the *Sec. 1* Sherman Act case law upon which plaintiff

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> 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 . . . .

The plaintiff's complaint also alleges a violation of Sec. 2 of the Sherman Act. Yet, there are no facts stated by plaintiff in any of the documents before this court which even hint at the existence of a monopoly or the assertion of monopolistic power. The court therefore strikes the plaintiff's allegation of a Sec. 2 violation.

[3] ***HN3***[] *15 U.S.C. Sec. 13(a)* states in pertinent part:

> It shall be unlawful for any person engaged in 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 to 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 . . . .

The plaintiff's pre-trial memorandum, filed some three-and-a-half years after his complaint, alleges violations of *15 U.S.C. Secs. 13(c)(d)* & *(e)*. Again, there is nothing in the record to buttress such tardy and conclusory allegations. The court therefore strikes the plaintiff's allegations of Secs. 2(c)(d) & (e) violations.

[4] ***HN4***[] *28 U.S.C. Sec. 1337* states:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[5] This is actually a renewed motion for summary judgment. Judge Day originally denied the defendant's motion. This court then decided it had the power to reconsider the denial and entertain a renewed motion, especially in the light of the decision of the district court on remand in *Simpson v. Union Oil Co., 270 F. Supp. 754 (N.D. Calif. 1967)*.

[6] ***HN5***[] *Fed. R. Civ. P. 56(b)* states in pertinent part:

> A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

relies, *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*, must not be applied retroactively, and, under prior established law construing *Sec. 1*, *U.S. v. General Electric Co., 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)*, defendant's motion **[**5]** must be granted, (2) that even if *Simpson* is the applicable law, defendant's motion must be granted because either (a) there is no restraint of trade because neither the vast distributional system nor the coercive element present in *Simpson* is present in the instant case, or (b) there is no combination or conspiracy in restraint of trade to which defendant is a party, or (c) there is no damage to the plaintiff proximately resulting from the restraint of trade, because the plaintiff was at all times free to shift to a purchase and sale arrangement and hence his own voluntary adherence to the consignment arrangement was the cause of this inquiry, or (d) the plaintiff is *in pari delicto* with the defendant. With respect to Sec. 2(a) of the Robinson-Patman Act, defendant states that (1) the plaintiff is not a purchaser, because gasoline is distributed to him only on a consignment basis; (2) that even if plaintiff is a purchaser, those Texaco dealers with whom plaintiff competes are not purchasers from Texaco but rather from Pennsylvania Petroleum Products Co., an independent wholesaler-jobber; and (3) that plaintiff is not in competition with Pennsylvania Petroleum Products **[**6]** Co. because plaintiff operates exclusively on the retail level selling to gasoline consumers, while Pennsylvania **[*888]** Petroleum Products Co. operates exclusively on the wholesale distributional level selling to gasoline retailers.

[7]** Although the motion for summary judgment serves a useful purpose in expediting judicial administration and foreclosing cases of no merit from the time-consuming and costly process of litigation, its effect, if granted, is so potent that it should be used with great caution. This is especially so with respect to antitrust suits, where appellate decisions treating important questions of public policy are dependent upon well-developed factual records. See *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *White Motor Co. v. U.S., 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)* (see especially concurring opinion of Mr. Justice Brennan); *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* (dissenting opinion of Mr. Justice Stewart and memorandum of Mr. Justice Brennan and Mr. Justice Goldberg). The recent decision of the Supreme Court in *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)* is not a blanket endorsement of the summary judgment procedure in antitrust cases. In fact, that summary judgment in the defendant's favor was granted only because **[**8]** of the plaintiff's failure to establish an inference of conspiracy on any reasonable, common sense theory not wholly contradicted by the undisputed facts. There, the plaintiff sought to support an inference of conspiracy between parties whose interests were discordant. Here, however, the plaintiff asserts a plausible theory of vertical combination in restraint of trade. [8]

Against a background of caution, then, this court approaches, first, a statement of the applicable law, and second, an inquiry into the issuability of the factual material before it.

The Law - The Sherman Act Claim

Retroactivity of Simpson v. Union Oil Co.

The defendant asserts that the decision of the Supreme Court in *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* should be given prospective effect only. The defendant states that the law prior to *Simpson* clearly permitted price fixing by way **[**9]** of the agency-consignment distribution mechanism. *U.S. v. General Electric Co., 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)*. The defendant then seeks to establish its

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[7] The record before this court for purposes of the summary judgment includes (1) the complaint, (2) the answer, (3) the original motion for summary judgment, (4) the original affidavit of P. R. Whitcomb, a Texaco employee, (5) the Texaco sale agreement - Exhibit A, (6) the Texaco consignment agreement - Exhibit B, (7) the defendant's original brief in support of its original motion, (8) the plaintiff's original brief in opposition to the defendant's original motion, (9) Judge Day's decision denying summary judgment, (10) the defendant's motion and memorandum concerning this court's power to reconsider, (11) the decision of this court to reconsider, (12) the defendant's renewed motion for summary judgment and supporting brief, (13) the deposition of the plaintiff, Stanton, and (14) the pre-trial memoranda of the two parties.

[8] See infra, this opinion, Sherman Act, *Sec. 1* Restraint of Trade and Combination or Conspiracy.

reliance upon General Electric by a comparison of the consignment arrangement there with the consignment agreement in the present case. The defendant finally asserts that its reliance was reasonable. In support of its position the defendant cites principally the decision of the District Court upon remand in *Simpson, 270 F. Supp. 754 (N.D. Calif. 1967)*, and another decision, *Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964)*. Both of those cases, however, reveal that the courts' decisions as to the retroactivity of *Simpson* were made only *after* trial, when the courts had received evidence concerning the actuality of reliance and its reasonability. Neither of those cases, moreover, could have been decided in the light of the very recent decision of the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In that case, the Supreme Court stated:

> The theory of the Court of Appeals seems to have been that when a **[**10]** party has significantly relied upon a clear and established doctrine, and ***HN6***[] the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of **[*889]** the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.

The Court then went on to develop the lack of a clearly established older doctrine changed abruptly by innovative principles. By the same reasoning, this court suggests that *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051* ***[**11]*** *(1964)*, was not nearly the radical departure from established ***antitrust law*** which defendant claims it to be. In fact, in *Simpson* itself the Supreme Court states that *General Electric* should have been read as limited exclusively to situations involving patents. Indeed, it might be argued as a general principle that stability is not the most important characteristic of decisions regulating business conduct with respect to the antitrust laws, and that ***HN7***[] because of the important social purposes sought to be effectuated by the antitrust laws, decisions upholding business practices which were arguably violative of those laws should be read narrowly, while decisions condemning business practices should be read broadly. There are still further reasons why a rule of non-retroactivity is dissatisfactory. Perhaps the most basic is that the plaintiff, who takes the risk and cost of the litigation derives no benefit, even though there is a judicially recognized wrong, while all subsequent persons similarly situated take, parasite-like, the full benefit of the plaintiff's pathbreaking. Moreover, a rule of non-retroactivity totally ignores the compensatory aspect of a treble damages award. **[**12]** It must be remembered that the purpose of a treble damages award is not solely to deter the violator, but also to compensate the injured party. At the very minimum, one-third of every treble damages award is devoted solely to the restoration of the plaintiff's competitive status. Perhaps the underlying reason for the various courts' decisions not to apply the *Simpson* case retroactively is the genuine fear that persons who relied upon what they deemed to be the law, and who are, hence, non-culpable persons, are burdened with punitive damages, at least with regard to approximately two-thirds of the judgment. One solution to this problem may be to allow the defendant to mitigate damages. While it is possible that the imperative mode of the treble damages statute precludes such a solution, the equities are strong enough to suggest an innovative case-law gloss. See Comment: Retroactive Application of Overruling Decisions in Antitrust Treble Damages Suits. 1967 U. Ill. L. Forum 837. For purposes of this motion for summary judgment, then, this court holds that *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* is applicable. The court, however, suggests **[**13]** that evidence be presented at trial as to the actuality and reasonability of the defendant's reliance on *General Electric*. The court further suggests that all counsel give consideration to the previously mentioned mitigation of damages theory. Finally, the court invites reconsideration of this question of law after trial.

Sec. 1 *Restraint of Trade*

HN8[] Resale price maintenance is *per se* illegal under *Sec. 1* of the Sherman Act because it constitutes an unjustifiable restraint on trader discretion in pricing practices, *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, and because it tends to lessen horizontal competition at the retail level. *U.S. v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*; *U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*.

Whether what is *per se* impermissible if done by way of sale - price fixing, in **[*890]** this case - becomes permissible when carried out by way of consignment or agency is a much mooted question. Defendant states that it does and seeks to avoid the impact of *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* **[**14]** by distinguishing it on two grounds: (1) the coercive element of consignment selling brought about in *Simpson* by forcing the retailer to either sell on consignment or not sell at all is absent from this case where the consignee is free to change to a number of different possible programs, including a purchase and sale program; and (2) the large-scale use of consignment price-fixing present in *Simpson* is not present in the instant case. Defendant reads *Simpson* too narrowly. In that case, in response to the defendant's argument that dealers were free to refuse to deal with the defendant if they objected to its price-rigging, the Court stated:

> If that were a defense, a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs, merely by fear of nonrenewal of short-term leases.
>
> We made clear in *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505*, that *HN9*[] a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that *it matters not what the coercive device is*.

In the instant case, the defendant has simply added other supposed **[**15]** options to the dealer's right to refuse to sell. But if those are not realistic competitive options - and the plaintiff has claimed they are not - then the dealer is put to the same futile choice here as he was in *Simpson:* follow the prices or get out. Nor is the vastness of the defendant's system a *sine qua non* for a *Sec. 1* violation. Admittedly, the defendant in *Simpson* maintained prices on a broad scale. But *Simpson* was a Sec. 2 monopoly as well as a *Sec. 1* restraint case. Moreover, in the light of *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, a vertically imposed price restraint operating upon only a single dealer could be a violation of *Sec. 1*. To say the least, when a major national oil company uses a consignment agreement, policed by a lease, to maintain the gasoline prices of its dealer-lessee, there is sufficient restraint on alienation and possible threat to dealer competition to mandate a trial on the matter. *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*.

Contrary to the theory of at least one person, see Hitchcock, **[**16]** Schwinn: Coaster Brake for Simpson?, 54 A.B.A.J. 574 (June, 1968), the recent decision of the Supreme Court in *U.S. v. Arnold Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)* does not condone vertical price-fixing by way of consignment. That case only subjects to the scrutiny of the rule of reason less competitively dangerous means of vertical restraint, namely consignment arrangements involving exclusive territorial and customer restrictions.

The decision of the First Circuit in *Quinn v. Mobil Oil Co., 375 F.2d 273 (1967)* does not dictate a contrary result. In that case, Judge McEntee limited himself to the absence of a combination or conspiracy. Judge Coffin's opinion with respect to vertical setting of maximum prices is distinguishable because the instant case involves fixing minimum prices, and at any rate, Judge Coffin's rationale has been overruled by *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*. Judge Aldrich's opinion does not conflict with the decision of this court.

Combination or Conspiracy

The complaint in the instant case, much like that in *Albrecht*, alleges the formation of a combination or conspiracy **[**17]** without specifying its makeup. The defendant suggests that there is no combination or conspiracy. Detailed consideration need not here be given to the developing definitional content of the statutory term "combination." See Turner, The Definition of Agreement Under the Sherman Act: Conscious **[*891]** Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962); Note "Combinations" in Restraint of Trade: A New Approach to *Sec. 1* of the Sherman Act, 1966 Utah L. Rev. 75. Suffice it to say that the facts alleged in the instant case make out one or more of the following combinations: (1) a combination between the defendant and its dealers to fix prices on the retail level, *Albrecht v. Herald Co., at p. 150* & n. 6, *U.S. v. Arnold Schwinn & Co., 388 U.S. 365, 372, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*; (2) a combination between the defendant and the plaintiff, *Albrecht v. Herald Co., 390 U.S. at p. 150* & n. 6, *U.S. v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 n. 16, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; **[**18]** *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*; (Judge McEntee's opinion in *Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir. 1967)* is distinguishable because there is here both a consignment agreement and prior acquiescence to the defendant's price dictates.) (3) a combination between the defendant and the plaintiff's customers, *Albrecht v. Herald Co., 390 U.S. at p. 150* & n. 6. This court is, therefore, prepared to go to trial on the question of combination or conspiracy. It is the suggestion of the court, however, that counsel for the plaintiff be prepared at the beginning of trial to specify which of the above or any other theories of combination or conspiracy he will present. *Fed. R. Civ. P. 8(e)(f)*. See *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*.

Proximate Cause

The defendant argues that "since plaintiff had the absolute freedom to terminate the consignment arrangement at any time, any injury that he might have sustained by failing to do so was his own doing." Defendant's Brief In Support of Motion for Summary Judgment at p. **[**19]** 16. The statement of Mr. Justice Douglas in *Simpson* supplies the short answer to that contention:

> ***HN10***[] If the "consignment" agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignee, and, in any event, to sell at competitive prices. The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.

Cf. *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*.

In Pari Delicto

The defendant also contends that "(Plaintiff) is also precluded from seeking to recover for injuries from the consignment agreement because, even if the agreement were unlawful, his continued voluntary adherence to it places him squarely within the *pari delicto* doctrine." Defendant's Brief In Support of Motion for Summary Judgment at p. 17. The recent decision of the Supreme Court in *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, **[**20]** 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)* completely disposes of this defense.

The Law - The Robinson-Patman Act Claim [9]

Sec. 2(a) - Consignment

The defendant asserts that the plaintiff's Robinson-Patman Act theory is faulty because the plaintiff was not a "purchaser" of Texaco gasoline but was only a consignee. [10] A close reading of the several cases cited by the

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[9] See, supra, note 3.

[10] For a statement of the statutory language here pertinent, see supra, note 3. The Robinson-Patman Act

defendant **[*892]** fails to reveal any specific holding that a consignee retailer cannot be a "purchaser" for purposes of Sec. 2(a) of the Robinson-Patman Act. In fact, the case which most nearly reaches such a holding, *Students Book Co. v. Washington Law Book Co., 98 U.S. App. D.C. 49, 232 F.2d 49 (D.C. Cir. 1955)*, cert. denied, *350 U.S. 988, 100 L. Ed. 854, 76 S. Ct. 474 (1956)*, does so only after a full trial going directly to the reality of the consignment device and to a comparison and contrast of the consignment and purchase-sale distribution mechanisms. This court is likewise inclined to reach the legal **[**21]** question concerning the alleged distinction between purchase and consignment only after a full trial. While the court, therefore, declines to pass on that question at this time, it does suggest that counsel be prepared to argue the question subsequent to the presentation of evidence. The court further expects counsel at such argument to discuss two important issues with respect to this matter: (1) whether the purposes of Sec. 2(a) of the Robinson-Patman Act would be effectuated by an elaboration of the statutory term "purchaser" such that a consignee is not within the section; (2) whether Sec. 2(a) of the Robinson-Patman Act should be construed *in pari materia* with *Sec. 1* of the Sherman Act and the cases thereunder.

Competitors as Purchasers

The defendant contends that even if the plaintiff is a purchaser within the meaning of the Act his alleged competitors were not, because they purchased **[**22]** not from Texaco but from Pennsylvania Petroleum Products Co., an independent wholesaler. Defendant's statement of the law appears to be correct. However, as will appear below, [11] the status of the Pennsylvania Products Co. presents a genuine issue of material fact.

Middleman as Competitor

Defendant finally asserts that even if it sold to Pennsylvania Petroleum Products Co. at a price lower than its price to plaintiff there can be no competitive injury, because the plaintiff discriminatee operates on a different horizontal level than the favored purchaser. Here again, the defendant's legal theory appears sound. However, as will appear below, [12] the plaintiff differs with the defendant as to the defendant's alleged exclusive wholesaler status.

[23]** The Facts - The Sherman Act Claim [13]

Several genuine issues of material fact are revealed by this record. (1) Did the defendant rely upon *General Electric* and was its reliance reasonable? (2) What is the shape of the geographic zone for purposes of competition? (3) Was the plaintiff genuinely free to shift to some other competitively realistic program? (4) What was the reason for the cancellation of the plaintiff's lease and the temporary nondelivery of gasoline to the plaintiff? (5) How much is the consignment device used by Texaco in the Rhode Island market? (6) What other distribution methods are used and how do they differ from the consignment method? (7) Was there any combination or conspiracy? (8) If so, what is its makeup? (9) Was the defendant's conduct **[**24]** the cause-in-fact of the plaintiff's harm or was stiff competition the cause? (10) What specific damages did the plaintiff suffer?

The Facts - The Robinson-Patman Act Claim

There are several genuine issues of material fact with respect to the plaintiff's Robinson-Patman Act claim. (1) What is the nature of the vertical relationship between the plaintiff and **[*893]** the defendant? (2) What is the nature of the relationship between Texaco and Pennsylvania Petroleum Products Co., with particular respect to the alleged retail competitors of plaintiff? (3) What is the status of Pennsylvania on the distributional chain - is it exclusively a wholesaler or does it also operate at the retail level?

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[11] See, infra, this opinion, The Facts - The Robinson-Patman Act Claim.

[12] Ibid.

[13] At this juncture, there is no need for this court to meticulously document the basis for every factual dispute arising out of the numerous documents before it. A general enumeration of the areas of relevant dispute will suffice.

Conclusion and Caveat

For the above stated reasons, this court has determined that a trial is appropriate in this case. Counsel need not be reminded that the administration of an antitrust case is a difficult and time-consuming matter. Preparation and precision on the part of counsel are most helpful to the court. To date, the court's burden has been considerably increased by the absence of these elements. It is the expectation of this court that the trial of this case will **[**25]** be approached with a more narrow compass than has heretofore guided the proceedings.

For the reasons recited herein, the motion is hereby denied.

Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.

United States Court of Appeals for the District of Columbia Circuit

September 30, 1968, Decided

No. 21,173

Reporter
404 F.2d 804 *; 1968 U.S. App. LEXIS 5431 **; 131 U.S. App. D.C. 226; 1968 Trade Cas. (CCH) P72,587

Pacific Seafarers, Inc., et al., v. Pacific Far East Line, Inc., et al.

Subsequent History: **[**1]** Cert. denied, *393 U.S. 1093, 21 L. Ed. 2d 784, 89 S. Ct. 872 (1969)*.

Disposition: Reversed and Remanded

Core Terms

shipping, foreign commerce, Sherman Act, transportation, anti trust law, vessels, commerce, cargoes, foreign port, importers, exports, conspiracy, financing, common carrier, Plaintiffs', foreigners, exemption, Maritime, selling, cement, nexus, ports, foreign nation, conferences, defendants', regulations, commodity, carriers, rates

LexisNexis® Headnotes

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Preferences & Subsidies

International Trade Law > General Overview

Transportation Law > Carrier Duties & Liabilities > General Overview

Admiralty & Maritime Law > Shipping > Regulations & Statutes > General Overview

Governments > Federal Government > Property

Transportation Law > Commercial Vehicles > Foreign Commerce

Transportation Law > Water Transportation > Cargo Preference Act

HN1[] **Regulations & Statutes, Preferences & Subsidies**

The Agency for International Development (AID) implements the Cargo Preference Law, 46 U.S.C.S. § 1241(b) by regulations requiring that at least 50% of AID-financed cargoes be transported to the recipient country in privately owned United States-flag commercial vessels. Furthermore, as a matter of policy, AID finances the costs of transportation, in addition to cargo, where the shipping is done in American-flag vessels. These regulations effectively reserve the trade in carriage of AID-financed cargo for American shipping.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

International Trade Law > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN2[] **Decisions, Collateral Estoppel**

Principles of collateral estoppel may properly be applied in administrative cases. In general these principles apply to jurisdictional issues and the court may assume that they require giving effect in subsequent litigation to an agency's determination of facts underlying its conclusion that jurisdiction was lacking.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Transportation Law > Carrier Duties & Liabilities > Definitions

Governments > Legislation > Interpretation

Transportation Law > Carrier Duties & Liabilities > Water Carriers

Transportation Law > Commercial Vehicles > Foreign Commerce

HN3[] **Water Transportation, Rates & Tariffs**

Section 1 of the Shipping Act, 46 U.S.C.S. § 80, defines a common carrier by water in foreign commerce as a common carrier engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country.

Admiralty & Maritime Law > Charterparties

Transportation Law > Carrier Duties & Liabilities > Water Carriers

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN4[] **Admiralty & Maritime Law, Charterparties**

See 46 U.S.C.S. § 814.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN5[] **Congressional Duties & Powers, Commerce Clause**

As used in the U.S. Const., "commerce" is a very broad concept which includes navigation, not merely because of the relationship between shipping and the movement of goods, most certainly commerce, but also because shipping itself is a form of gainful economic activity. Were it not so, the government of the Union would have no direct power over the subject, and could make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen.

Governments > Federal Government > US Congress

International Law > Authority to Regulate > General Overview

International Trade Law > Authority to Regulate > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

International Trade Law > General Overview

HN6[] **Federal Government, US Congress**

The constitutional language granting Congress power to regulate "commerce with foreign nations" authorizes congressional enactment of laws regulating every species of commercial intercourse between the United States and foreign nations.

Admiralty & Maritime Law > Maritime Contracts > General Overview

International Trade Law > General Overview

Transportation Law > Commercial Vehicles > Foreign Commerce

Transportation Law > Water Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN7[] **Admiralty & Maritime Law, Maritime Contracts**

Section 14 of the Shipping Act of 1916, 46 U.S.C.S. § 813 authorizes the Federal Maritime Commission to bar foreign carriers from United States ports if they are parties to an agreement respecting transportation between foreign ports that excludes American-flag carriers from admission on equal terms.

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

International Trade Law > General Overview

HN8[] **International Aspects, International Application of US Law**

If the policy of limiting accumulation of and exercise of dominant economic power cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

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

HN9[ ] Regulated Practices, Price Fixing & Restraints of Trade

Antitrust principles are relevant even in those economic sectors subject to day-to-day supervision by federal regulatory agencies.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

International Trade Law > General Overview

Transportation Law > Commercial Vehicles > Foreign Commerce

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10[ ] Interstate Commerce, Restraints of Trade

The Sherman Act is not limited, in effect, to restraints on sales of goods. In the domestic setting, it is settled that the Sherman Act's bar on unreasonable restraints on trade or commerce extends to service industries as part of commerce. There is no basis in the statute or in reason to argue that conspiracies in service industries are proscribed only if the services are in interstate commerce, and not if they are in foreign commerce.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN11[ ] Sherman Act, Penalties

Where the allegedly illegal restraint concerns commodities then, of course, the absence of an effect on United States exports or imports renders the Sherman Act inapplicable.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[ ] Antitrust & Trade Law, Sherman Act

The Sherman Act has no application where the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American flag ships.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

The Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

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

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN14[] Choice of Law, Significant Relationships

It is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon. It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] International Aspects, International Application of US Law

It is settled that the antitrust laws may apply to foreigners. Where restraints of commodity exports or imports are concerned, the test most used to determine whether the Sherman Act is applicable to acts done outside the United States is whether the agreement was intended to, and did affect United States imports or exports. The principal question is what is meant, in this context, by the word "intent" in light of the presumption that persons are presumed to intend the natural consequences of their actions.

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

International Trade Law > General Overview

HN16[] International Aspects, International Application of US Law

The antitrust laws, which represent a fundamental national economic policy, continue in effect as to the shipping industry, and their rate making activities in foreign commerce.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN17[] **Antitrust & Trade Law, Exemptions & Immunities**

The Shipping Act limits the scope of the antitrust laws, but this curtailment is confined to the explicit provision exempting activities which are lawful under *§ 15* of the Shipping Act, 46 U.S.C.S. § 814.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

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

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN18[] **Antitrust & Trade Law, Exemptions & Immunities**

Therefore the antitrust laws continue in effect, without modification based merely on implication, as to common carriers, subject to the Shipping Act, which do not obtain the Commission approval under *§ 15* of the Shipping Act, 46 U.S.C.S. § 814, which Congress required as a condition of exemption. The antitrust laws also continue in effect as to areas not subject to the Shipping Act.

Antitrust & Trade Law > Sherman Act > General Overview

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN19[] **Antitrust & Trade Law, Sherman Act**

The Shipping Act, 46 U.S.C.S. §§ 814, 815, and 817, does not eliminate all possibility of risks under the antitrust laws.

Governments > Legislation > Interpretation

HN20[] **Legislation, Interpretation**

The court is not to turn to the acts of subsequent Congresses for unstated exemptions, or implied repeals, of the anti-trust laws. Moreover, how members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act.

Judges: McGowan, Tamm and Leventhal, Circuit Judges.

Opinion by: LEVENTHAL

Opinion

[*807] LEVENTHAL, Circuit Judge:

This case concerns the applicability of sections 1 and 2 of the Sherman Act to an alleged conspiracy among defendant-appellees, 21 American shipping lines and two conferences to which they belong, [1] to destroy plaintiff-appellants' business of carrying AID [2]-financed cement and fertilizer cargoes between Taiwan and South Vietnam. The charges were first aired before the Federal Maritime Commission, which dismissed plaintiffs' complaint alleging violations of *sections 15*, *16* First, and 18 of the Shipping Act [3] on the ground that this trade between foreign ports, of goods owned and shipped by foreigners to foreigners, [4] **[**3]** **[*808]** was not within the Commission's jurisdiction under the Shipping Act. That ruling was not appealed. Plaintiffs' subsequently-filed complaint for damages under the antitrust laws [5] was dismissed, at the close of oral argument, when the District Court granted defendant's motion for dismissal of the complaint. This order was **[**2]** presumably based on the jurisdictional ground that the Sherman Act was inapplicable to the complaint because of the absence of a claim of restraint of foreign commerce. [6] We reverse that determination.

These are the pertinent facts as set forth in the complaint, which must be accepted as true for purposes of a motion to dismiss. Plaintiffs Pacific Seafarers, Inc. (PSI) and Seafarers, Inc. (Seafarers) [7] are American corporations, formerly engaged in the ocean shipping business. They operated United States flag vessels, manned by American crews. Plaintiffs' business operations were centered in New York, and their ships intermittently returned to the United States for personnel and maintenance requirements. Plaintiffs' business was selling their American-flag shipping services to cement and fertilizer exporters in Taiwan, and, to a lesser extent, Thailand, who needed American-flag shipping for AID-financed sales to importers **[**4]** in South Vietnam. AID does not own the goods, nor does it arrange for their transportation. It does, however, provide, either on loan or grant basis, dollars to the South Vietnamese Government, which in turn sells these dollars to South Vietnam merchants desiring to finance their purchases abroad. ***HN1***[] AID implements the Cargo Preference Law [8] by regulations requiring that at least 50% of AID-financed cargoes be transported to the recipient country in privately owned United States-flag commercial vessels. Furthermore, as a matter of policy, AID finances the costs of transportation, in addition to

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[1] Liability is alleged as to most of the defendants by virtue of their participation in either the Atlantic and Gulf American - flag Berth Operators (AGAFBO) or the West Coast American-flag Berth Operators (WCAFBO) conferences, rather than from active participation in the Far East interport trade.

[2] Agency for International Development.

[3] 46 U.S.C. §§ 814, 815 First, 817, respectively.

[4] The Federal Maritime Commission found that " the cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales -- including the cost of water transportation -- our Government in no way participates in the transactions." (JA 114)

[5] *15 U.S.C. § 15*.

[6] The District Judge rendered his decision from the bench at the close of oral argument. He stated: "I am of the opinion that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, this Court is without jurisdiction and the motions to dismiss will be granted." (JA 167)

[7] The other plaintiffs' claims are derivative.

[8] 46 U.S.C. § 1241(b). See AID Regulation 1, § 201.6(N).

cargo, where the shipping is done in American-flag vessels. [9] These regulations effectively reserve the trade in carriage of AID-financed cargo for American shipping.

[5]** At the time plaintiffs entered the business it was handled primarily by American-flag competition engaged in round-trip voyages from the United States to the Far East. In the course of their journeys, these vessels would stop to take on cargoes of foreign origin destined for ports farther along. The rate for this service was set by AFBO, [10] an association of American-flag carriers which are members of either or both AGAFBO [11] or WCAFBO, [12] both conferences of American-flag shippers organized to carry military cargoes for the Government (which must likewise use American-flag shipping where available). Neither the AFBO agreement, nor the rates set thereunder for cargoes originating in foreign ports and destined to foreign ports, were filed with the Federal Maritime Commission.

[*809] Plaintiffs thought that by using older, less-expensive vessels they could institute **[**6]** and profitably operate a substantial service in AID-financed cargoes. As stated by plaintiffs, defendant American-flag shipping lines acted to preserve this profitable trade to themselves, at rates set pursuant to concerted action and not subject to regulatory scrutiny. They first sought to erect legal barriers to plaintiffs' getting the business, and when they failed in that endeavor they dropped their prices and drove plaintiffs out of business.

(a) Their first effort was to seek issuance of a directive from AID limiting AID-financed shipping in the area to "conference liners." That would have excluded plaintiffs' vessels, but it was not obtained.

(b) Defendants then successfully urged the Director General of Commerce of South Vietnam to issue a ruling to South Vietnamese importers requiring that all future AID-financed shipments of cement be shipped on liners operated by AFBO members. Plaintiffs were not then members of AFBO, but AID countermanded that directive.

(c) Next, plaintiff PSI was told by the Director General that it would have to join WCAFBO if it wished to continue in the South Vietnamese cement business. When PSI tried to comply, its application for membership **[**7]** was blocked because it had no Military Sea Transportation Service Contract (MSTS) with the Defense Department, as did all other WCAFBO members. Plaintiff sought such a general eligibility contract, and seven of the appellees tried to block it by protesting to the Defense Department. That too was unsuccessful.

(d) Finally, at an AFBO meeting held in the United States, the rates on cement and fertilizer from Taiwan to South Vietnam, and on cement from Thailand to South Vietnam were thrown open, and they dropped from $8.95 per long ton to $4.96 per long ton. All other rates were maintained.

Plaintiffs were shortly driven out of business. Thereafter defendants raised the rates, and indeed raised them to substantially higher levels than those prevailing before plaintiffs sought to enter the trade.

1. We first consider defendants' arguments that principles of collateral estoppel and "practical primary jurisdiction considerations" preclude relitigation by plaintiffs of the Federal Maritime Commission's determination that this trade, carried on "totally within the confines of Far Eastern ports," was not part of "our foreign commerce."

[8]** ***HN2***[] Principles of collateral estoppel may properly be applied in administrative cases. [13] In general these principles apply to jurisdictional issues [14] and we may assume that they require giving effect in subsequent litigation

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[9] Affidavit of David E. Bell, former Administrator of AID. (JA 147)

[10] American-flag Berth Operators.

[11] Atlantic-Gulf American-Flag Berth Operators.

[12] West Coast American-flag Berth Operators.

[13] *United States v. Utah Constr. & Min. Co., 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)*; *Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-03, 84 L. Ed. 1263, 60 S. Ct. 907 (1940)*; *Fairmont Aluminum Co. v. Commissioner of Internal Revenue, 222 F.2d 622, 627 (4th Cir.)*, cert. denied, ***350 U.S. 838, 100 L. Ed. 748, 76 S. Ct. 76 (1955)***; 2 Davis, Administrative Law §§ 18.01-18.10 (1958).

to an agency's determination of facts underlying its conclusion that jurisdiction was lacking. In this case, however, there is no real dispute concerning those facts which the Commission held to be jurisdictional. Thus, plaintiffs do not seriously allege that they were plying a trade other than selling shipping services to foreigners, for transportation of foreign-owned goods to foreign consignees. They do not allege that the goods thus transported between foreign ports originated in the United States. On the other hand, defendants cannot seriously contest that the key to this whole trade was that plaintiffs and defendants were not just selling shipping services: They were selling United **[*810]** States-flag shipping services, which fact was of crucial importance to importers requiring AID-dollar financing for their transactions. Thus the sole question is whether, under those facts, a conspiracy to drive plaintiffs **[**9]** out of the business of selling United States-flag shipping services is a restraint on United States foreign commerce subject to the Sherman Act.

Although the Commission was of the view that defendant's activities had no effect on United States "foreign commerce," that determination rested solely on the standards of the Shipping Act of 1916. Thus the Commission held that its entire jurisdiction **[**10]** was limited to activities affecting "foreign commerce" within the intendment of ***HN3***[] section 1 of the Shipping Act, [15] which defines a "common carrier by water in foreign commerce" as a "common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country." As plaintiffs carried no property or passengers to or from the United States they were not engaged in foreign commerce under the Shipping Act. [16]

[11]** The Commission did not rule that there was no "foreign commerce" as that term is used in the Sherman Act, nor did it rule that the standards under the two acts were the same. It is commonplace in the law to encounter instances of the same words being given different scope in different contents. [17] **[**12]** Indeed counsel for the defendants effectively put it to the Commission that jurisdiction under the Shipping Act is narrower than under the Sherman Act, and counsel objected to antitrust principles being "dragged in by the heels." [18] **[**13]** **[*811]**

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[14] *Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. at 403*; *Estevez v. Nabers, 219 F.2d 321, 323-24 (5th Cir. 1955)*.

[15] 46 U.S.C. § 801.

[16] ***HN4***[] *Section 15* of the Shipping Act provides that, "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement " in this section includes understandings, conferences, and other arrangements." 46 U.S.C. § 814.

The Commission thus substantially limited the broad term "every agreement," presumably on the grounds that the sole concern of the Shipping Act was with that trade which by virtue of § 1 made anyone carrying it subject to the Act. A similar approach, albeit in a different context, was rejected by the ***Supreme Court in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 88 S. Ct. 929, 19 L. Ed. 2d 1090 (1968)***.

Moreover, the Commission held that, in the AFBO context, the defendants "cannot be deemed to be engaged in the foreign commerce of the United States, . . . for the simple reason that the trade does not involve as one terminus any port in a State, District, Territory or possession of the United States."

[17] *Smiley v. Holm, 285 U.S. 355, 76 L. Ed. 795, 52 S. Ct. 397 (1932)*; *Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434, 76 L. Ed. 1204, 52 S. Ct. 607 (1932)*; *Sampson v. Channell, 110 F.2d 754, 128 A.L.R. 394 (1st Cir.)*, cert. denied, ***310 U.S. 650, 84 L. Ed. 1415, 60 S. Ct. 1099 (1940)***; *Cf.* *Towne v. Eisner, 245 U.S. 418, 62 L. Ed. 372, 38 S. Ct. 158 (1918)*; Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933).

[18] The following colloquy took place at oral argument before the Commission:

Accordingly defendants cannot bootstrap the Commission's determination into a preclusive ruling on whether foreign commerce was restrained under Sherman Act standards. [19]

2. We turn therefore to the principal issue in the case: Whether the District Court was correct **[**14]** in its jurisdictional determination that the complaint made no allegation of restraint on United States foreign commerce. Seeking affirmance of that ruling, defendants urge that there can be no restraint of United States foreign commerce, and hence no Sherman Act violation, no matter how egregious the conduct under Sherman Act standards, unless there is restraint of, or substantial effect on, United States commodity imports or exports or transportation to or from the United States.

In our view plaintiffs, in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States. We have no doubt that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping. We hereafter elaborate our reasons for these views.

3. We may usefully begin our analysis by considering defendants' rather guarded assertions that the carriage of foreign-owned goods between foreign ports in American vessels may not be "commerce with foreign nations" subject **[**15]** to constitutional regulation by Congress. Concededly defendants themselves are engaged in United States foreign commerce, because they carry United States exports and imports. Their actions clearly can be regulated by Congress. Their contention, however, is that the Sherman Act cannot be applicable unless United States foreign commerce itself is restrained. [20] Obviously if plaintiffs **[*812]** were not engaged in United States

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> Commissioner Hearn: Now, do you contend that, furthering Mr. Patterson's question, do carrier members of AFBO, purely by reason of the foreign inter-port carriage, can act with impunity so far as this Commission is concerned, dealing with MSTS and AID cargo, even to the detriment of the United States-flag carrier?
>
> Mr. Poole: So far as the Shipping Act is concerned, yes. I think they take their chances under the antitrust laws.
>
> Commissioner Hearn: Well, in that case, you draw the distinction between foreign commerce of the United States and *section 15* here?
>
> Mr. Poole: Yes.
>
> Well, *section 15* I think, can only be read in reference to section 1 of the Act where it defines those carriers which are subject to the regulation of the Shipping Act. There section 1 makes it pretty clear that it is only those carriers which are in the foreign trade from or to ports in the United States or districts, territories, and possessions of the United States are those carriers in the foreign commerce which are regulated by the Shipping Act.
>
> What I am saying is it has been held, and I think it is true, that the jurisdiction under the Shipping Act is more restrictive than the jurisdiction under the antitrust laws. That is why I objected to antitrust principles being dragged in by the heels, so to speak, to define the jurisdiction of the Commission under the Shipping Act. (JA 148)

[19] In our view the judgment cannot be affirmed because of the doctrine of primary jurisdiction invoked by appellees. The Hearing Examiners' findings insofar as they are purely factual are not really contested. Insofar as they make judgment on matters like legal causality under anti -trust standards, their significance is limited both because the Commission made no ruling on them, and in any event, they do not lie within the area of expertise which justifies deference to the agency's findings.

Furthermore, the purpose of the primary jurisdiction doctrine is to harmonize the application of antitrust and regulatory policies. The Commission held merely that it had no regulatory power with respect to this conspiracy, not that this was lawful behavior under the Act and consistent with public interest. Compare *S.W.W., Inc. v. Air Transport Ass'n of America, 89 U.S. App. D.C. 273, 280, 191 F.2d 658, 664 (1951)*, cert. denied, ***343 U.S. 955, 72 S. Ct. 1049, 96 L. Ed. 1355 (1952)***.

[20] Defendants' point rests on analogy from cases involving restraints in interstate commerce, holding the Sherman Act is applicable only where the target of the restraint is interstate commerce, *e.g.*, *Lieberthal v. North Country Lanes, 332 F.2d 269, 272 (2d Cir. 1964)*; *Page v. Work, 290 F.2d 323, 330 (9th Cir.)*, cert. denied, ***368 U.S. 875, 7 L. Ed. 2d 76, 82 S. Ct. 121 (1961)***; *David Cabrera, Inc. v. Union de Choferes y Duenos, 256 F. Supp. 839, 843-44 (D.P.R. 1966)*.

foreign commerce in the constitutional sense, there could be no such restraint. We therefore consider whether plaintiffs engaged in United States foreign commerce.

[16]** Gibbons v. Ogden [21] makes clear that, *HN5*[] as used in the Constitution, "commerce" is a very broad concept which includes navigation -- not merely because of the relationship between shipping and the movement of goods, [22] **[**17]** most certainly commerce, but also because shipping itself is a form of gainful economic activity. [23] Were it not so, Chief Justice Marshall wrote, "the government of the Union has no direct power over the subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen." [24]

Gibbons v. Ogden unequivocally **[**18]** states that *HN6*[] the constitutional language granting Congress power to regulate "commerce **[*813]** with foreign nations" authorizes Congressional enactment of laws regulating "every species of commercial intercourse between the United States and foreign nations." [24]A That much was "universally admitted" in 1824. Plainly, United States vessels engage in a "species of commercial intercourse" between the United States and foreign nations regardless of the ownership or national origin of the goods they carry.

Similarly the defendants urge that *United States v. Yellow Cab Co., 332 U.S. 218, 230-32, 233, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)* holds that the "commerce " affected by a restraint on transportation is determined by terminal points of the journey. In that case, the Supreme Court dismissed, for want of a restraint of interstate commerce, that portion of the Government's antitrust complaint that related to a monopoly of local taxicab service. However, the problem there is primarily whether the federal government, acting within the framework of a federal system, has power to deal with such local restraint. The issue turns, as it must under the Constitution, on whether the facts show an effect on interstate commerce. The disclaimer of interstate commerce does not constitute a withdrawal of American law, but an assessment that what is involved is a matter of local law rather than national law.

Where foreign commerce is involved, however, the issues are different. In a sense the question of interpretation may still be similar: Whether United States regulation is reasonable in light of the international, rather than intrastate, character of the trade. However, the problem is different for the courts because the question may properly be answered by reference to factors such as citizenship that are meaningful in an international setting yet not involved where the issue is whether local commerce or national interstate commerce is restrained. Furthermore, the courts have an obligation to follow Congressional will that is greater when the only reason for failure to do so is lack of harmony with principles of international law, than it is when the Congressional intention is counter to the Constitutional mandates reserving the regulation of local affairs to the states rather than to Congress. *Compare* *Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434, 76 L. Ed. 1204, 52 S. Ct. 607 (1932)*.

[21] *22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824)*.

[22] *Compare* *United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 538, 64 S. Ct. 1162, 88 L. Ed. 1440 n. 7 (1944)* where the Government, appealing a dismissal of an indictment, argued that even if insurance was not "commerce" a restraint in the insurance industry was a restraint on those industries which must buy fire insurance. Because of its broad reading of "commerce" the Court found it unnecessary to pass on such questions.

[23] See also Justice Story's construction of the word "trade" in the Coasting and Fishery Act of 1793, 1 Stat. 305, in *The Nymph, 18 Fed. 506 (1834)*, quoted by the *Supreme Court in United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 490-91, 94 L. Ed. 1007, 70 S. Ct. 711 (1950)*:

> "The argument for the claimant insists that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of the opinion that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."

[24] 22 U.S. (9 Wheat.) at 190, 6 L. Ed. 2d 23.

[24] A 22 U.S. (9 Wheat.) at 193, 6 L. Ed. 23.

One of the significant accounts in foreign commercial intercourse is the fact that certain maritime nations earn income for their balance of international payments by providing transportation services involving neither their ports nor their products. Examples readily suggest themselves: e.g., Norway, Greece, Great Britain. They are engaged, in terms that **[**19]** are readily and fully understood by practical businessmen as well as theoretical economists, in the "export" of shipping services. So too, when American vessels earn transportation income, whether by payments from foreigners or Americans, there is direct benefit to the economy of the United States. More American seamen are employed and there is more business for American-based service industries dependent on shipping -- e.g., repair and insurance. The fact that American-flag vessels must carry American crews, [25] and are liable to penalty tax if they are repaired abroad, [26] and are available to the Government in time of national emergency [27] provides a substantial and on-going nexus to the United States.

[20]** These are the kinds of beneficial consequences, apart from any interest of the vessel owner himself, that nations further in their public interest by protecting the trade aspirations of their citizens. That policy is particularly compelling where ships are concerned because of the need to maintain a strong merchant marine available in wartime regardless of its peacetime routes.

Substantiating our view that the sale of American flag shipping services to foreigners is itself a form of United States foreign trade, is the protection Congress accorded to that trade in section 14 of the Shipping Act of 1916. ***HN7***[] That section authorizes the Federal Maritime Commission to bar foreign carriers from United States ports if they are parties to an agreement respecting transportation between foreign ports that excludes American-flag carriers from admission on equal terms. [28] **[**21]** And defendants apparently concede that the National Labor Relations Act, *29 U.S.C. § 151 et seq.*, passed by Congress under its commerce power, is applicable to all American-flag vessels. [29]

[*814] 4. We hold that plaintiffs were engaged in the foreign commerce of the United States for purposes not only of determining constitutional power, but also **[**22]** of determining the applicability of the Sherman Act, which prohibits conspiracies "in restraint of trade or commerce among the several States or with foreign nations."

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[25] 46 U.S.C. § 672a(b), requires generally that 75% of the crew shall be United States citizens.

[26] 19 U.S.C. § 257.

[27] 46 U.S.C. § 1242(a). The statute applies to all vessels owned by citizens of the United States.

[28] 46 U.S.C. § 813, providing in pertinent part:

> "The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property --
>
> * * *
>
> "(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission."

Any person who is a party to such an agreement is denied the right of entry to United States ports.

[29] Defendants note that the Jones Act, 46 U.S.C. § 688, according a remedy to seamen injured in the course of their employment, is rooted in Congress's Article III admiralty power. As to the National Labor Relations Act, *29 U.S.C. § 151 et seq.*, defendants contend that this is mere application of the internationally recognized principle that for purposes of on-board conduct and regulation of the crew, ships are part of the territory of the flag nation. *United States v. Flores, 289 U.S. 137, 77 L. Ed. 1086, 53 S. Ct. 580 (1933)*. While it may be that the fiction justifies application of United States law to American vessels as a matter of international law, it by no means follows that this serves as the source of Congressional power under our constitutional law. The constitutional basis of the National Labor Relations Act is, pure and simple, the commerce power.

The basic approach to Sherman Act construction is the broad premise that Congress exercised therein the full scope of its powers under the *Commerce clause of the Constitution*. [30] That premise has been stated in cases involving interstate commerce, and may well be subject to limitations -- for cause shown, so to speak -- in regard to foreign commerce. [31] **[**23]** For example, it may fairly be inferred, in the absence of clear showing to the contrary, that Congress did not intend an application that would violate principles of international law. [32]

[*815] However, the broad statement that Congress has exercised the full sweep of its commerce powers is **[**24]** not without significance in determining whether the Sherman Act applies as to restraints that operate, in the constitutional sense, against the "foreign commerce" of the United States. The Sherman Act has aptly been characterized as a "charter of freedom." [33] **[**25]** Its principle of limiting the accumulation and exercise of dominant economic power [34] is rooted in historic notions of the invalidity of unreasonable trade restraints, [35] and that policy has been increasingly accepted as a fundamental principle of our system. [36] ***HN8***[] If, as defendants contend,

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[30] *See*, *United States v. Frankfort Distilleries, 324 U.S. 293, 298, 89 L. Ed. 951, 65 S. Ct. 661 (1945)*; *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*; *Atlantic Cleaners & Dyers Inc., v. United States, 286 U.S. 427, 435, 76 L. Ed. 1204, 52 S. Ct. 607 (1932)*.

[31] In *United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)*, Judge Learned Hand wrote: "Nevertheless, it is quite true that we are not to read general words, such as those in this 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.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."

The International complications that have arisen concerning the application of United States antitrust laws to foreign commerce relate primarily to subjection of foreigners to United States laws for acts not done in the United States. *See e.g.*, British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All E.R. 780 (Ct. App. 1952). The theory on which this liability has proceeded is that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of America, supra, 148 F.2d at 443*. Conformance to international law is argued by analogy to the decision in The Case of the S.S. "Lotus" P.C.I.J. Ser. A. No. 10 (1927).

In the case at bar, however, no such international complications are present insofar as nationality is a recognized international basis for prescribing conduct, *cf.* *Blackmer v. United States, 284 U.S. 421, 76 L. Ed. 375, 52 S. Ct. 252 (1932)*, and in any event the interests of foreign parties are insubstantial. Thus while we agree with defendants' arguments that considerations of comity are appropriate in construction of the antitrust laws, we think that here it is the Sherman Act's applicability, rather than inapplicability, that is supported by consideration of the "comity" factors -- considerations similar to the factors appropriate in choice-of-law cases, see generally Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959 (1952).

[32] *Compare* ***McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963)*** *with* *The Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804)* (Marshall, C.J.).

For a sampling of the dialogue concerning the legality under international standards of applications of the anti-trust laws of the United States to foreign nationals, *see, e.g.*, Carlston, Antitrust Policy Abroad, 49 Nw. U. L. Rev. 713 (1955); Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 U. Va. L. Rev. 925 (1963); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954); Symposium, Extraterritorial Effect of the U.S. Antitrust Laws, A.B.A. ***Antitrust Law*** Section, Proceedings at the Annual Meeting 65 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966).

[33] *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359, 77 L. Ed. 825, 53 S. Ct. 471 (1933)*.

[34] See generally Bork, Bowman, Blake & Jones, The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 422 (1965).

[35] *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*; *United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898)*, aff'd *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*; Dewey, Common-Law Background of Antitrust Policy, 41 U. Va. L. Rev. 759 (1955).

that policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

[26]** ***HN10***[] The Sherman Act is not limited, in effect, to restraints on sales of goods. That is the thrust of defendants' distinction. In the domestic setting, however, it is settled that the Sherman Act's bar on unreasonable restraints on trade or commerce extends to service industries -- and transportation is clearly a service industry [37] -- as part of commerce. [38] **[**27]** There is no basis in the statute or in reason to argue that conspiracies in service industries are proscribed only if the services are in interstate commerce, and not if they are in foreign commerce. [39]

Defendants correctly point out that the cases hitherto applying the Sherman Act to foreign commerce have in fact involved either exports or imports of goods, or transportation to or from **[*816]** United States ports, [40] and conclude that it is inapplicable unless one or the other is present. [41] We recognize that ours is the first ruling on the issue before us -- but if there has never before been a ruling affirming application of the Act to this kind of trade, neither has there been a ruling rejecting that application. The matter is *res nova*, and we must decide it in the light of the reasoning and analysis **[**28]** that appears to us to be sound.

[29]** It may be noted that in related contexts contentions close to those urged by defendants have not been accepted. A mechanical commodity export-import limitation was rejected by the *District Court in In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 313 (D.D.C. 1960)*. Prior to that it had been rejected as unsound by the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws (p. 77-80). We reject it also.

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[36] ***HN9***[] Antitrust principles are relevant even in those economic sectors subject to day-to-day supervision by federal regulatory agencies. ***FMC v. Aktiebologat Svenska Amerika Linien, 390 U.S. 238, 88 S. Ct. 1005, 19 L. Ed. 2d 1071 (1968)***; *United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*; *United States v. Radio Corp. of America, 358 U.S. 334, 351, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*; *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*; *City of Pittsburgh v. FPC, 237 F.2d 741, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956)*.

[37] *United States v. Joint Traffic Ass'n, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25 (1898)*; *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*.

[38] *United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 94 L. Ed. 1007, 70 S. Ct. 711 (1950)*; *Atlantic Cleaners & Dyers Inc., v. United States, supra note 17*; *United States v. American Medical Ass'n, 72 App. D.C. 12, 110 F.2d 703*, cert. denied, ***310 U.S. 644, 84 L. Ed. 1411, 60 S. Ct. 1096 (1940)***.

[39] With this case in a purely jurisdictional posture we need not consider the question, in many ways more difficult, whether in terms of ruling on the merits of the validity of actions taken, the Sherman Act standards of reasonableness developed for interstate commerce should be applicable with full force to foreign transactions, and whether that issue is still open in light of *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*.

[40] *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* (United States vanadium exports); *Timken Roller Bearing Co. v. United States, supra note 39* (imports and exports of industrial bearings); *United States v. Sisal Sales Corp., 274 U.S. 268, 71 L. Ed. 1042, 47 S. Ct. 592 (1927)* (United States sisal imports); *United States v. Aluminum Company of America (ALCOA), 148 F.2d 416 (2d Cir. 1945)* exports and imports of aluminum ingot); *United States v. Imperial Chemical Industries, 100 F. Supp. 504, 591-592 (S.D.N.Y. 1951)* (exports and imports of explosive powder); ***United States v. General Electric Co., 82 F. Supp. 753, 891 (D.N.J. 1949)*** (exports and imports of incandescent lamps).

[41] ***HN11***[] Where the allegedly illegal restraint concerns commodities then, of course, the absence of an effect on United States exports or imports renders the Sherman Act inapplicable. *See, e.g.*, *Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951)* (price-fixing agreement "explicitly confined to Great Britain and Ireland" not violative of United States antitrust laws).

It may be assumed that, as a matter of construing Congressional intent, ***HN12***[] the Sherman Act has no application where the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American flag ships. In the case before us, however, we hold that, since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant -- a market defined as involving the transportation of AID-financed cargoes, which **[**30]** has a definite nexus with significant interests of the United States -- ***HN13***[] the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade. [42]

Our conclusion as to the existence of the requisite nexus is influenced by three salient considerations. First, the trade is entirely a product of the United States policy of subsidizing its merchant **[**31]** marine. It is the United States that has the greatest interest in this trade, and its conduct on a strong and efficient basis. Defendants claim that AID is merely a financier, yet the fact that the foreign importers were willing to accept the burden of higher-cost United States-flag shipping in order to get AID financing tends to show that AID was providing a stimulus to trade far beyond the realm of the conventional private financier. We may take note of what Judge Ryan found, on a more complete record, concerning the significance of AID and its programs. In United States v. Concentrated Phosphate Export Ass'n he wrote:

> We also do not accept or agree with defendant's argument that AID was but an incidental party to the transaction -- no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transactions, it was the force which initiated, directed, controlled **[*817]** and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transactions, particularly **[**32]** by the supplier who looked to it for payment and obligated itself to conform to its requirements and conditions if he was to receive payment. [43]

Since the United States has established and promoted, in carriage of AID-financed movements, this trade of providing American-flag shipping service, it is only reasonable to expect the "fundamental national economic policy" of the antitrust laws to be applicable. [44] **[**33]** Clearly, the right of all American-flag ships to participate is basic. Had there been a conspiracy of *foreign* carriers to exclude American-flag ships from access to trade, the Federal Maritime Commission would have been directed to exclude them from United States ports. [45] Can it be supposed that Congress intended American competitors to be able to organize a similar conspiracy with total immunity for their conduct?

Secondly, all parties must be Americans to participate in serving this market for American-flag shipping. Consequently there are few possible international complications to justify an interpretation that deliberately cuts back on the scope of the antitrust laws as applied to commerce which greatly concerns the United States. ***HN14***[] It is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon. [46] **[**34]** It is also significant, for the purpose of determining whether what is involved

[42] *Compare*, *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; *Branch v. FTC, 141 F.2d 31 (7th Cir. 1944)*, both of which condemned, as illegal, conduct by American firms having an adverse effect on the international business opportunities of other American firms. See also the Webb-Pomerene Act, *15 U.S.C. §§ 61-65*, conditioning antitrust immunity for export associations, in part, on the absence of restraint on the export trade of any domestic corporation.

[43] *273 F. Supp. 263, 270-71 (S.D.N.Y. 1967)* prob. juris noted, ***390 U.S. 1001, 88 S. Ct. 1245, 20 L. Ed. 2d 102 (1968)***.

[44] *Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966)*.

[45] *See* 46 U.S.C. § 813, quoted note 28, *supra*.

constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns. [47]

5. We now consider whether the foregoing analysis is to any extent aborted or negatived by defendants' contention that, whatever the case as to the application of the antitrust laws generally to foreign commerce not involving commodity exports, the Sherman Act must be read in conjunction with, and be limited by, the Shipping Act of 1916. Defendants thus switch from their prior position **[*818]** before the Commission, [48] and now urge that the Commission's jurisdiction and the Sherman Act are coterminous. If the two acts are to be held to have similar coverage, it may well be because insofar as agreements of common carriers affecting foreign commerce are concerned, the Commission was in error in its narrow view of Shipping Act jurisdiction, [49] **[**35]** not because the Sherman Act is to be narrowed.

The Supreme Court has specifically held that ***HN16***[] the antitrust laws, which "represent a fundamental national economic policy," continue in effect as to the shipping industry, and their rate-making activities in foreign commerce. *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966)*. The Court recognized that ***HN17***[] the Shipping Act limits the scope of the antitrust laws, but this curtailment was confined to the "*explicit* provision exempting activities which are lawful under *§ 15* of the [Shipping] Act," and the Court declined to countenance any "*unstated* legislative purpose to free the shipping industry from the antitrust laws." See *383 U.S. at 216, 217.* **[**36]** ***HN18***[] Therefore the antitrust laws continue in effect, without modification based merely on implication, as to common carriers, subject to the Act, which do not obtain the Commission approval under *§ 15* which Congress required as a condition of exemption. The antitrust laws also continue in effect as to areas not subject to the Shipping Act -- e.g., a restraint engineered by one or more ocean tramps affecting American foreign commerce. The fact that the Shipping Act is limited by virtue of § 1, to those vessel operators who are "common carriers" certainly cannot be supposed to make an exemption available, say, to operators not common carriers, offering service of transporting commodities from the United States. That instance is not our case, of course, but it exemplifies that the two acts do not precisely mesh. [50]

[37]** In a more sophisticated contention, defendants say that the fact that the provision in *§ 15* providing an exemption from the antitrust laws was not made applicable to shipping between foreign ports is an indication of Congressional understanding that such shipping was not subject to the American antitrust laws. Indeed Congress

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[46] ***HN15***[] It is settled that the antitrust laws may apply to foreigners. *See, e.g.*, *United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, 134 F. Supp. 710 (S.D.N.Y. 1955)*; *168 F. Supp. 904 (S.D.N.Y. 1958)*.

Where restraints of commodity exports or imports are concerned, the test most used to determine whether the Sherman Act is applicable to acts done outside the United States is that formulated by *Judge Learned Hand in United States v. Aluminum Co. of America, supra note 31*, whether the agreement was intended to, and did affect United States imports or exports. *See, e.g.*, *United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950)*. The principal question is what is meant, in this context, by the word "intent" in light of the presumption that persons are presumed to intend the natural consequences of their actions.

The considerations outlined in this opinion of American contacts and nexus (see *supra, p. 816*) provide objective criteria that may usefully supplement such an "intent" test.

[47] In our case it is effectively the province of American operators, by law. It is significant that in the overwhelming bulk of the decided cases involving application of the antitrust laws to American commerce, the prohibited conspiracy was one in which American concerns played a significant role. *See, e.g.*, cases cited note 40, *supra*.

[48] See note 18, *supra*.

[49] See note 16, *supra*.

[50] ***HN19***[] The Shipping Act does not eliminate all possibility of risks under the antitrust laws. *Compare* ***Ryan, J., in Sabre Shipping Corp. v. American Presidential Lines, 285 F. Supp. 949 (S.D.N.Y. 1968)***.

contemplated in § 14 of the Act that American carriers would participate in foreign rate conferences governing shipping between foreign ports, and could hardly have supposed that they would be subject to the antitrust laws, or to more competition than governed shipping to and from the United States.

The dispositive analysis seems to us to run as follows: ***HN20***[] We are not to turn to the acts of subsequent Congresses for unstated exemptions, or implied repeals, of the anti-trust laws. That is clear from *Carnation*.[51] **[**38]** Moreover, "how members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act."[52]

The immunity granted by Congress in the Shipping Act was limited to those instances where there was some assurance, provided by Commission approval, that acts immunized from the antitrust laws were not contrary to the over-all public interest. We have already **[*819]** expressed our doubt whether the Commission correctly disclaimed jurisdiction over the commerce before us. But assuming, for discussion, that the Commission was right, this is at most a *casus omissus*, and the antitrust exemption or limitation is not to be implied, but is to be furnished only when and as directed by the legislature, which has hitherto accompanied such directions with substitute provisions to safeguard the public interest.

Finally, we turn to defendants' argument that American participation in unapproved foreign conferences is contemplated by § 14 of the Shipping Act, and hence cannot reasonably be deemed governed by the anti-trust laws. Such foreign conferences do not have the primary nexus of American **[**39]** contacts (*supra* point 5), which underlies our ruling that the activities before us constitute foreign commerce within the meaning of the Sherman Act.

Reversed and remanded.

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[51] *See also*, *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*; *Pan American World Airways v. United States, 371 U.S. 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963)*; *California v. FPC, 369 U.S. 482, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962)*; *United States v. Borden Co., 308 U.S. 188, 201, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*.

[52] *United States v. Wise, 370 U.S. 405, 414, 8 L. Ed. 2d 590, 82 S. Ct. 1354 (1962)*.

Research Frontiers, Inc. v. Marks Polarized Corp.

United States District Court for the Eastern District of New York

September 30, 1968

No. 67 Civ. 1149

Reporter

290 F. Supp. 725 *; 1968 U.S. Dist. LEXIS 12305 **; 160 U.S.P.Q. (BNA) 574 ***; 12 Fed. R. Serv. 2d (Callaghan) 301

RESEARCH FRONTIERS INCORPORATED, Plaintiff, v. MARKS POLARIZED CORPORATION, Alvin M. Marks and Mortimer M. Marks, Defendants, and Robert Saxe, Morton Berger and Robert Thompson, Counter-Defendants

Core Terms

patents, license, infringement, license agreement, pendent jurisdiction, patent infringement, state court

LexisNexis® Headnotes

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Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN1[] **Conveyances, Licenses**

If a complaint states only a claim for breach of a patent license agreement, and not an infringement or threatened infringement of patents, jurisdiction would be in the state courts, there being no diversity of citizenship. On the other hand, an exclusive licensee of a patent may sue for infringement of the patent. He may sue his licensor in the federal courts under the patent laws, even though the licensor is the owner of the patents he is charged with infringing.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN2[] **Conveyances, Licenses**

The fact that a license is subject to rights previously granted to others, does not prevent the license agreement from being an "exclusive" license under *35 U.S.C.S. § 261*. It is sufficient that the license agreement bars the licensor from enlarging the scope of existing licenses or increasing the number of licenses.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Patent Law > Infringement Actions > Infringing Acts > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN3[] **Conveyances, Licenses**

The issues would have been clarified if plaintiff had expressly alleged infringement of "patents" instead of infringement of the "exclusive licenses" granted by the patentee-defendant. Such verbal niceties should not be decisive of the sufficiency of a pleading, even on allegations of jurisdiction, under the present practice of "notice pleading." An allegation that the patentee-licensor has infringed the exclusive license by "manufacture, use and sale" of specified products gives notice that infringement of patents is claimed. Particulars concerning which patents are infringed can be obtained through discovery proceedings.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN4[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Where a valid ground of federal jurisdiction exists, the court may consider state claims, which derive from "a common nucleus of operative fact." The current test stated by the United States Supreme Court is that the state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN5[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Pendent jurisdiction is to be exercised in the court's discretion, based on judicial economy, convenience and fairness to litigants.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

International Trade Law > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > General Overview

Patent Law > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Unfair Competition

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Infringement Actions > Jurisdiction > General Overview

HN6[] **Inequitable Conduct, Anticompetitive Conduct**

The United States Circuit Court of Appeals for the Second Circuit recognizes a widening scope for pendent jurisdiction, where there is an overlap of factual basis between patent or trademark and unfair competition claims. The same liberal application of the rule extends to claims of misappropriation of trade secrets, ***antitrust law*** violations, fraudulent transfers, and foreign patents.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN7[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

A plaintiff with two claims against the same defendants, based on breach of the same agreements, is normally expected to try both claims in one proceeding.

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Partnerships

HN8[] **Preliminary Considerations, Removal**

The extent of effort already put into a case is a proper factor when considering pendent jurisdiction. The burden on the litigants, and on the state courts, if two actions are required, is also relevant. Although the state courts are a separate judicial system, they are partners of the federal courts in the administration of justice. Easing the burden of a federal court by removing part of a case to the state courts, where such a removal is not required, would be unfair treatment of an already over-burdened partner. Leaving the entire case joined in the federal venue promotes judicial economy and the convenience of the parties.

Counsel: **[**1]** Feldshuh & Frank, New York, New York, Sidney Feldshuh, New York, New York, of counsel, for plaintiff.

Hopgood & Calimafde, New York, New York, John M. Calimafde, New York, New York, of counsel, for defendants.

Judges: Judd, District Judge.

Opinion by: JUDD

Opinion

[*575]** **[*726]** OPINION AND ORDER

JUDD, District Judge.

A motion to dismiss the complaint raises the question whether plaintiff has stated a claim for infringement of patents of which it is the exclusive licensee, or merely a claim for breach of the license agreements.

The complaint recites that plaintiff holds exclusive licenses from defendants to make, use and sell products and processes embodying inventions covered by certain patents. The agreements name twenty-one United States patents and twenty-five applications for United **[*727]** States patents relating to the polarization of light and other fields apparently related thereto. Certain foreign patents and applications are also covered by the license agreements. Each agreement recites that the defendants have granted plaintiff "an exclusive license, including the right to grant sub-licenses, to make, use and sell products and processes under the licensed patents and licensed **[**2]** applications."

Infringement of the licenses is alleged, without reference to any specific patents. It is asserted that defendants manufactured and sold polarized sheets and polarized lenses to others. Additional claims are asserted against defendants, based on their negotiations with named companies for use of the same inventions licensed to plaintiff, thereby frustrating plaintiff's efforts to exploit its licenses. The allegations of improper license negotiations constitute a larger portion of the complaint than the allegations of infringing manufacture and sale.

The complaint seeks an injunction, ordinary and punitive damages, and counsel fees.

Defendants served an answer and amended answer, asserting defenses and counterclaims, obtained an order adding counter-defendants, and served notices of taking depositions, which have survived motions for protective orders. There were already twenty-five entries in this Court's docket before the motion to dismiss was filed.

The proceedings already taken would not prevent dismissal for lack of jurisdiction, for that question may be raised even after judgment. *Smith Separator Corp. v. Dillon, 98 F.2d 521 (10th Cir. 1938)*. If jurisdiction **[**3]** exists, however, they are relevant to the Court's exercise of discretion whether to retain jurisdiction of pendent causes of action.

HN1[] If the complaint stated only a claim for breach of a patent license agreement, and not an infringement or threatened infringement of patents, jurisdiction would be in the state courts, there being no diversity of citizenship. *Luckett v. Delpark, Inc., 270 U.S. 496, 510-511, 46 S. Ct. 397, 70 L. Ed. 703 (1926)*. On the other hand, an exclusive licensee of a patent may sue for infringement of the patent. *Wilborn & Sons, Inc. v. Brandex Tilt Sash, Inc., 380 F.2d 44 (7th Cir. 1967)*. He may sue his licensor in the federal courts under the patent laws, even though the licensor is the owner of the patents he is charged with infringing. *Littlefield v. Perry, 88 U.S. (21 Wall.) 205, 22 L. Ed. 577 (1874)*; *E.I.S. Mfg. Co., Inc. v. Supco Products Corp., 26 F. Supp. 758 (S.D.N.Y.1938)*.

HN2[] The fact that the license is subject to rights previously granted to others, does not prevent the license agreement from being an "exclusive" license under section 1 of the Patent Law (*35 U.S.C. § 261*). It is sufficient that the license agreement bars the licensor from enlarging **[**4]** the scope of existing licenses or increasing the number of licenses. *Mechanical Ice Tray Corp. v. General Motors Corp., 144 F.2d 720, 725* (C.C.A. 2, 1944).

HN3[] The issues here would have been clarified if plaintiff had expressly alleged infringement of "patents" instead of infringement of the "exclusive licenses" granted by the patentee-defendant. Such verbal niceties should not be decisive of the sufficiency of a pleading, even on allegations of jurisdiction, under the present practice of "notice pleading." *A. T. Brod & Co. v. Perlow, 375 F.2d 393, 398 (2d Cir. 1967)*; *Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944)*. An allegation that the patentee-licensor has infringed the exclusive license by "manufacture, use and sale" of specified products gives notice that infringement of patents is claimed. Particulars concerning which **[***576]** patents are infringed can be obtained through discovery proceedings.

It is assumed for purposes of this motion that the claims based on negotiations between defendants and others are not of themselves subject to federal jurisdiction, in the absence of any allegations that they resulted in the manufacture, **[*728]** use or sale of patented products or processes. **[**5]** Half a century ago, it would have been necessary to split the lawsuit, and dismiss these portions of the complaint. *Geneva Furniture Mfg. Co. v. S. Karpen & Bros., 238 U.S. 254, 259, 35 S. Ct. 788, 59 L. Ed. 1295 (1915)*. Intervening changes in the Federal Rules of Civil Procedure and extension of the doctrine of pendent jurisdiction put in question the continuing viability of the *Geneva* case.

HN4[] Where a valid ground of federal jurisdiction exists, the Court may also consider state claims which derive from "a common nucleus of operative fact." The current test has been stated by the Supreme Court as:

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966)*.

HN5[] Pendent jurisdiction is to be exercised in the Court's discretion, based on "judicial economy, convenience **[**6]** and fairness to litigants" (*id. at 726, 86 S. Ct. at 1139*).

Even before the *Gibbs* case, HN6[] the Second Circuit Court of Appeals had recognized a widening scope for pendent jurisdiction, where there was an overlap of factual basis between patent or trademark and unfair competition claims. *Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 543-544 (2d Cir. 1956)*; *28 U.S.C. § 1338(b)*. The same liberal application of the rule has been extended to claims of misappropriation of trade secrets (*A. H. Emery Co. v. Marcan Products Corp., 268 F. Supp. 289, 292* [S.D.N.Y.1967]), anti-trust law violations (*David & David, Inc. v. Myerson, 277 F. Supp. 973, 979* [E.D.N.Y.1966]), fraudulent transfers (*Bartle v. Markson, 357 F.2d 517, 522-523* [2d Cir. 1966]), and foreign patents (*Ortman v. Stanray Corp., 371 F.2d 154* [7th Cir. 1967]).

Applying the rule of the *Gibbs* case to the pleadings before us here, the license agreements and the various United States patents and patent applications provide a "common nucleus of operative fact." Defendants' counterclaims, seeking to annul the license agreements, could be pleaded in defense to the patent infringement portions of the **[**7]** complaint (*Wilborn & Sons, Inc. v. Brandex Tilt Sash, Inc., 380 F.2d at 47*), and pleaded again in the state court if a separate action there were required on the claims based on negotiations between the defendant and others.

Acceptance of pendent jurisdiction is also indicated by the tendency to require a plaintiff to try his whole case in a single action (*United Mine Workers v. Gibbs, 383 U.S. 715, 725 n. 13, 86 S. Ct. 1130, 16 L. Ed. 2d 218*). ***HN7***[] A plaintiff with two claims against the same defendants, based on breach of the same agreements, would normally be expected to try both claims in one proceeding, thus bringing its case within the test stated in the *Gibbs* opinion (*383 U.S. at 725, 86 S. Ct. 1130*).

HN8[] The extent of effort already put into this case is a proper factor for consideration. *A. H. Emery Co. v. Marcan Products Corp., 268 F. Supp. at 292-293*. The burden on the litigants, and on the state courts, if two actions were required, is also relevant. Although the state courts are a separate judicial system, they are partners of the federal courts in the administration of justice. Easing the burden of a federal court by removing part of a case to the state courts, where **[**8]** such a removal is not required, would be unfair treatment of an already over-burdened partner. Leaving the entire case joined in the federal venue promotes judicial economy and the convenience of the parties. *American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., 268 F. Supp. 656 (E.D.Pa.1967)*.

[*729] "Judicial economy, convenience and fairness to litigants" all point to the exercise of pendent jurisdiction, and the power exists to exercise it.

The motion to dismiss is denied.

This opinion shall serve as an order.

End of Document

Klinger v. Rose

United States District Court for the Southern District of New York

October 1, 1968

No. 64 Civ. 3653

Reporter

291 F. Supp. 456 *; 1968 U.S. Dist. LEXIS 10140 **; 1968 Trade Cas. (CCH) P72,582

Charlotte Klinger and Eric Klinger, Plaintiffs, v. Edward C. Rose, Revelle W. Brown, Wm. Fulton Kutz, Howard E. Simpson, Sidney D. Koine, E. Paul Gangewere, Jervis Langdon, Jr., Watson F. Tate, Jr., Edward F. McGinley, Jr., Frank C. LaGrange, the Baltimore and Ohio Railroad Co., and Reading Co. Defendants

Core Terms

Terminal, carrier, railroads, bids, interlocks, legislative history, private suit, Clayton Act, Defendants', summary judgment, common stock, antitrust, Commerce, damages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

HN1[] **Private Actions, Costs & Attorney Fees**

See 15 U.S.C.S. § 15.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See 15 U.S.C.S. § 20.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

The evident purpose of § 10 of the Clayton Act is to prohibit a corporation from abusing a common carrier by palming off upon it securities, supplies, and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN4[] **Clayton Act, Claims**

Section 4 of the Clayton Act provides a cause of action where a person has been injured by a violation of "the anti-trust laws."

Judges: [1]** Tyler, D.J.

Opinion by: TYLER

Opinion

[*457] TYLER, D.J.:

Plaintiffs, the owners of both common and preferred stock of Reading Company ("Reading"), a common carrier, have brought this derivative action on behalf of Reading seeking treble damages from the Baltimore and Ohio Railroad Company ("B&O"), another common carrier, and from ten individual defendants who were directors of Reading at the time of the alleged misconduct. None of the individual defendants have been served. The suit is brought under Sections 4 [1] **[**2]** and 10 [2] of the Clayton Act. The defendants B&O and Reading [3] jointly move for summary judgment dismissing the complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

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[1] *HN1*[] "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 three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15*.

[2] *15 U.S.C. § 20*. That Section provides in pertinent part:

HN2[] "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $

[3] [*458]** Most of the facts have been stipulated by the parties. The transaction which is the basis of this action was the April, 1963 termination of Reading's interest in the Philadelphia Perishable Products Terminal Company ("Terminal"), a corporation created by the two railroads in 1927 to hold a joint terminal facility in Philadelphia. In 1927, Reading and B&O were each issued 250 shares of the common stock of Terminal, and in 1936 each was issued $ 2,000,000 of 4% negotiable demand notes by the company.

In the early 1960's Reading sought to terminate its interest in Terminal, and in April, 1963 sold its common stock and notes to B&O for $ 225,250 cash and $ 900,000 payable in 5 annual installments at 3% interest. On April 30, 1964, B&O paid the first installment with interest and pre-paid the balance of $ 720,000 discounted at 5% per year.

In connection with this transaction neither Reading nor B&O ever attempted to solicit bids pursuant to Section 10 and the rules of the Interstate Commerce Commission ("I.C.C.") promulgated thereunder. [4]

[4]** At the time of this transaction Reading and B&O had several directors in common. E. Paul Gangewere was president and director of Reading and a director of B&O, Jervis Langdon, Jr. was director of Reading and president of B&O (and part of its governing body), and Howard E. Simpson was a director of both railroads. Permission had been received by each of these individuals from the I.C.C. pursuant to *Section 20(a)(12)* of the Interstate Commerce Act, 49 U.S.C. § 20(a)(12), to hold the respective interlocking directorships. At that time B&O owned 42% of the outstanding common stock of Reading. Reading was represented in the negotiations leading to the sale by John F. Kerslake, who was then an employee of the Chesapeake & Ohio Railway Company, B&O's parent.

The complaint alleges that Reading received for its interest in Terminal consideration that was inadequate by $ 765,000, and that this loss was a result of the failure of the Reading board of directors to obtain public bids as required by Section 10. The complaint also asserts that this failure by the board of directors was a direct result of the domination of the board by B&O and the acquiescence of the individual defendants **[**5]** in the sale to B&O.

The primary basis for the joint motion for summary judgment by B&O and Reading is that Section 10 is not applicable to this transaction. The defendants make four arguments based on their interpretation of the legislative history of Section 10.

1. Defendants' first argument is based upon the word "securities" in the first paragraph of Section 10. Defendants correctly point out that nowhere is the word defined for purposes of the Clayton Act and that the meaning of the word in statutes varies. [5] **[**6]** Defendants then describe certain parts of the legislative history which indicate that Congress' primary reason for inserting the word "securities" in Section 10 was to cover the gross abuses of interlocks between investment bankers and the railroads. [6] Defendants take great pains to characterize this sale of stock and notes as a mere paper transaction - the termination of a joint venture. Their conclusion is that this sale,

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50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission."

[3] There is some disagreement between the parties as to the reason that Reading, for which recovery is sought in this action, has joined in B&O's motion. Plaintiffs claim that this fact is more evidence that the two railroads are in collusion. Defendant Reading claims that it has opposed plaintiffs because if plaintiffs are successful in this suit it will indicate that Reading has committed a crime under Section 10.

[4] 49 C.F.R. Part 1010.

[5] See, e.g., Securities Act of 1933, § 2(1), *15 U.S.C. § 77b(1)*; Securities Exchange Act of 1934, § 3(a)(10), *15 U.S.C. § 78c(a)(10)*; Interstate Commerce Act, § 20a, 49 U.S.C. § 20a; Federal Power Act, § 3(16), *16 U.S.C. § 796 (16)*; *Internal Revenue Code, Sections 351*, *354*, *355*, *1236(c)*.

[6] Hearings, H. Judic. Comm., 63d Cong.2d Sess., Trust Legislation, 1913-14, pp. 679-80, 1062.

which could have been accomplished by dissolving Terminal and selling to B&O Reading's share of the assets, did not constitute "dealing in securities" within the meaning of Section 10.

The answer to this argument lies in the statute itself. Section 10 prescribes public bidding on certain " . . . dealings **[*459]** in securities, supplies, *or other articles of commerce*." The notes and stock in question fall within any normal meaning of the word "securities". Moreover, they are "articles of commerce" in the sense that they were apparently transferrable to third parties. Presumably defendants would not contend that if these notes and shares of common stock had been sold by Reading to a third party with which Reading had an interlock, they would not be "securities" for purposes of Section 10. The transaction under consideration here was not different merely because the sale was made to the owner of the other half of Terminal.

Defendants' argument that if Reading had accomplished the sale by another method Section 10 surely would not have applied begs the question. I assume that the parties had good and sufficient reasons for accomplishing the result in the manner they chose, **[**7]** a transfer of stock and notes. I have no occasion to consider whether the defendants could have avoided the operation of Section 10 by using a different form.

2. Defendants' second argument, also based primarily upon an interpretation of legislative history, is that Section 10 does not apply to an interlock between two railroads. It is said that Section 10 applies only to so-called "vertical" interlocks, e.g., those in which a common carrier has directors in common with a supplier or an investment banker. [7]

The statute, of course, does not except "horizontal" interlocks. Furthermore, the authorities to which defendants have cited have concentrated on the nature of the interlock **[**8]** rather than the nature of the transaction. The draftsmen of Section 10 as it now reads decided in favor of prohibiting certain tainted transactions rather than prohibiting interlocks outright. [8] As the defense memoranda point out, the present wording of Section 10 indicates that the Congress was concerned with vertical transactions rather than horizontal anti-competitive relationships which are covered in other parts of the statute. But the transaction in issue can be viewed as a vertical transaction, the nature of which is not changed by the fact that the purchaser was a competing railroad. Reading, in financial difficulties, sought through this sale to divest itself of properties not necessary for its current railroad operations and to enhance its precarious cash position. The mere fact that the buyer of the securities was a railroad rather than an investment banker does not obviate the abuse which Congress sought to remedy. On the contrary, if there was in fact damage to the Reading as a result of this sale, this is precisely the type of transaction which Section 10 was designed to cover. This contention, then, is rejected.

[9]** It is suggested by counsel that the result of so deciding this point makes it practically impossible for two railroads to engage in this type of transaction because each would be required to get competitive bids, the seller being forced to accept the highest bid and the buyer the lowest. Two suggestions can be made on this point. First, where one of the two carriers dominates the other to the extent of holding 42% of its common stock, as here, the purposes of Section 10 are fulfilled if the dominated carrier alone obtains public bids. Second, if it be assumed that this and no other solution is available to substantially comply with the competitive bidding provisions of Section 10, perhaps this is not the kind of transaction in which two carriers ought to participate. [9]

3. Defendants' third venture into legislative history gives rise to their **[*460]** conclusion that Section 10 applies only to securities issued by the common carrier **[**10]** itself. They rely on a footnote in Minneapolis & St. Louis R. Co. v. U.S. [10] That case was an appeal from an order of the I.C.C. The petitioner seeking to overthrow the

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[7] H. Rep. 627, 2 H. Reps. Misc. II; 63d Cong.2d Sess., p. 3; S. Rep. No. 698, 2 Sen. Reps. Misc. II, 63d Cong.2d Sess., 47-48. See, F.T.C. Report on Interlocking Directorates at 11 (1951); Staff of Sub Comm. No. 5, House Comm. on the Judiciary 89th Cong., 1st Sess., Interlocks in Corporate Management 10, 27 (Comm. Print 1965).

[8] 51 Cong. Rec. 16002-3 (Oct. 1, 1914).

[9] *In re Missouri Pacific R. Co., 13 F. Supp. 888, 893 (D. Mo. 1935)*.

Commission's order argued that there would be a violation of Section 10 if the Commission's order were enforced. In the course of dismissing this objection on a ground not important for our purpose, the Court made the following statement:

> "Section 10 of the Clayton Act is, of course, an ***antitrust law***, and much of what we have just said relative to the problem of accommodation of § 5(2) of the Interstate Commerce Act and the antitrust laws is equally applicable to this contention. ***HN3***[] The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest. n.13
>
> n.13 "The legislative history of § 10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language **[**11]** of the several drafts of § 10, together with the types of abuses cited in support of its enactment, suggests strongly that the words 'dealings in securities' were intended to cover only a carrier's dealings with related persons in its own securities. See H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 3; S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47-48; S. Doc. No. 585, 63d Cong., 2d Sess., pp. 8-9; 51 Cong. Rec. 15943." [11]

It is at once apparent that the second sentence of footnote 13 and the text which it supports are inconsistent. The fact is that the legislative history indicates some concern with both types of abuses, and the Section subsequently has been applied to both purchases and sales of securities. [12] Accordingly, I am not convinced that a limitation should be read into Section 10 that the word "securities" means only the carrier's own securities.

[12]** 4. Finally, defendants maintain that Section 10 cannot be enforced by a private suit under Section 4 of the Clayton Act. [13] They submit that because Section 10 contains its own criminal penalties and provides for rules by the I.C.C. regulating the public bid process, Congress did not intend that a private suit would be available in Section 10 cases. Defendants also point out that the I.C.C. has construed the statute to allow it to hear private complaints based on violations of Section 10 and that the Congress specifically exempted Section 10 cases from § 16 (*15 U.S.C. § 26*) which provides for private injunctive relief.

My conclusion is to the contrary. Section 4 ***HN4***[] provides a cause of action where a person has been injured by a violation of "the anti-trust laws". In interpreting another statute, the Supreme Court has held that Section 10 is an "***antitrust law***". [14] The courts and the agencies charged with enforcing the antitrust laws have consistently recognized the value **[**13]** of private suits in securing compliance with the statutes. It is also clear that the remedies under these statutes were designed to be cumulative. [15] But, say defendants, because the Congress did not see fit to allow private injunctive relief in Section 10 cases, it follows that a private suit for damages is likewise prohibited. If any inference is to be drawn from the Congress' failure to except Section 10 cases from the operation of Section 4 while making such an exception **[*461]** in Section 16, it is that the private suit for damages was to remain a remedy for this type of transaction. Thus, the fourth "defense" is rejected.

In summary, defendants' four legal arguments raised on this motion to the effect that this transaction is not the proper basis for a private suit under Section 10 must fail. It follows that defendants' motion for summary judgment **[**14]** based on these arguments must be and is denied.

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[10] *361 U.S. 173, 190, n. 13, 80 S. Ct. 229, 4 L. Ed. 2d 223 (1959)*.

[11] Id.

[12] It is apparent that the I.C.C. in drafting its regulations has assumed this to be true. 49 C.F.R. §§ 1010.1(a), 1010.3.

[13] The statute is set out at n. 1.

[14] Minneapolis & St. Louis R. Co. v. U.S., supra, n. 9, at 190.

[15] See, *U.S. v. Borden Co., 347 U.S. 514, 518, 98 L. Ed. 903, 74 S. Ct. 703 (1953)*.

There remains the question of whether or not plaintiffs' motion for partial summary judgment on all issues except that of damages should be granted. Rule 56(c) and (d), F.R. Civ. P. In the light of the views expressed heretofore in this opinion, it might be said that the stipulated facts are sufficient for granting plaintiffs' motion as prayed. Nevertheless, there are at least two complaint allegations which suggest that plaintiffs may wish to present additional proof, and, if they do, that defendants will wish to rebut such proof by evidence of their own. To illustrate, in paragraph "six" of the complaint, it is alleged, *inter alia*, that defendant B&O not only dominated and controlled the affairs and directors of Reading but that such defendant has used its power and control over Reading to benefit itself and to damage Reading in the manner thereafter set forth in the complaint. Further, in paragraph "eight", it is alleged that the facilities of Terminal have been used almost exclusively by B&O and its subsidiaries, but notwithstanding this fact, Reading has been caused to join with B&O in financing and maintaining Terminal. **[**15]** In the exercise of caution, I am constrained to deny plaintiffs' motion for partial summary judgment upon the possibility that they will wish to adduce additional proof in support of the aforementioned allegations at trial and because these allegations of "dominance" tend to be somewhat intertwined with the question of damages. Parenthetically, however, the alleged issue of whether or not Terminal is a "paper company" would seem to be irrelevant and thus not susceptible of further fact development at trial in the light of the legal views heretofore expressed in this memorandum. Rule 56(d), F.R. Civ. P.

It is so ordered.

Sahm v. V-1 Oil Co.

United States Court of Appeals for the Tenth Circuit

October 16, 1968,

No. 9647

Reporter

402 F.2d 69 *; 1968 U.S. App. LEXIS 5240 **; 1968 Trade Cas. (CCH) P72,604

Stephen K. Sahm v. V-1 Oil Co.

Core Terms

lease, cancellation, retail, illegal agreement, resale price, termination, anti trust law

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > 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

HN1[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A business agreement that directly and effectively controls both prices and profits constitutes a per se violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1.

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

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A mere announcement in advance of a policy and a unilateral refusal to deal with those who reject the announced policy does not run counter to the antitrust laws. However, where the producer or supplier secures adherence to his suggested price by means which go beyond his mere declination to sell to a customer who will not observe his announced policy, the antitrust laws are violated.

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

Contracts Law > Defenses > Illegal Bargains

Labor & Employment Law > Wrongful Termination > Remedies > Reinstatement

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Tying Arrangements, Clayton Act**

Where a resale price maintenance agreement is tied to and enforced by related agreements between the parties, and where the related agreements are used by one of the parties in his attempt to have the illegal agreement reinstated, an agreement for purposes of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is established and continued even though the resale price maintenance agreement itself is repudiated by the injured party prior to the conduct of the other party which causes the injury.

Judges: [1]** Lewis, Seth and Hickey, Circuit Judges.

Opinion by: LEWIS

Opinion

[*70] LEWIS, Circuit Judge.

This appeal is taken from an order of the District Court for the District of Utah dismissing the appellant-plaintiff's amended complaint and action for failure to state a claim upon which relief can be granted. Rule 12 (b, c), Fed. R. Civ. P. The complaint is founded on *Section 1* of the Sherman Act [1] and we accept the allegations as true for the purposes of present review. *United States v. Reilly, 10 Cir., 385 F.2d 225*. The allegations need only to be narratively summarized.

On August 26, 1966, plaintiff by written instrument leased from defendant a retail gasoline service station located in Salt Lake City, Utah. **[**2]** The lease provided for a primary term of one year, and thereafter from year to year, with the right to termination reserved to each party through thirty-day written notice. The lease contemplated the operation of the service station under defendant's trade name and colors. At the same time the parties entered into an oral agreement providing for the consignment to plaintiff of gasoline furnished by defendant and to be retailed at prices set by defendant. Plaintiff's commission profit was variable and dependent in amount upon the retail price level as determined by defendant.

Plaintiff abided by the terms of the total agreement until the middle of October 1966, at which time, without defendant's consent, he raised his retail price from 26.9 cents per gallon to 29.9 cents per gallon. On October 26, defendant through its sales manager protested the price increase and threatened cancellation of the lease unless plaintiff would resume compliance with the agreement as it pertained to retail sales pricing. On October 28, defendant gave letter notice of the cancellation of the lease effective in thirty days as provided by the lease. A few days later plaintiff was told by defendant's **[**3]** sales manager that termination could be prevented if plaintiff would set his retail price in accord with defendant's schedule. Plaintiff remained adamant and the lease was canceled on November 28, 1966. Plaintiff asserts the cancellation was motivated by his refusal to set his retail price at levels

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[1] *Section 1* reads 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 . . . ." 26 Stat. 209, *15 U.S.C. § 1*.

fixed by defendant, that damage resulted, and characterizes the agreement and acts of defendant as a collusive price-setting scheme violative of the cited statute.

It is immediately apparent that plaintiff has alleged the existence and operation of a total agreement that if continued would directly and effectively control both prices and profits. ***HN1***[] Such an agreement or combination smacks of a per se violation of *§ 1* of the *Sherman Act. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811*. Indeed, defendant **[*71]** concedes the violative nature of the plan during its operative period but argues that the complaint is fatally defective because **[**4]** of a lack of an existing conspiracy at the time of the cancellation of the lease and during the period for which damages are sought. Defendant thus characterizes the complaint as alleging no more than a mere unilateral refusal to deal regardless of motivation and so within the confines of acceptable business policy.

It is true that ***HN2***[] a mere announcement in advance of a policy and a unilateral refusal to deal with those who reject the announced policy does not run counter to the antitrust laws; [2] however, where the producer or supplier "secures adherences to his suggested price by means which go beyond his mere declination to sell to a customer who will not observe his announced policy," *United States v. Parke, Davis & Co., 362 U.S. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503*, the antitrust laws are violated. Petitioner herein alleges that before appellee canceled the lease his agent threatened immediate cancellation of the lease unless appellant complied with the provisions of the illegal agreement and it was only when such threat failed and in response to the failure that the **[**5]** lease was canceled. Also petitioner alleges that during the thirty-day cancellation period required by the written contract that appellee's agent called upon him and assured him that he could save the lease if he would abide by the oral resale price maintenance agreement. This alleged attempt on behalf of appellee and his agent to coerce appellant into reinstating an illegal agreement cannot be classified as a mere refusal to deal.

Defendant also emphasizes the fact that the complaint contains no allegation that defendant conspired with others in price setting and does allege affirmatively that plaintiff repudiated the admittedly prohibited agreement before the cancellation of the lease. Therefore, so says defendant, there was no existent conspiracy to found a *section 1* violation, citing *Quinn v. Mobil Oil Co., 1 Cir., 375 F.2d 273*, cert. denied *389 U.S. 801, 88 S. Ct. 8, 19 L. Ed. 2d 56*; **[**6]** *Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D.C. 79, 344 F.2d 173*; *House of Materials, Inc. v. Simplicity Pattern Co., 2 Cir., 298 F.2d 867*; *Nelson Radio & Supply Co. v. Motorola Inc., 5 Cir., 200 F.2d 911*, cert. denied *345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356*. We deem such reasoning to be faulty.

HN3[] Where, as here, the resale price maintenance agreement is tied to and enforced by related agreements between the parties, and where the related agreements are used by one of the parties in his attempt to have the illegal agreement reinstated, an agreement for purposes of *§ 1* of the Sherman Act is established and continued even though the resale price maintenance agreement itself is repudiated by the injured party prior to the conduct of the other party which causes the injury. If we were to hold otherwise, a paradox would emerge which would allow the injured party to bring suit only if he followed the illegal agreement but would prevent such a suit where the injured party refused to continue to be a party to the illegal agreement. **[**7]** To allow such a paradox would defeat the policy of the antitrust laws as stated by Mr. Justice Black in *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981*, that

> the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

In the present case the resale price maintenance agreement and the thirty-day termination clause, which appellee relied upon to terminate the lease and which in turn terminated appellant's **[*72]** source of livelihood, should be deemed inseverable and the latter should be construed as an agreement which would support a *§ 1* cause of action. It was the termination agreement which enabled appellee to attempt to coerce appellant into obeying the

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[2] *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465*.

resale price maintenance agreement and to punish him for disobeying. That the resale price maintenance agreement itself does not have to be technically in "existence" at the time of the injury in order to **[**8]** support a cause of action under *§ 1* finds comfort in recent Supreme Court decisions. Mr. Justice White in writing for the majority in *Albrecht v. Herald Co., 390 U.S. 145, 150, 19 L. Ed. 2d 998, 88 S. Ct. 869*, in footnote 6 of that opinion stated the petitioner therein could have asserted an illegal combination under *§ 1* of the Sherman Act by claiming "a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price" and this was true even though the conduct of respondent therein which caused the petitioner's injury occurred after the petitioner had reneged on his agreement to follow respondent's advertised price. Also Mr. Justice Black in his majority opinion in *Perma Life, supra*, cited *Simpson v. Union Oil Co. of California, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*, [3] not for the proposition that a conspiracy could be found by an expressed or implied agreement between the lessor (oil company) and its other dealers, as appellee herein argues the case stood for, but for the proposition that a "conspiracy" could be found solely on the agreement between the lessor and **[**9]** the alleged victim of the illegal agreement. *Simpson*, so interpreted, cannot be distinguished in principle from the case at bar. So, too, it is manifest that the defense of in pari delicto does not defeat plaintiff's alleged cause of action as inherent in his claim and as a matter of law. *Perma Life Mufflers, Inc. v. International Parts Corp., supra.*

The judgment is reversed and the case remanded with instructions to reinstate the action and the amended complaint.

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[3] Simpson held that the supplier of crude oil to the petitioner therein had violated the anti-trust laws by attempting to maintain resale prices through the coercive type of "consignment" and lease agreements.

Bela Seating Co. v. Poloron Prods.

United States District Court for the Northern District of Illinois, Eastern Division

December 23, 1968

Civ. A. No. 65 C 1702

Reporter

297 F. Supp. 489 *; 1968 U.S. Dist. LEXIS 12412 **; 160 U.S.P.Q. (BNA) 646 ***

BELA SEATING COMPANY, Inc., Plaintiff, v. POLORON PRODUCTS, INC., Defendant

Core Terms

chair, patent, arm, tablet, seat, folding, pivotal, license, infringement, invention, cooperative, prior art, sliding, specification, lawsuit, universal joint, royalty rate, manufactured, drawings, closed position, disclosure, universal, opening, front, terms, expert witness, folding chair, automatically, demonstrations, rear

LexisNexis® Headnotes

Patent Law > Ownership > Conveyances > General Overview

HN1[] **Ownership, Conveyances**

Plaintiff has the right to limit its licenses to a specific form or forms of the invention, and to agree itself to forego manufacture of a specific form or forms of the invention.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Ownership > Conveyances > General Overview

HN2[] **Misuse of Rights, Patent Misuse Defense**

Plaintiff has the right to sue defendant for infringement without first offering defendant a license.

Patent Law > Remedies > Equitable Relief > Injunctions

HN3[] **Equitable Relief, Injunctions**

The patent system of the United States would be of little value if a patent owner could not legally couple the bringing of an infringement suit with a demand that the accused infringer cease production of the infringing article.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN4[] **Trials, Judicial Discretion**

A mechanical or other technical expert may testify as to structural and operational features of the accused device, and it is the function of the court to determine whether such structural and operational features are defined by the patent claims. The weight to be given the expert's testimony should be left to the sound discretion of the court in view of the qualifications of the expert, all the evidentiary facts in the record, and the rules governing construction of patent claims.

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN5[] **Jurisdiction & Review, Standards of Review**

Legal conclusions, such as whether a claim is infringed and whether a claim is valid, should be made by the court, and opinions as to legal conclusions from a patent expert are never binding upon the court.

Evidence > Types of Evidence > Testimony > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

Evidence > Judicial Notice > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN6[] **Types of Evidence, Testimony**

The court is not obliged to follow blindly the testimony of any expert, even if uncontroverted by explicit testimony on the same point from another expert. The testimony of an expert witness on any opinion question, whether a question of technical opinion or legal opinion, must be considered in the light not only of any other opinion evidence in the record but also all factual evidence in the record, including the wording of the specification and claims of the patent in suit, the drawings of the patent in suit, the file history of the application which matured into the patent in suit, physical exhibits, courtroom demonstrations, photographs in evidence, and all other factual testimony and evidence in the record and of which the court may take judicial notice.

Patent Law > ... > Claims > Claim Language > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN7[] **Claims, Claim Language**

In determining whether or not defendant's product finding a claim of the patent in suit, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out, and that is the end of it.

Patent Law > Claims & Specifications > Invention Theory

HN8[] **Claims & Specifications, Invention Theory**

It is a well established rule of patent law that every patentee is entitled to be his own lexicographer.

Patent Law > ... > Specifications > Definiteness > General Overview

HN9[] **Specifications, Definiteness**

The definition of the invention is governed by the express terms of the patent claims, and resort to the specification to narrow a claim by interpreting a particular limitation in a certain way, in order purportedly to save the claim from being invalid over the prior art, is not permitted unless the claim is ambiguous because of the limitation in question.

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

Patent Law > ... > Claims > Claim Language > General Overview

HN10[] **Filing Requirements, Drawings**

The claims of the patent measure the invention.

Patent Law > ... > Specifications > Definiteness > General Overview

HN11[] **Specifications, Definiteness**

A patentee may claim his invention as broadly as the prior art allows.

Patent Law > Infringement Actions > General Overview

HN12[] **Patent Law, Infringement Actions**

Defendant may not avoid infringement by merely making the device different in form in minor respects.

Evidence > ... > Presumptions > Exceptions > Statutory Presumptions

Patent Law > Originality > Joint & Sole Inventorship

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

HN13[] **Exceptions, Statutory Presumptions**

A patent is presumed valid. *35 U.S.C.S. § 282*. The statutory presumption of validity is not an idle gesture, and is not to be overthrown except by clear and cogent evidence. Every reasonable doubt should be resolved against the defendant who is attempting to show invalidity.

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > Originality > Joint & Sole Inventorship

HN14[] **Jurisdiction & Review, Standards of Review**

The presumption of validity cannot be weakened by reliance on prior art which was cited but not applied by the Patent Examiner. On the contrary, the fact that the most pertinent prior art relied upon by defendant was considered and rejected by the Patent Office greatly strengthens the presumption of the validity of the patent.

Patent Law > Originality > Joint & Sole Inventorship

HN15[] **Originality, Joint & Sole Inventorship**

The copying of the patented invention by defendant indicates its commercial importance and emphasizes the validity of the prior patent.

Patent Law > Infringement Actions > Defenses > General Overview

HN16[] **Infringement Actions, Defenses**

The defense of anticipation requires that all of the elements of a claim be found in a single piece of prior art.

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN17[] **Jurisdiction & Review, Standards of Review**

A prior art patent which has not contributed anything to the practical art, and is thus in the category of paper patents, should be strictly construed with respect to whatever teaching may be found in the same.

Patent Law > Anticipation & Novelty > Description in Prior Patents > Combinations

Patent Law > Anticipation & Novelty > Elements

Patent Law > ... > Claims > Claim Language > Combination Claims

Patent Law > Double Patenting > General Overview

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN18[] **Description in Prior Patents, Combinations**

An attempted combination of individual features found in separate prior art patents to show that the invention of the patent in suit is obvious, is improper. The combination patent cannot properly be anticipated in a piecemeal fashion by combining individual features from different prior art patents when such combination is not taught by the prior art patents themselves.

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN19[] **Nonobviousness, Elements & Tests**

A new combination resulting in an improved construction which accomplishes a new result and which is markedly more efficient than the prior art devices is patentable.

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN20[] **Elements & Tests, Prior Art**

The failure of those working in the prior art and the success of the patentee is evidence that the patentee's contribution was not obvious.

Patent Law > Nonobviousness > Elements & Tests > Hindsight

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN21[] **Elements & Tests, Hindsight**

Although many things seem obvious after they have been done, one cannot properly apply hindsight to attempt to determine what was obvious at the time the invention was made.

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Originality > Joint & Sole Inventorship

HN22[] **Nonobviousness, Elements & Tests**

Defendant's use of eight different prior art patents in its attempt to invalidate plaintiff's claims tends in and of itself to negate the position of defendant that the patent in suit is invalid.

Patent Law > Anticipation & Novelty > General Overview

Patent Law > ... > Specifications > Definiteness > General Overview

HN23[] **Patent Law, Anticipation & Novelty**

The claims are not functional at the point of novelty when all of them clearly indicate to one skilled in the art a variety of specific structural elements for performing the functions specified, definite properties of such elements, or some definite interrelation between such elements. No more is required. *35 U.S.C.S. § 112*.

Patent Law > Originality > Joint & Sole Inventorship

HN24[] **Originality, Joint & Sole Inventorship**

Claims covering a combination of elements, in which a new and functional result is achieved as a result of the coaction of the various elements of the combination, are valid.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN25[] **Conveyances, Licenses**

Plaintiff has no duty to grant a license to defendant under the patent in suit, merely because defendant has requested such a license. A patent owner has the right to grant a license to some, as he chooses, without granting a license to others.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN26[] **Conveyances, Licenses**

A patent owner is not required to grant licenses to all comers at equal rates and terms. He may select or reject prospective licensees and prefer one over another for considerations within his discretion.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN27[] **Ownership & Transfer of Rights, Assignments**

Plaintiff need not justify different royalty rates among different licensees. An owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Conveyances > General Overview

HN28[] **Conveyances, Licenses**

A patent owner who grants a license under his patent may restrict the licensee's product which falls under the licensed patent to a specific use or to a specific form.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN29[] **Infringement Actions, Exclusive Rights**

A patent owner has the right to bring an infringement suit against an infringer without first offering the infringer a license.

Counsel: **[**1]** Dressler, Goldsmith, Clement & Gordon, Chicago, Illinois, for plaintiff.

Bair, Freeman & Molinare, Chicago, Illinois, for defendant.

Judges: Austin, District Judge.

Opinion by: AUSTIN

Opinion

[*648]** **[*491]** AUSTIN, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FINDINGS OF FACT THE PARTIES

1. Plaintiff, Bela Seating Company, Inc. (Bela Seating), is an Illinois corporation having a place of business at 9505 South Prairie Avenue, Chicago, Illinois. Plaintiff is the successor-in-interest of J & J Tool & Machine Company, a sole proprietorship owned by Bela B. Junkunc. For purposes of convenience, both Bela Seating and J & J Tool & Machine Company are referred to in these Findings of Fact as "plaintiff."

2. Defendant, Poloron Products, Inc. (Poloron), is a New York corporation. Defendant has admitted that it has a regular and established place of business **[*492]** at 600 South Michigan Avenue, Chicago, Illinois. Acts of infringement, including sales of the accused chairs, have been committed in Chicago and elsewhere.

THE ISSUES

3. This suit was filed by plaintiff on October 13, 1965, for infringement of United States Letters Patent No. 2,954,073, entitled "Folding Tablet Arm **[**2]** Chair," issued on September 27, 1960 in the name of Bela B. Junkunc. On January 1, 1965, the entire right, title and interest in and to the patent in suit (hereinafter sometimes called the Junkunc patent) was assigned to Bela Seating.

4. The case was tried on the issues presented by the Amended Complaint and the Amended Answer and Counterclaim. Defendant was charged with infringing claims 1 through 7, 10, 12, 14 and 15 of the Junkunc patent. Defendant denied validity and infringement and counterclaimed against plaintiff, charging violation of the antitrust laws.

5. Prior to trial, defendant moved for summary judgment on the ground that plaintiff had allegedly misused its patent by refusing to grant to defendant a license on the identical terms and conditions as are contained in a license previously granted to another company, Hampden Specialty Products Corp. Defendant's motion was denied.

6. The trial was extensive and thorough, continuing for a period of ten days in court. The record of testimony and argument is almost 2,000 pages in length. These Findings of Fact represent a thorough study of the evidence and are based on the most credible evidence.

THE SUBJECT MATTER **[**3]** OF THE PATENT IN SUIT

The Disclosure

7. The Junkunc patent concerns a "Y-frame" folding chair which has a tablet arm that is supported in its position of use by an elogated link pivotally connected at one end to the chair seat and connected at its other end to the underside of the tablet arm by means that (a) permit pivotal movement of the tablet arm with respect to the link about two perpendicular axes, and (b) also permit sliding movement of the tablet arm along the link. The actual invention disclosed in the patent in suit is not limited to such means in the form either of a true universal joint or the equivalent thereof, nor is it limited to use of a slidable sleeve of any type in such means. Nothing in the prior art requires any such limitation.

[*649]** 8. The tablet arm disclosed in the Junkunc patent moves from a lowermost out-of-the-way position (illustrated in Figure 3 of the patent) to a writing position (illustrated in Figures 1, 2 and 17 of the patent), and vice versa, independently of the chair seat while the chair seat is in its open, unfolded position.

9. The tablet arm disclosed in plaintiff's patent also opens to its writing position cooperatively with the chair **[**4]** seat when the chair is unfolded into its open position from its fully closed position (illustrated in Figures 6 and 16 of the patent).

10. The tablet arm disclosed in plaintiff's patent also moves down from its writing position to a fully closed position cooperatively with the chair seat when the chair seat is folded into its fully closed position from its open, writing position.

Differences Between Y-Frame and X-Frame Chairs

11. Chairs of the "Y-frame" type are completely different in structure and operation from chairs of the "X-frame" type. A "Y-frame" folding chair is a folding chair in which the front frame and the back legs of the chair form an inverted Y-shaped structure, and if the chair is a folding tablet arm chair, the tablet arm supporting link is pivotally connected at its lower end to the chair seat, as is required by the claims of the Junkunc patent. In contrast, in the conventional "X-frame" folding chair, the **[*493]** front and rear legs cross to form an X-shape, and, if the chair is a folding tablet arm chair, the tablet arm supporting link is pivotally connected at its lower end to the front frame of the chair.

12. A Y-frame chair is usually formed **[**5]** of tubular steel, while an X-frame chair is usually formed of channel steel. This is so because if an X-frame chair were made of tubular steel, the frame would become very bulky by reason of the additional width required to allow for the scissors action of the front legs against the rear legs. On the other hand, the Y-frame chair is very well suited for the desirable tubular steel construction because it does not have the scissors action of the legs.

13. The difference between tubular steel and channel steel construction is extremely important. There is testimony by witnesses for both parties as to the superiority of the tubular steel construction as compared with the channel steel construction.

14. Other advantages of the Y-frame chair over the conventional X-frame chair are that a Y-frame chair is usually easier to open than an X-frame chair, a Y-frame chair has superior strength and rigidity over the X-frame chair, and a Y-frame chair is considerably more stable and safer than an X-frame chair.

The Invention Was of Great Significance to the Chair Industry

15. Despite the fact that chairs with Y-frame construction have many advantages over X-frame chairs, prior to the **[**6]** invention of the patent in suit there was no Y-frame folding chair with a tablet arm that could be moved both cooperatively and independently with respect to the seat. The Junkunc invention gave to the industry and to the public for the first time a Y-frame folding tablet arm chair with both cooperative and independent movement of the tablet arm with respect to the folding and unfolding of the chair seat.

16. The patented chair is very useful in institutions such as schools, churches, clubs, cafeterias, hotels, business establishments, colleges, universities and the like.

17. It is very important for institutional use to have folding tablet arm chairs that can be stored in a relatively small amount of space. With the patented chair, the seat, legs and tablet arm can be folded to provide a compact unit. The folded chairs can thus be stacked and stored in a small space whenever desired.

18. It is also important in institutional use that folding tablet arm chairs be opened and closed quickly so that they can be set up and subsequently removed in a very short time. With the patented chair, there is cooperative movement of the tablet arm with the chair seat, making possible rapid **[**7]** setting up or rapid folding, and in preferred embodiments both rapid setting up and rapid folding.

19. To open the patented chair, one needs merely to lift up on the tablet arm and as the arm swings up, the seat and legs unfold cooperatively with the tablet arm. The chair may be folded automatically from its fully opened position by merely putting one foot on the conventional bottom cross brace at the rear of the chair and pulling up on the backrest of the chair. Another method of rapidly folding the chair while the tablet arm is in its writing position is to grasp the seat and pull up on it to fold it.

20. In institutional use, it is also very advantageous to have a tablet arm that can be swung out of the user's way, while the chair seat remains in its open position. Such independent movement of the tablet arm permits closer spacing of rows of chairs and also enables one **[***650]** to sit down on the chair and get up from the chair with ease. The independent movement of the tablet arm with respect to the chair seat is extremely useful for specialized activities, such as in music classes, in which the tablet arm is used only part of the time.

21. The Junkunc invention was of great significance **[**8]** to the chair industry. None of the many chairs of the prior art had all the advantages of the patented **[*494]** chair which are specified in Findings of Fact 12 through 20 above.

Courtroom Demonstrations of Plaintiff's Chairs

22. The very chair from which Figures 1 through 16 of the drawings of the patent in suit were prepared was operated in courtroom demonstrations. These demonstrations established that that chair was indeed one of the chairs disclosed in the patent in suit, and that the claims in issue in this lawsuit read upon that chair.

23. Plaintiff's present commercial chair, which is covered by the claims in issue in this lawsuit, was also operated in courtroom demonstrations. Plaintiff's commercial chair is substantially the same as the particular chair from which Figures 1 through 16 of the drawings of the patent in suit were prepared, the main difference being that in the chair sold commercially today the tablet arm is designed to drop to a still lower out-of-the-way position at the side of the chair than is shown in Figure 3 of the patent. This difference is not reflected in the claims of the patent in suit.

24. During preparation for the trial of this **[**9]** lawsuit, one of plaintiff's employees was instructed to make the chair shown in Figures 17-21 of the Junkunc patent, and he did construct a chair that conformed to those drawings. Courtroom demonstrations of that chair clearly established its operability and usefulness, and that the claims in issue in this lawsuit read upon that chair.

INFRINGEMENT BY DEFENDANT

Meaning of the Claims

25. None of the act of the applicant or his attorney during the prosecution of the patent application which matured into the patent in suit in any way restricted the normal and ordinary meaning of the language of the claims in issue. All of the claims in issue were allowed by the Patent Office in the condition in which they were originally filed, and are entitled to a scope covering their literal meaning and a full range of equivalents.

26. Both of the parties to this lawsuit presented expert witnesses. Plaintiff's technical expert, Alexander Cowie, is a professor in the Department of Mechanical and Aerospace Engineering of the Illinois Institute of Technology, and specializes in the field of kinematics, which is the study of the movement of bodies without regard to the forces applied to them. **[**10]** Defendant's expert witness, Charles Pigott Jr., is a patent attorney who practices in the city of Chicago and has a background in mechanical engineering.

27. Professor Cowie described in ordinary mechanical or technical terms the various structural and operational features of defendant's accused chair. These terms were for the most part the terms employed in the claims in issue in the present lawsuit.

28. Much trial time was taken up by defendant's patent expert in an attempt to construe the words of the claims in issue as encompassing something different from that present in defendant's accused chair. Much of Mr. Pigott's testimony served only to make a relatively simple folding chair appear like an unduly complex mechanism, notwithstanding the relatively simple language of the claims in issue.

Claims in Issue Cover Accused Chair

29. Most of the terms employed in the claims in issue in this lawsuit are ordinary mechanical terms that in the context of the claims in which they are found have a clear, accepted and usual meaning.

30. The meaning of the term "relative sliding movement" between the tablet arm and the supporting link is clear beyond any question in the light **[**11]** of the entire specification and the drawings of the patent in suit. The term "universal joint," found in certain of the claims in issue, is a technical term the accepted meaning of which is shown by the testimony **[*495]** of the expert witnesses of both plaintiff and defendant and the publications relating to the term which are in evidence. The term "universal pivotal movement" is directly defined, and the term "maintain * * * in position" is indirectly defined, in the specification of the patent in suit.

31. Even without the aid of the expert testimony of Professor Cowie, the Court was able to identify very nearly all of the elements of claims 1 through 7, 10, 12, 14 and 15, which are the claims in issue in this lawsuit, in the specimens

of defendant's accused chair which were introduced in evidence by both plaintiff and defendant. Professor Cowie's testimony made it **[***651]** clear that the relatively few features of the claims in issue which were not easily observable and identifiable by the Court were also present in defendant's accused chair.

32. Every structural and functional detail specified in claims 1-6 and 14 of the patent in suit is precisely copied and utilized in defendant's **[**12]** chair.

33. With respect to claims 7, 10, 12 and 15 of the patent in suit, each of these claims has one detail (the universal joint) which is not copied exactly by defendant, but as to that detail defendant's accused structure is mechanically equivalent.

34. Specimens of the accused chair were demonstrated and operated during the trial. It was clear that all of the operational characteristics of the patented chair that are described above in Findings of Fact 17-20 are present in the accused chair.

Movement "Simultaneously As A Cooperative Assembly"

35. Claims 1 and 2 of the patent in suit require, among other things, movement of the tablet arm and chair seat to different positions "simultaneously as a cooperative assembly." Such cooperative movement is present, and the expert witnesses of plaintiff and defendant both testified to this effect, during closing of defendant's accused chair. Although defendant's patent expert testified that claims 1 and 2 of the patent in suit, as well as the claims with similar language, require that the tablet arm be raised from its completely closed position by merely manipulating the chair seat to thereby automatically raise the tablet arm, **[**13]** such a construction is erroneous because it is a departure from the unambiguous literal meaning of the language of the claims, and is nowhere required by the language of the specification of the patent in suit or by the prior art.

36. Courtroom demonstration of the chair from which Figures 1 to 16 of the patent in suit were prepared, and the chair which was made by following Figures 17 through 21 of the patent in suit, show that the chairs disclosed in the patent cannot be opened from their completely closed position by merely manipulating the chair seat to thereby automatically raise the tablet arm, as defendant's patent expert testified. Both Professor Cowie and Mr. Junkunc recognized from the disclosure of the patent in suit that the chairs there shown could not be opened from their completely closed position by merely pushing forward on the chair seat. That such operation is impossible would be clear to anyone skilled in the art, simply by referring to Figure 5 of the patent in suit. Figure 5 shows beyond question that manipulation of the seat alone will not cause the tablet arm to rise when it is in its completely closed position, because in that position the pivot between **[**14]** the top end of the link and the tablet arm is located behind the centerline which passes through (a) the axis about which the rear of the tablet arm pivots and (b) the axis about which the bottom of the link pivots, when the arm is raised.

37. In any event, movement of the tablet arm and chair seat to different positions "simultaneously as a cooperative assembly" is present, and the expert witnesses of plaintiff and defendant both testified to this effect, when defendant's accused chair is opened by pulling up on the outer edge of the tablet arm.

[*496] *Movement of the Tablet Arm "With" the Chair*

38. Claims 3 and 6 call for movement of the tablet arm "with" the chair. This is a common English term. Simple observation shows that during closing of defendant's accused chair, there is movement of the tablet arm "with" the chair. Defendant's expert witness testified to the same effect.

39. The language of claims 3 and 6 does not require that the tablet arm move with the chair seat during both closing and opening of the chair, nor is there anything in the specification to require this result.

"*Universal Pivotal Movement*"

40. Claims 4 and 5 fall for "universal pivotal **[**15]** movement" of the tablet arm with respect to the link. This term has no established or common meaning. "Universal movement" is defined in column one of the patent, lines 65-68, as "movement about different axes at the same time or at different times." Claims 4 and 5 are original claims of the application as filed, and call for "substantially universal pivotal movement of said arm with respect to said link." The specification and claims thus together define the term "universal pivotal movement." The term includes movement of the tablet arm in the specified manner with respect to the link, as well as movement of the parts of the joint structure with respect to one another.

41. Defendant's accused chair has universal pivotal movement of the tablet arm with respect to the link within the meaning of claims 4 and 5 of the patent in suit.

[*652]** "*Sliding Movement*"

42. Claim 5 calls for "relative sliding movement" between the arm and the link "in selected positions of said arm with respect to said chair." A similar limitation in claim 14 reads "permitting sliding movement axially of said link."

43. The only reasonable construction of these phrases in claims 5 and 14, in the light of the **[**16]** general disclosure of the specification and drawings of the patent in suit, is to describe the downward and upward sliding of the tablet arm with respect to the link as the arm moves between its uppermost and lowermost out-of-the-way positions.

44. Defendant's accused chair exhibits the sliding movement between the tablet arm and the link that is called for by claims 5 and 14 of the patent in suit.

"*Support" and "Maintain*"

45. Claims 6 and 14 of the patent in suit recite two different pairs of elements -- the joint structure and the link in claim 6, the joint structure and the rear pivotal connection in claim 14 -- which cooperate to support the tablet arm and maintain it in position when the arm is disposed in a position of use and the chair is in an open position. Claims 7 and 10, being dependent from claim 6, are similar to claim 6 with respect to this limitation.

46. There can be no doubt that the front joint structure "supports" the tablet arm of defendant's accused chair. This was testified to by the expert witnesses of both plaintiff and defendant, and can be observed as well.

47. In order to "maintain" the tablet arm of a folding tablet arm chair in position, **[**17]** it is not necessary to have a positive lock against downward pressure on the outer edge portion of the tablet arm, as with the chair illustrated in Figures 1 to 16 of the patent in suit. There is no showing in the patent in suit of an apparatus in which the front and rear pivotal connections of the tablet arm cooperate to lock the arm against downward pressure on the outer edge portion of the tablet arm. Nor is a lock of any kind provided against downward pressure on the outer edge portion of the tablet arm in the embodiment of Figures 17 to 21 of the patent in suit.

48. The specification and claims of the patent in suit show that as the terms are used in the claims, "support" means support against gravity, and "maintain" **[*497]** means to maintain the tablet arm in writing position against downward (writing) pressure on the inner edge portion of the tablet arm.

49. The joint structure and the link of defendant's accused chair are cooperatively arranged to maintain the tablet arm in position when said arm is disposed in a position of use and said chair is in an open position. So also are the joint structure and the rear pivotal connection of the accused chair.

"*Universal* **[**18]** *Joint*"

50. Claims 7, 10, 12 and 15 of the patent in suit call for a "universal joint." In a true "universal joint," (a) there are two perpendicular pivot axes, (b) there are two intersecting non-colinear axes of rotation, and (c) each axis of rotation intersects at least one pivot axis. A true "universal joint" has three functions: (a) to transmit rotary motion between said non-colinear axes, (b) to permit "compound pivotal movement," i.e., movement about two

perpendicular axes at the same time, and (c) to permit movement about two perpendicular pivot axes at different times.

51. The joint structure at the front of the tablet arm in defendant's accused chair is the mechanical equivalent of a true universal joint. When the tablet arm of defendant's accused chair is forced by the chair seat from its fully closed position to its lowermost out-of-the-way position by the opening of the chair seat, the tablet pivots with respect to the link about two perpendicular axes at the same time. In other words, defendant's joint structure provides compound pivotal movement of the tablet arm with respect to the link, which is a function of a true universal joint. Additionally, like a true **[**19]** universal joint, defendant's joint structure has two perpendicular pivot axes. Hence, the arm can pivot with respect to the link about a pivot axis perpendicular to the plane of the tablet arm and can pivot with respect to the link about the fore-and-aft axis of the tablet arm at a different time. In providing the described pivoting actions at the same time and at different times, defendant's joint structure performs the same function in substantially the same way and with the same results as would a true universal joint.

52. Defendant has made certain unimportant variations in order to avoid having a true universal joint, but its joint structure performs the same function in substantially the same way to obtain the same results as a true universal joint, and is therefore equivalent thereto.

"*Means for Holding Said Link Against Sliding Movement*"

53. Claim 15 calls for "means for holding said link against sliding movement." This language is clear and unambiguous.

[*653]** 54. The only reasonable construction of this phrase in claim 15, in the light of the remainder of the claim and the general disclosure of the specification of the patent in suit, is to include in this phrase any **[**20]** means for holding the tablet arm against sliding movement in a downward direction along the link from an uppermost position, and any means to hold the tablet arm from sliding off the outermost end of the link when the tablet reaches that point in its sliding movement in an upward direction along the link.

55. As such means for holding the link against sliding movement, defendant's accused chair has (a) the detent between the link and sleeve that, when engaged, holds the tablet arm in its uppermost out-of-the-way position, (b) the flange on the link abutting the plastic plug at the top of the link, and (c) the plastic plug at the top of the link which is held against the underside of the tablet arm by the joint structure when the tablet arm is in its writing position.

"Automatic" Movement

56. Claim 15 requires that the "tablet arm is moved automatically by the pivotal movement of said seat relative to said front frame." Since the claim does not **[*498]** require that the automatic movement called for be present during both closing and opening of the chair, this limitation is met by movement of the type described during either closing or opening of the chair.

57. The courtroom **[**21]** demonstrations of defendant's accused chair made it clear, and defendant's patent expert agreed, that there is automatic movement of the tablet arm when the chair is normally closed by putting one foot on the brace across the rear legs and pulling up with one hand on the top of the back of the chair. There is also automatic movement of the tablet arm when the chair is closed by lifting up on the seat of the chair. In both methods of closing the chair, as the seat pivots with respect to the front frame, the tablet arm will move "automatically" to its folded position.

58. The Court observed in demonstrations of defendant's accused chair during the trial, and defendant's patent expert conceded upon cross examination, that there is "automatic" movement between the tablet arm and chair seat during opening of defendant's accused chair by pulling up on the tablet arm so that the tablet arm moves into its writing position and the chair seat goes into its position of use.

THE PRIOR ART

59. In its answering brief, defendant relies on eight patents in an attempt to show that the patent in suit is invalid as being either "anticipated within the meaning of *35 U.S.C. Sec. 102*" or "obvious **[**22]** and lacking the conditions for patentability within the meaning of *35 U.S.C. Sec. 103*." These eight patents are Watkins No. 1,196,050, Moore No. 1,864,750, Hamilton No. 1,905,859, Clarin No. 2,664,943, Clarin No. 2,675,062, Supita No. 2,676,645, Adler No. 2,719,574 and Eves et al. No. 3,024,065.

60. Of the eight patents on which the defendant relies, five were considered by the Patent Office Examiner during the prosecution of the application which matured into the patent in suit. These were the Watkins, Moore, Clarin '943, Clarin '062 and Supita patents. The Examiner held the claims to be allowable notwithstanding those five patents. The fact that certain prior art patents were not applied by the Examiner against the claims but were only cited in the file history shows that the Examiner did not consider such patents to be as pertinent as those that he did apply against the claims.

61. The three patents relied upon by defendants at the trial which were not before the Examiner -- the Hamilton, Adler and Eves et al. patents -- are no more pertinent than the patents which were considered by the Patent Office, and add nothing to the disclosure of those patents.

Moore Patent No. **[**23]** *1,864,750*

62. Much emphasis was placed by the defendant on the Moore patent No. 1,864,750, which was issued in 1932. The lack of importance to the industry of the disclosure of that patent is demonstrated by the fact that there is no evidence in the record that the chair shown therein has ever been made or sold commercially in the 36 years since the patent issued.

63. Certain extremely significant elements of claims 1 and 3 are not found in the Moore patent relied upon by defendant. It is thus apparent that the Moore patent does not constitute an anticipation, as the defendant contends, of claims 1 and 3 of the patent in suit.

64. Claim 1 of the patent in suit calls for "movement of said tablet arm and * * * movement of said chair to different positions simultaneously as a cooperative assembly." The chair of the Moore patent does not have any such movement. When the claims of the patent in suit speak of various movements of the tablet arm and chair seat, such language applies only to movements between useful positions of those members, and there is no cooperative movement **[***654]** between useful positions of the tablet arm and chair seat of the Moore chair. There is, for example, **[**24]** no cooperative movement of the tablet arm with the chair seat in the Moore chair from the open position **[*499]** (in which the set screw 49 of that chair must be tight) to the fully folded position unless the set screw is first loosened and the tablet arm is dropped to a non-useful position. If one wishes to open Moore's chair from its fully closed position, it is necessary to lift the tablet arm with the set screw loosened, and at the same time or subsequently to unfold the chair seat to its open position, and then finally to tighten the set screw while manually holding the tablet arm in the desired position of use.

65. The Moore chair does not have a rear pivotal connection operative for movement about a plurality of axes, as called for by claim 3 of the patent in suit. The pivotal connection at the rear of the Moore tablet arm provides only a single axis 62.

66. Claim 3 of the patent in suit calls for "movement of said arm with respect to said link in a plurality of directions." Because the movement referred to takes place at the pivotal connection at the forward end of the tablet arm, the movement in question must be angular movement. This feature is absent from the chair **[**25]** of the Moore patent.

67. The reliance by defendant upon the Moore patent as allegedly showing that the subject matter of the claims at issue was obvious to one skilled in the art is based upon a misunderstanding by defendant with respect to the structure and operation of the chair disclosed in the Moore patent.

68. The defendant's misunderstanding as to the operation of the Moore chair was illustrated by the repeated testimony of defendant's patent expert that when the chair of the Moore patent is folded from its open position of use (shown in Figure 1 of that patent) to a closed position while the set screw 49 remains tightened, the tablet arm

rises automatically to the position in which it is approximately coplanar with the folded chair. This theory of operation of the Moore chair is shown to be wrong by the drawings of the Moore patent, from which it is seen that the set screw must be loosened to permit the relatively small portion of rod 48 which is exposed in Figure 1 to slide out so that a substantially greater portion of rod 48 may be exposed as in Figure 2, thus permitting the tablet arm to move to the closed position of Figure 2. The theory of operation of the Moore **[**26]** chair suggested by defendant's patent expert is also inconsistent with the Moore specification, is inconsistent with claim 4 of the Moore patent, and was proved wrong by the drawing of the Moore chair which was prepared by counsel for plaintiff and introduced in evidence as plaintiff's Exhibit 28.

69. The testimony by plaintiff's mechanical expert witness with respect to the operation of the Moore chair is entirely consistent with the drawings, specification and claims of the Moore patent. Although in his early testimony defendant's patent expert disagreed with the testimony of plaintiff's mechanical expert as to folding of the Moore chair from its Figure 1 to its Figure 3 position, subsequently defendant's patent expert conceded that plaintiff's mechanical expert's theory on this point was correct.

OTHER PATENTS RELIED UPON BY DEFENDANT TO SHOW INVALIDITY

X-Frame Chairs

70. The file history of the application which matured into the patent in suit reflects the significant differences which exist between an X-frame folding tablet arm chair and a Y-frame folding tablet arm chair, since the Patent Office Examiner did not apply any patent showing an X-frame chair as a primary **[**27]** reference against any of the claims of the application. Clarin patent No. 2,675,062 relates to an X-frame chair, and this patent was merely cited for the record and not applied against the claims. Likewise, the Examiner did not apply Clarin patent No. 2,664,943 (another X-frame chair) or Moore patent No. 1,864,750 (which is 1/2 X-frame and 1/2 Y-frame) against any of the claims, but merely cited them for the record.

[*500] *Clarin '062 and Clarin '943*

71. In addition to being an X-frame chair, the chair of Clarin patent No. 2,675,062 does not have a link pivotally connected to the seat, nor do the tablet arm and link slide relative to each other, as required by claims in issue in this law-suit. Clarin 2,664,943 also does not have a link pivotally connected to the seat nor a tablet arm and seat which move as a cooperative assembly, and the tablet arm and link do not slide relative to each other.

Eves et al. 3,024,065

72. In Eves et al. patent No. 3,024,065, cooperative movement of the tablet arm and chair seat cannot take place with the tablet arm in the writing position until an unlatching adjustment similar to the loosening of the set screw in Moore is made. Even **[**28]** if such an unlatching adjustment is made, it is not at all certain that any cooperative movement will take place. In addition, the X-frame **[***655]** chair of the Eves et al. patent does not have a link pivotally connected to the seat, as required by the claims in this lawsuit. If the link of the Eves et al. chair were pivotally connected to the seat, the seat could not be folded.

Supita Patent No. 2,676,645 and Adler Patent No. 2,719,574

73. Supita patent No. 2,676,645, which was at first applied by the Examiner against the claims but was subsequently withdrawn, does not disclose a chair having a tablet arm which moves about a plurality of different axes, nor does Supita's tablet arm move independently of the chair seat. Adler patent No. 2,719,574, shows a chair very similar to the Supita chair, and adds nothing to the Supita patent, as defendant's patent expert admitted.

Watkins Patent No. 1,196,050

74. Watkins patent No. 1,196,050, which the Examiner first used as a secondary reference but subsequently withdrew, does not relate to a Y-frame chair, and in fact does not even relate to a folding chair. Although Watkins shows sliding movement at the front of the tablet arm, the **[**29]** other prior art patents do not teach any obvious combination with Watkins which would result in the invention of the patent in suit.

Hamilton Patent No. 1,905,859

75. Hamilton patent No. 1,905,859 is similar to Watkins in that it discloses a stationary chair from which a two-way hinge might be borrowed. However, Hamilton shows even less than Watkins, because it does not show the sliding movement at the front of the tablet arm.

76. Although there is no evidence that the Hamilton, Adler and Eves et al. patents were considered by the Patent Office Examiner during the prosecution of Mr. Junkunc's patent application, these patents are no more pertinent than the patents which were considered by the Patent Office, and add nothing to the disclosure of those patents.

The Junkunc Patent Discloses and Claims A New Combination of Functionally Co-operating Elements

77. The claims at issue define a folding tablet arm chair which includes a combination of elements which interact functionally with each other. Even though each of these elements, if taken separately, is not unique or patentable, it is the combination of these elements which is new and unobvious, and which produces a **[**30]** new result in that a unique and highly efficient folding tablet arm chair is produced. The invention disclosed in the patent in suit is not limited to any single element such as a joint structure, but covers the entire combination of elements called for by the various claims.

78. The combination of elements recited in the claims in issue contribute materially to the sum of useful knowledge in the chair industry. The combination of functionally cooperating elements, to which the claims in issue are directed, would not have been obvious at the time the invention was made to a person having ordinary skill in the art.

[*501] 79. None of the disclosures relied upon by the defendant as purportedly anticipating, or rendering the invention of the patent in suit obvious, either discloses, teaches or suggests the novel combination of elements disclosed and claimed in the patent in suit. Although certain of the features of the patent in suit are shown piecemeal in some of the prior art patents, no one before Mr. Junkunc was able to combine these elements to provide a unique Y-frame folding tablet arm chair with cooperative and independent movement of the tablet arm with respect to **[**31]** the seat, which was a significant step forward in the chair industry.

Mr. Junkunc's Invention Was Not Obvious

80. In the second Office Action on the application which matured into the patent in suit, the Patent Office Examiner concluded that the combination of references suggested by him in the first Office Action did not bar the allowance of the application, and the rejection based on those references was withdrawn. Defendant's attempted combination of eight prior art patents, all of which are the same as or no more pertinent than the references cited by the Examiner in the first Office Action, appears to be hindsight based on the disclosure of the patent in suit, which cannot be relied upon to show that the patented idea is obvious.

81. The dates of the prior art references relied upon by defendant shed a good deal of light on whether the invention of the patent in suit was in fact obvious to one skilled in the art at the time it was made. The Moore patent was issued in 1932, and in the 27 years between then and the year in which Mr. Junkunc filed his patent

application, the Moore disclosure failed to suggest or even give a hint of this important invention. The Supita **[**32]** and Adler applications were filed in 1952, and seven more years went by without anyone thinking of the invention in suit, even by combining the teaching of those two patents with Moore or with the earlier patents to Watkins or Hamilton as defendant's **[***656]** hindsight suggests might be done. Eves et al. was filed at about the same time as the application of Mr. Junkunc, and shows what different, complicated, and clumsy chairs other workers were developing. The failure by those working in the prior art and the success of the patentee is evidence that the patentee's contribution was not obvious.

The Claims In Issue Are Clear And Definite, And Properly Define The Invention

82. The specification of the patent in suit describes the invention in full, clear, concise and exact terminology so as to enable any person skilled in the art to make and use the invention.

83. The claims in issue particularly point out and distinctly claim the folding tablet arm chair which forms the invention of the patent in suit.

84. The claims in issue cover a folding tablet arm chair assembly that includes a number of structural elements cooperating together to provide a Y-frame chair having both independent **[**33]** and cooperative movement of the tablet arm with respect to the chair seat. All of the elements set forth in the claims cooperate to provide Mr. Junkunc's unique and important development.

85. The claims of the Junkunc patent define an operable structure. None of the claims requires, as defendant has suggested, that one pivot axis necessarily be perpendicular to the plane of the tablet arm, and in addition, none of the claims requires, as defendant has suggested, that the tablet arm be raised from a fully closed position merely by manipulation of the chair seat.

86. All functional language used in the claims in issue is entirely appropriate because it (a) is either expressed in terms of "means" for performing the function specified or is fully supported in each claim by specific structure (such as a joint) for performing such a function; (b) clearly indicates to one skilled in the art a variety of specific structural **[*502]** elements for performing the function specified, definite properties of such elements, or some definite interrelation between such elements; and (c) is described in structural detail in the specification.

87. A member of the public would have no trouble, **[**34]** because of any alleged functionality in any of the claims in issue, in telling whether or not what he is doing infringes those claims. The defendant purported to find in the prior art, in a piecemeal manner, features similar to the very features which it alleges are vague and functional. In the same manner that the meaning of the claims was clear and definite when defendant was trying to reconstruct the invention of the patent in suit from the prior art, the meaning of the claims is also clear and definite with respect to the readability of the claims on defendant's accused chair.

88. Anyone skilled in the art could readily understand what the claims in issue cover. Several claims recite that certain structural elements "permit" various operational characteristics of the claimed chair. The first portion of each of these claims sets forth "means" or structural elements, and the latter portion recites how those "means" or elements cooperate to achieve various operational characteristics through structure, properties or interrelations which are indicated to one who is skilled in the art by the language used in the context of the entire claim. In addition, all of the elements recited **[**35]** in the claims are clearly and definitely exemplified in detail in the specification and drawings of the patent in suit.

89. With the exception of "universal pivotal movement" and "maintain the [tablet arm] in position," all of the terms used in the claims in issue are ordinary English terms, which, when read in context, provide claims which are very easy to understand. The meaning of the terms "universal movement" and "maintain the [tablet arm] in position" as they are used in the claims is entirely clear from the specification, claims and drawings of the patent in suit.

90. There is no evidence that plaintiff has been inconsistent in its application of the claims in issue with respect to the accused chair. Several years ago counsel for plaintiff wrote to Clarin Manufacturing Co. stating that one of the

chairs made by Clarin was covered by the patent in suit, as well as constituting a breach of a contractual obligation arising out of plaintiff's license to Clarin. The evidence indicates that this letter was sent as the opening move in an effort to obtain a royalty rate reduction from Clarin, and any assertion of infringement in that letter was not pressed by plaintiff, but **[**36]** on the contrary was effectively withdrawn by reason of its lack of pursuit by plaintiff.

Expert Testimony

91. The testimony by defendant's patent expert that certain claims should be construed in such a way that they would be valid but not infringed comprised legal conclusions which are the function of this Court to determine. The legal conclusions stated by defendant's patent expert on this question are inconsistent with the wording **[***657]** of the specification and claims of the patent in suit, the drawings of the patent in suit, the file history of the application which matured into the patent in suit, the chairs in evidence as physical exhibits, the courtroom demonstrations of the operation of those chairs, certain photographs in evidence, and certain uncontroverted testimony by the respective expert witnesses for the two parties, all of which constitute evidence which can be readily observed and understood by the Court without the need for testimony by any expert witness.

92. A major portion of the specification and claims of the patent in suit is simple enough for the Court to understand without the need for expert testimony. Helpful testimony was provided by Mr. Junkunc, the **[**37]** inventor of the patent in suit, Fred Stace, who is Vice President of plaintiff and is a person very **[*503]** knowledgeable in the folding chair field, and Professor Cowie, who is an expert in the field of kinematics. The Court's own observations, together with the testimony of these three witnesses and certain testimony during cross-examination of defendant's patent expert, provide a basis for the Court's determination of the issues of infringement and validity of the Junkunc patent.

Allegations of Misuse of Patent and Antitrust Violations Are Without Merit

93. Plaintiff has granted licenses under the patent in suit to Clarin Manufacturing Co. (Clarin) and Hampden Specialty Products Corp. (Hampden). The license to Clarin, dated September 4, 1964, is royalty-free, and superseded a previous license given to Clarin in settlement of a lawsuit which was brought by Clarin against plaintiff. The license to Hampden executed on March 9, 1962 involves a royalty rate of 17 1/2 cents per chair, which is considered by plaintiff to be unreasonably low and Mr. Junkunc, the president of plaintiff, regrets having granted this license.

94. Wishing to take advantage of plaintiff's past **[**38]** action in granting Hampden a license with a royalty rate of only 17 1/2 cents per chair, the defendant requested a license from plaintiff "on the identical terms and conditions that were extended to Hampden." Plaintiff refused this request. On March 16, 1967, plaintiff offered defendant a license at a royalty of $1.60 per chair. This was meant as a starting figure, and prior to trial the proposed rate was reduced by plaintiff to 75 cents per chair. At 75 cents per chair, plaintiff's proposed royalty rate is less than seven percent of the price of defendant's accused chairs to dealers.

95. In the Hampden license, the parties agreed that in manufacturing chairs embodying the licensed invention, the respective parties "shall utilize their own designs," and the chairs of one party shall not be "identical in design to those being manufactured by the other party." Plaintiff conditioned its offer of a license to the defendant on the condition "that the chairs manufactured by Poloron shall be the same as or similar to the chairs currently manufactured by it."

96. Much time preparing for the trial and at the trial was taken up in connection with defendant's charge that plaintiff had misused **[**39]** its patents and violated the antitrust laws because (a) plaintiff refused to grant defendant a license with the same royalty rate as the rate granted more than six years earlier to Hampden; (b) because of Hampden's expressed concern about charges of infringement from both plaintiff and Clarin, plaintiff, Clarin and Hampden had some joint license negotiations (although they finally executed separate licenses); (c) plaintiff's license offer to Poloron required that Poloron chairs made under the license "be the same as or similar to the chairs

currently manufactured by it"; and (d) plaintiff brought this lawsuit against defendant without first offering defendant a license.

97. All of plaintiff's licensing practices and other actions in connection with the patent in suit are clearly reasonable and legal practices.

98. Defendant did not bother to take market surveys with respect to its charge. Defendant itself suggested a settlement with plaintiff which contemplated a reduced allocation of royalty payments to plaintiff because of defendant's concern about a possible charge of infringement against it by Clarin, just as Hampden had suggested to plaintiff six years before. These facts, **[**40]** taken together with the extreme lack of substance in the arguments presented by defendant in support of its patent misuse and antitrust charge, show that defendant was not really serious in its misuse and antitrust charge against plaintiff.

99. Each of the parties filed a brief directed solely to the antitrust issues of this lawsuit. The briefs of counsel, together with the evidence in the record, clearly establish that the plaintiff has not misused its patent and has not violated the antitrust laws, and that **[***658]** defendant's **[*504]** counterclaim with regard to alleged antitrust violations is groundless.

The Royalty Rate

100. Mr. Junkunc, president of plaintiff, testified that plaintiff considers it was a mistake to have granted Hampden a license at such a low royalty rate.

101. Although the defendant has asserted that the $1.60 per unit royalty originally requested by plaintiff "would make Poloron's chair impossible to sell," this assertion was not proved by defendant, and in any event it is clear that $1.60 was only a starting figure for negotiations. The evidence indicates that plaintiff is justified in seeking a much higher royalty rate than the 17 1/2 cents royalty **[**41]** rate of the Hampden license. It would be economically deleterious to plaintiff's business to grant to Poloron a license at a royalty rate of only 17 1/2 cents per chair.

102. To force plaintiff to grant a license to defendant at such a royalty rate would effectively be to create a system of compulsory licensing.

The Restriction As to Form

103. ***HN1***[] Plaintiff has the right to limit its licenses to a specific form or forms of the invention, and to agree itself to forego manufacture of a specific form or forms of the invention. The devices to which the respective restrictions apply are covered by the patent, and such restrictions are reasonable as steps adapted to maintain individuality between manufacturers with respect to the designs of their respective chairs.

104. All the restrictions in defendant's licenses relate to chairs covered by the patent in suit. Defendant has not shown in any way that any of the restrictions are outside of the scope of plaintiff's patent monopoly.

Lawsuit Prior to License Offer

105. ***HN2***[] Plaintiff has the right to sue Poloron for infringement without first offering Poloron a license. In its post-trial brief of the antitrust issues, the defendant **[**42]** has made the argument that the mere bringing of the present lawsuit, coupled with the demand that the defendant cease production of its infringing chair, was a misuse of the plaintiff's patent. ***HN3***[] The patent system of the United States would be of little value if a patent owner could not legally couple the bringing of an infringement suit with a demand that the accused infringer cease production of the infringing article.

The Relevant Market

106. In many cases a customer who is in the market for folding tablet arm chairs will consider both (a) a folding chair having a tablet arm which folds only cooperatively with the seat and (b) a folding chair with a tablet arm that folds down alongside the chair in an out-of-the-way position. The customer might also be interested in (c) a non-folding or stationary-type chair having a tablet arm which folds down alongside the chair into an out-of-the-way position, or (d) a non-folding chair with a fixed tablet arm.

107. The determining factors as to which type of chair is selected are (a) the function or desirability of the unit, (b) the budget which is available to purchase the unit, and (c) the delivery time involved. Mr. Becker, vice **[**43]** president of defendant, pointed out that a chair in which the tablet arm folds only cooperatively with the seat will often be sold in preference to the accused chair "primarily because of price and delivery and primarily because they find it will meet the function that they need a folding tablet arm chair for, or a tablet arm." Mr. Stace, vice president of plaintiff, pointed out that a non-folding chair might sometimes be preferred over a folding chair.

108. One type of tablet arm chair, whether folding or not, can be substituted for another type of tablet arm chair in almost any situation, if budget or delivery considerations, or both, call for it. It is only if one assumes that some purchasers have a wholly fixed and inflexible need, that he must conclude **[*505]** that those purchasers will not accept any substitutions. There is no evidence as to how many customers have inflexible chair requirements, and the uncontroverted testimony of Mr. Stace indicates that one type of chair is commonly substituted for another.

109. It is only in a music room that it is very important to have a chair in which the tablet arm can fold to an out-of-the-way position, and a music department **[**44]** of a school is only one aspect of one type of purchaser. Moreover, a music department could obviously use a stationary chair with a tablet arm that folds to an out-of-the-way position.

110. The evidence clearly establishes that the true definition of the relevant market is *all chairs with tablet arms*. Applying this definition of the relevant market, the uncontroverted testimony of Mr. Stace shows that plaintiff's sales comprise at the most only five to ten percent of the market. Plaintiff obviously does not come close to **[***659]** having a controlling share of the market.

111. The evidence clearly indicates that it is not "essential" that a chair manufacturer be able to make plaintiff's patented chair. Plaintiff is only a minor member of the tablet arm chair industry, despite the fact that it is the owner of the patent in suit. Not all members of the tablet arm chair industry sell chairs made in accordance with the patent in suit.

112. The evidence makes it clear that plaintiff is lawfully seeking to control products made according to plaintiff's own patent. There is no evidence whatsoever that plaintiff is seeking to control the entire market in chairs having tablet arms, and **[**45]** in fact, the uncontroverted evidence is clear that plaintiff has only a small share of that market.

113. Poloron has forced Bela Seating into a long battle against Poloron to enforce the Junkunc patent. This fact has nothing to do with an alleged anti-competitive intent on the part of plaintiff, but arises solely from the unnecessary multiplicity of defenses presented by defendant in the instant lawsuit.

114. Any Finding of Fact entered herein which may be properly construed in whole or in part as a Conclusion of Law shall be so deemed and treated as if set forth under Conclusions of Law.

CONCLUSIONS OF LAW

1. Any Conclusion of Law entered herein which may be construed in whole or in part as a Finding of Fact shall be so deemed and treated, as if set forth above under Findings of Fact.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the parties to this suit and the subject matter of this suit, including the subject matter of the amended complaint, the amended answer and the amended counterclaim.

3. Venue is properly laid in this District.

FACTS ALLEGED

4. Plaintiff is the owner of United States Letters Patent No. 2,954,073, entitled "Folding Tablet Arm Chair," **[**46]** which was duly and legally issued on September 27, 1960 to Bela B. Junkunc. Plaintiff has the right to sue for infringement and to seek an injunction against future infringement.

5. Plaintiff has proved the essential facts alleged in the amended complaint.

6. Defendant has failed to prove the essential facts alleged in the amended answer and counterclaim.

INFRINGEMENT

7. Claims 1 through 7, 10, 12, 14 and 15 of the patent in suit, the only claims at issue, have been and are being infringed by defendant.

8. ***HN4***[] A mechanical or other technical expert may testify as to structural and operational features of the accused device, and it is the function of the Court to determine whether such structural and operational features are defined by the patent claims. The weight to be **[*506]** given the expert's testimony should be left to the sound discretion of the Court in view of the qualifications of the expert, all the evidentiary facts in the record, and the rules governing construction of patent claims. *Kohn v. Eimer, 265 F. 900, 902* (2 Cir., 1920); *Hughes Aircraft Co. v. General Instrument Corp., 275 F. Supp. 961* (D.C.R.I., 1967); *Old Mission Portland Cement Co. v. Commissioner **[**47]** of Internal Revenue, 69 F.2d 676* (9 Cir., 1934), aff. *293 U.S. 289, 55 S. Ct. 158, 79 L. Ed. 367 (1934)*; 2 Walker on Patents 1211 (Deller's Ed., 1937); Rogers, The Law of Expert Testimony 758, Matthew Bender & Company, Inc. (Werne Ed., 1941).

9. ***HN5***[] Legal conclusions, such as whether a claim is infringed and whether a claim is valid, should be made by the Court, and opinions as to legal conclusions from a patent expert are never binding upon the Court. *Minnesota Mining & Mfg. Co. v. Carborundum Co., 155 F.2d 746* (3 Cir., 1946); *Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 167* (9 Cir., 1957), cert. denied *356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958)*; 1 Walker on Patents 272 (Deller's Ed., 1937).

10. ***HN6***[] The Court is not obliged to follow blindly the testimony of any expert, even if uncontroverted by explicit testimony on the same point from another expert. The testimony of an expert witness on any opinion question, whether a question of technical opinion or legal opinion, must be considered in the light not only of any other opinion evidence in the record but also all factual evidence in the record, including the wording of the specification and claims of the **[**48]** patent in suit, the drawings of the patent in suit, the file history of the application which matured into the patent in suit, physical exhibits, courtroom demonstrations, photographs in evidence, and all other factual testimony and evidence in the record and of which the Court may take judicial notice.

11. ***HN7***[] In determining whether or not defendant's chair finding a claim of **[***660]** the patent in suit, "resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out, and that is the end of it." *Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 607, 70 S. Ct. 854, 855, 94 L. Ed. 1097 (1950)*; *Ransburg Electro-Coating Corp. v. Nordson Corporation, 293 F. Supp. 448, 158 USPQ 385, 411* (N.D.Ill., 1968).

12. Because the term "universal pivotal movement" which occurs in claims 4 and 5 of the Junkunc patent has no established or accepted meaning, it is necessary and proper to resort to the specific definition from the specification to understand what the patentee meant by the term "universal pivotal movement" in his claims. *Texas Company v. Globe Oil & Refining Company, 225 F.2d 725, 734-735* (7 Cir., 1955). **[**49]**

13. *HN8*[] It is a well established rule of patent law that every patentee is entitled to be his own lexicographer. *Dennis v. Pitner, 106 F.2d 142, 148* (7 Cir., 1939); *Northwest Engineering Corp. v. Keystone Driller Co., 70 F.2d 13, 15* (7 Cir., 1934), aff'd *294 U.S. 42, 55 S. Ct. 262, 79 L. Ed. 747 (1935)*; *Advance Rumley Co. v. John Lauson Mfg. Co., 275 F. 249, 251* (7 Cir., 1921).

14. As original claims of the application as filed, claims 4 and 5 constitute part of the disclosure of the patent in suit.

15. The tablet arm of defendant's accused chair has universal pivotal movement with respect to the supporting link, as called for by claims 4 and 5 of the Junkunc patent.

16. *HN9*[] The definition of the invention is governed by the express terms of the patent claims, and resort to the specification to narrow a claim by interpreting a particular limitation in a certain way, in order purportedly to save the claim from being invalid over the prior art, is not permitted unless the claim is ambiguous because of the limitation in question. *Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 277, 69 S. Ct. 535, 93 L. Ed. 672 (1949)*; **[*507]** *Borg-Warner Corporation v. Mall Tool Company,* ***[**50]*** *217 F.2d 850, 856* (7 Cir., 1955), cert. den. *349 U.S. 946, 75 S. Ct. 875, 99 L. Ed. 1272 (1955)*; *University of Illinois Foundation v. Block Drug Co., 133 F. Supp. 580, 589* (E.D.Ill., 1955), aff'd *241 F.2d 6* (7 Cir., 1957), cert. den. *354 U.S. 922, 77 S. Ct. 1382, 1 L. Ed. 2d 1437 (1957)*.

17. Defendant's chair infringes claims 1 through 6 and 14 of the patent in suit on the basis of direct readability of those claims on the accused device.

18. Since the joint structure at the front of the tablet arm of defendant's accused chair performs substantially the same function in substantially the same way to obtain the same results as the true universal joint called for by claims 7, 10, 12 and 15 of the Junkunc patent, the defendant has taken over the essence of Mr. Junkunc's invention, using in its accused chair the mechanical equivalent of a true universal joint. This is an ideal case for the application of the doctrine of equivalents. *Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 607, 70 S. Ct. 854, 94 L. Ed. 1097 (1949)*; *Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 42, 50 S. Ct. 9, 74 L. Ed. 147 (1929)*.

19. The accused chair differs in minor respects from **[**51]** the chairs shown as illustrative embodiments in the drawings of the patent in suit, but the scope of plaintiff's patent is not limited to the precise structures illustrated, since *HN10*[] the claims of the patent measure the invention. *King-Seeley Thermos Co. v. Tastee Freez Industries, Inc., 357 F.2d 875, 880* (7 Cir., 1966); *Stuart W. Johnson & Co., Inc. v. Ro-Ber, Inc., 156 USPQ 177, 182-183* (N.D.Ill., 1967).

20. Having illustrated his invention and described his invention in the specification, *HN11*[] a patentee may claim his invention as broadly as the prior art allows.

21. *HN12*[] Defendant, which appropriated the principle and mode of operation of the Junkunc chair, and obtained its results by the same or equivalent means, may not avoid infringement by merely making the device different in form in minor respects. *Nordberg Mfg. Co. v. Woolery Machine Co., 79 F.2d 685, 692* (7 Cir., 1935); *Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649, 672-673* (N.D.Ill., 1961).

VALIDITY

22. Claims 1 through 7, 10, 12, 14 and 15 of the patent in suit, the only claims at issue, are good and valid in law.

23. *HN13*[] A patent is presumed valid. *35 U.S.C. Sec. 282*. The statutory presumption of validity "is not an **[**52]** idle gesture," and "is not to be overthrown except by clear and cogent evidence." *King-Seeley Thermos Co. v. Tastee Freez Industries, Inc., 357 F.2d 875, 879* (7 Cir., 1966); *Copease Mfg. Co. v. American Photocopy Equipment Co., 298 F.2d 772, 777* (7 Cir., 1961); *Hazeltine Research, Inc. v. Dage Electric* ***[***661]*** *Company, Inc., 271 F.2d 218, 224* (7 Cir., 1959); *Artmoore Co. v. Dayless Mfg. Co., 208 F.2d 1, 3* (7 Cir., 1953). Every reasonable

doubt should be resolved against the defendant who is attempting to show invalidity. *Mumm v. Jacob E. Decker & Sons, 301 U.S. 168, 171, 57 S. Ct. 675, 81 L. Ed. 983, 985 (1937)*.

24. ***HN14***[] The presumption of validity cannot be weakened by reliance on prior art which was cited but not applied by the Examiner. On the contrary, the fact that the most pertinent prior art relied upon by defendant was considered and rejected by the Patent Office "greatly strengthens the presumption of the validity of the patent." *Stuart W. Johnson & Co., Inc. v. Ro-Ber, Inc., 156 USPQ 177, 183* (N.D.Ill., 1967); *King-Seeley Thermos Co. v. Tastee Freez Industries, Inc., 145 USPQ 596, 600* (N.D.Ill., 1965), aff'd *357 F.2d 875* (7 Cir., 1966); *Ekstrom-Carlson & Co. v. Onsrud Machine Works, **[**53]** Inc., 298 F.2d 765, 768* (7 Cir., 1962); *AMP Incorporated v. Vaco Products Co., 280 F.2d 518, 521* (7 Cir., 1960); *Ransburg Electro-Coating Corp. v. Nordson Corp., 293 F. Supp. 448* (N.D.Ill., 1968).

[*508] 25. ***HN15***[] The copying of the patented chair by defendant indicates its commercial importance and emphasizes the validity of the Junkunc patent. *Shumaker v. Gem Manufacturing Co., 311 F.2d 273, 276* (7 Cir., 1962).

26. Moore patent No. 1,864,750 does not anticipate any of the claims at issue, since several of the essential elements of the claims are not found in the Moore patent and ***HN16***[] the defense of anticipation requires that all of the elements of a claim be found in a single piece of prior art. *Stuart W. Johnson & Co., Inc. v. Ro-Ber, Inc., 156 USPQ 177, 181* (N.D.Ill., 1967).

27. As there is no evidence that the chair shown in the Moore patent has ever been made or sold commercially, this patent comes within the rule that "A ***HN17***[] prior art patent which has not contributed anything to the practical art, and is thus in the category of paper patents, should be strictly construed with respect to whatever teaching may be found in the same." *Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. **[**54]** 649, 671* (N.D.Ill., 1961).

28. ***HN18***[] Defendant's attempted combination of individual features found in separate prior art patents to show that the invention of the patent in suit was obvious, was improper. The combination folding tablet arm chair of the Junkunc patent cannot properly be anticipated in a piecemeal fashion by combining individual features from different prior art patents when such combination is not taught by the prior art patents themselves. *Imhaeuser v. Buerk, 101 U.S. 647, 660, 25 L. Ed. 945 (1880)*; *Holstensson v. Webcor, Inc., 150 F. Supp. 441, 447* (N.D.Ill., 1957); *Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649, 671* (N.D.Ill., 1961).

29. The patented folding tablet arm chair is ***HN19***[] a new combination resulting in an improved construction which accomplishes a new result and which is markedly more efficient than the prior art devices. Such a construction is patentable. *Aerosol Research Company v. Scovill Manufacturing Co., 334 F.2d 751, 755* (7 Cir., 1964); *Copease Mfg. Co. v. American Photocopy Equipment Co., 298 F.2d 772, 781* (7 Cir., 1961); *Anderson Company v. Sears, Roebuck and Co., 265 F.2d 755, 762-763* (7 Cir. 1959); *Church of Religious Science v. Kinkead Industries, **[**55]** Inc., 234 F.2d 573, 576* (7 Cir., 1956).

30. ***HN20***[] The failure of those working in the prior art and the success of the patentee is evidence that the patentee's contribution was not obvious. *Pyle Nat. Co. v. Lewin, 92 F.2d 628, 630* (7 Cir., 1937); *Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649, 671* (N.D.Ill., 1961).

31. ***HN21***[] Although many things seem obvious after they have been done, one cannot properly apply hindsight to attempt to determine what was obvious at the time the invention was made. *Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 434-435, 31 S. Ct. 444, 55 L. Ed. 527, 531-532 (1911)*; *Ransburg Electro-Coating Corp. v. Nordson Corp., 293 F. Supp. 448* (N.D.Ill., 1968); *Walt Disney Productions v. Fred A. Niles Com. Ctr., Inc., 369 F.2d 230, 234-235* (7 Cir., 1966); *Shumaker v. Gem Manufacturing Co., 311 F.2d 273, 275-276* (7 Cir., 1962); *Hazeltine Research, Inc. v. Dage Electric Company, Inc., 271 F.2d 218, 225* (7 Cir., 1959).

32. *HN22*[] Defendant's use of eight different prior art patents in its attempt to invalidate plaintiff's claims tends in and of itself to negate the position of defendant that the patent in suit is invalid. *Stuart W. Johnson & Co., Inc. v.* ***[**56]*** *Ro-Ber, Inc., 156 USPQ 177, 183* **[***662]** (N.D.Ill., 1967); *King-Seeley Thermos Co. v. Tastee Freez Industries, Inc., 145 USPQ 596, 600* (N.D.Ill., 1965), aff'd *357 F.2d 875* (7 Cir., 1966).

33. *HN23*[] The claims at issue are not functional at the point of novelty, since all of them clearly indicate to one skilled in the art a variety of specific structural elements for performing the functions specified, definite properties of such elements, or some definite interrelation **[*509]** between such elements. No more is required. *35 U.S.C. Sec. 112*.

34. The claims at issue are not broader than the disclosure because all of the elements recited in the claims coact with each other to produce a novel Y-frame tablet arm chair having both independent and cooperative movement of the tablet arm with respect to the chair seat. *HN24*[] Claims covering a combination of elements, in which a new and functional result is achieved as a result of the coaction of the various elements of the combination, are valid. *Church of Religious Science v. Kinkead Industries Inc., 234 F.2d 573, 576* (7 Cir., 1956).

ALLEGED PATENT MISUSE AND ANTITRUST VIOLATIONS

35. The evidence clearly indicates that the plaintiff has not misused **[**57]** its patent, and has not violated the antitrust laws of the United States.

36. *HN25*[] Plaintiff has no duty to grant a license to defendant under the patent in suit, merely because defendant has requested such a license. A patent owner has the right to grant a license to some, as he chooses, without granting a license to others. *Extractol Process v. Hiram Walker & Sons, 153 F.2d 264, 268* (7 Cir., 1946); *Radio Corporation v. Hygrade Sylvania Corporation, 10 F. Supp. 879, 882-883* (D.N.J., 1934).

37. *HN26*[] A patent owner is not required to grant licenses to all comers at equal rates and terms. He may select or reject prospective licensees and prefer one over another for considerations within his discretion. *United States v. Huck Manufacturing Company, 227 F. Supp. 791, 800, 803, 804* (E.D.Mich., 1964), aff'd per curiam *382 U.S. 197, 86 S. Ct. 385, 15 L. Ed. 2d 268 (1965)*; *United States v. E. I. Du Pont De Nemours & Co., 118 F. Supp. 41, 224* (D.Del., 1953), aff'd *351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

38. *HN27*[] Although plaintiff need not justify different royalty rates among different licensees, plaintiff has shown that it was a mistake to grant Hampden a license at such a low royalty **[**58]** rate and plaintiff is not required to make the same mistake again. An owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly. *General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 181, 58 S. Ct. 849, 82 L. Ed. 1273 (1938)*.

39. *HN28*[] A patent owner who grants a license under his patent may restrict the licensee's product which falls under the licensed patent to a specific use or to a specific form. *General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 181, 58 S. Ct. 849, 82 L. Ed. 1273 (1938)*; *Vulcan Mfg. Co. v. Maytag Co., 73 F.2d 136, 138-139* (8 Cir., 1934); *Reliance Molded Plastics, Inc. v. Jiffy Products, 215 F. Supp. 402, 408-409* (D.N.J., 1963); *Harte & Co., Inc. v. L. E. Carpenter & Co., 138 USPQ 578, 583-584* (S.D.N.Y., 1963); *Atlas Imperial Diesel Engine Co. v. Lanova Corporation, 79 F. Supp. 1002, 1003-1004* (D.Del., 1948). Plaintiff clearly had the right to restrict Hampden to the manufacture of chairs of Hampden's own design, and also to restrict defendant Poloron, if the latter accepted a license, to chairs which are "the same as or similar to the chairs **[**59]** currently manufactured by it."

40. Plaintiff had the right to restrict itself from making a chair identical in design with the chair being made by Hampden. Such a restriction embraces articles which fall within the scope of the patent in suit and has an effect that is similar to an exclusive license to Hampden to make chairs of its own design. *Rail-Trailer Co. v. ACF Industries, Inc., 358 F.2d 15, 16-17* (7 Cir., 1966); *Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121, 129* (9 Cir., 1954); *E. Bement & Sons v. National Harrow Co., 186 U.S. 70, 94, 22 S. Ct. 747, 46 L. Ed. 1058 (1902)*.

41. All of the restrictions in plaintiff's licenses to Clarin and Hampden **[*510]** are reasonable and are within the scope of the patent monopoly.

42. *HN29*[] A patent owner has the right to bring an infringement suit against an infringer without first offering the infringer a license.

43. Defendant has not met its burden of proof that any of plaintiff's actions are in restraint of trade or commerce and violative of *Sec. 1* of the Sherman Act (*15 U.S.C. Sec. 1*).

44. Defendant has failed to prove that plaintiff has done anything that **[***663]** goes beyond the scope of the original patent monopoly. Hence, defendant's **[**60]** charges of violation of *Sections 1* and *2* of the Sherman Act (*15 U.S.C. Secs. 1* and *2*) must fail.

45. Plaintiff does not control a "relevant market", nor has defendant shown that plaintiff has or ever had any unlawful intent to monopolize. These facts were matters that defendant was required to prove if it was to support its charges of violation of *Section 2* of the Sherman Act. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 432* (2 Cir., 1945).

46. Since plaintiff's sales comprise at the most only five to ten percent of the true relevant market of all chairs with tablet arms, plaintiff does not have the monopoly power that is required for violation of *Section 2* of the Sherman Act.

47. Defendant's counterclaim charging violation of the antitrust laws has no basis in fact or in law. Defendant knew or should have known this, and its charge of antitrust violations against plaintiff was unreasonable and has required plaintiff to expend much time in defending this charge.

RELIEF TO WHICH PLAINTIFF IS ENTITLED

48. Plaintiff is entitled to a permanent injunction restraining **[**61]** the defendant, its officers, agents and employees, and all persons controlled by or acting in concert or association with defendant, from further infringement of United States Letters Patent No. 2,954,073, and from further making, using, offering for sale or selling devices embodying the invention described and claimed in said patent.

49. Plaintiff is further entitled to an accounting of damages arising by virtue of the infringement by defendant of United States Letters Patent No. 2,954,073 and for interest thereon. This cause should be continued with respect to the accounting issues pursuant to *Rule 42(b) of the Federal Rule of Civil Procedure*.

50. Plaintiff is entitled to an award of costs with respect to the issues of patent validity and infringement and the antitrust counterclaim.

End of Document

Boise Cascade International, Inc. v. Northern Minnesota Pulpwood Producers Asso.

United States District Court for the District of Minnesota, Fifth Division

December 28, 1968

No. 5-68 Civ. 52

Reporter

294 F. Supp. 1015 *; 1968 U.S. Dist. LEXIS 12535 **; 1969 Trade Cas. (CCH) P72,771

Boise Cascade International, Inc. Plaintiff v. Northern Minnesota Pulpwood Producers Assn., Emery Carlson, Norman Warpula, and James Parnham, Defendants

Core Terms

pulpwood, plant, contracts, merits, Sherman Act, injunctive, producers, exempt, anti trust law, products, boycott, cords, agricultural, deliveries, purposes, preliminary injunction, agricultural product, organizations, Northern, withhold, concert, parties, existing contract, open market, Volstead Act, conspiracy, grievances, Relations, dissuade, deliver

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Permanent Injunctions**

Permanent injunctive relief can only be granted after a full hearing and specific findings by the trier of fact whether this be by the jury or by the court.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

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

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

The request for a preliminary injunction, at the very outset of the litigation, is addressed to the sound discretion of the Court. The plaintiff must show: (1) that the conduct to be enjoined is in furtherance of the alleged violations of the Sherman Act; (2) that there is a substantial likelihood the allegations of the complaint will be sustained at the trial of the cause; (3) that irreparable harm to the plaintiff will result if the injunction pendente lite is denied; (4) and that there is no conduct by plaintiff which would bar the granting of equitable relief. Further, these four rather specific burdens are concomitant with other well-established principles of equity, e.g., preservation of the status quo, public interest and the defense of unclean hands.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Personal Service Agreements

Contracts Law > Defenses > Public Policy Violations

Contracts Law > Remedies > Specific Performance

HN3[] **Types of Contracts, Personal Service Agreements**

Courts of equity have recognized the impossibility of enforcing a contract where personal services are involved, and have refused so to do.

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**

It is well established that any individual operator acting alone and not in concert with others is, and has been free, to sell his product or his labor to whom he will at such price as he cares to demand, or to withhold the same from the market as he pleases.

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

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, requires no formal association but only a "combination or conspiracy," and this has always been interpreted to countenance some type of agreement among the parties to the conspiracy or combination, whether formal or informal.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

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

It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN7[] **Exemptions & Immunities, Collectives & Cooperatives**

See The Capper Volstead Act, 7 U.S.C.S. § 291.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

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Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN8[] **Collectives & Cooperatives, Capper-Volstead Act**

See 15 U.S.C.S. § 17.

Judges: [1]** Neville, District Judge.

Opinion by: NEVILLE

Opinion

[*1017] NEVILLE, District Judge:

Plaintiff, a paper mill and manufacturer of insulite wallboard, is engaged in interstate commerce with a mill and plant at International Falls, Minnesota on the Canadian border. It brings this suit to enjoin defendants, an "ad hoc" unincorporated association and three individuals, said to be officers thereof, (1) from what it claims to be a violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, in the form of a boycott and (2) from inducing other persons to breach their existing contracts with plaintiff. The complaint also seeks treble damages. Plaintiff followed the filing of the complaint with moving papers seeking a preliminary injunction. No answer has yet been filed and the time therefor has not yet expired; nor is the court advised whether either party demands a jury trial on the merits.

Prior to the hearing and the taking of testimony on the question of a preliminary injunction, the court invited the attention of both counsel to *Rule 65(a)(2) of the Federal Rules of Civil Procedure* relative to consolidating the trial of the action on the merits with the application for preliminary injunction. **[**2]** Neither counsel expressed themselves to this end and no stipulation was made concerning such a procedure. The court is aware of the last sentence of Subd. (a)(2) that it shall be construed "as to save the parties any rights they may have to trial by jury." Consequently, since this action involves not only a request for injunctive relief but a prayer for treble damages, it is clear either party is entitled to demand a jury trial. This would seem to prevent the court from making any finding on the merits of the request for injunctive relief since under traditional principles of *res adjudicata* such would deprive either party or both parties of the right to a jury trial. Even should plaintiff waive a jury trial, defendants would seem entitled to have a jury pass on the question of whether they are in violation of law so as to render them liable. None of the parties should be bound as though there had been a trial on the merits at the preliminary hearing had before this court.

It should thus be emphasized that this is a suit for preliminary relief under *15 U.S.C. § 26* and that the court is not passing upon the merits of the controversy in question. Any ***HN1***[] permanent injunctive relief, **[**3]** if in fact plaintiff succeeds in its case on the merits, can only be granted after a full hearing and specific findings by the trier of fact whether this be by the jury or by the court. See, *Beacon Theatres v. Westover, 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959)*; *United States v. Munsingwear, Inc., 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950)*; and *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n, 371 F.2d 263, 270-71* (7th Cir.), cert. denied, *387 U.S. 909, 87 S. Ct. 1686, 18 L. Ed. 2d 627 (1967)*. Whether **[*1018]** at a full trial on the merits, the evidence heretofore adduced need not be repeated will await a ruling by the court at that time. A general jury term of this court commences at Duluth, Minnesota on January 6, 1969, and this case will be advanced and will stand for trial on the merits on that date or as soon after January 6, 1969 as the case can be reached.

The facts of this case are not seriously in dispute. Plaintiff uses as its raw material a forest product known as pulpwood in its manufacturing processes. It acquires this for the most part locally, that is to say within a radius of 50 miles or thereabouts. Trees **[**4]** employed for this purpose are younger trees -- largely second growth -- said to be 40 years of age and up. This part of northern Minnesota is a sparsely populated wooded or forest area. Seventy-five per cent of the land in Koochiching County of which International Falls is the county seat was testified to be either state or county owned. Permits to cut timber therefrom must be obtained from proper authorities. Plaintiff employs some wood chips and contracts with what are called loggers, who cut timber growing for the most part if not entirely on land owned or controlled by plaintiff. These loggers and generally the deliverers of wood chips are not involved in this dispute. Plaintiff also traditionally contracts each year with approximately 400 "pulpwood producers" or as plaintiff's witnesses characterized them "open market operators". As of date of hearing herein, plaintiff had existing contracts with some 250 such operators. These operators and their recent activities are the subject matter of this action.

Generally the operators enter into individual contracts with plaintiff for the winter season commencing on or about November 1st of each year. The contracts obligate them **[**5]** to deliver a specified quantity of pulpwood in particular lengths for a price for each species or set amount of dollars per cord, deliveries to be completed on or before March 15th of the following year, (or apparently occasionally at an earlier date). There are also summer contracts made with the operators but such are not presently involved in the request for preliminary injunction. The dates for the so-called winter contracts are determined to accommodate weather conditions. Operators cannot well get into the woods and across the swamps with their equipment to cut timber until the ground is frozen, nor operate successfully at least for a period after the spring "break up".

The open market operators meet the classic definition of independent contractors. They provide their own saws, loaders, trucks and trailers and other equipment. Plaintiff company does not furnish nor finance such. They cut and deliver pulpwood when and as they can and please so long as they have completed their deliveries by the deadline date of mid-March (occasionally earlier). They may, and many do, hire others to assist them. They receive no wages, but merely a price for their product and apparently **[**6]** at the desire of both the Company and operators are not considered employees. There was testimony that plaintiff owns and controls some 375,000 acres of land near International Falls, and is re-planting trees on some of its "plantations". For the most part if not entirely, however, the operators cut trees that were not planted by themselves but are natural growth and are 40 years or more of age. "Cropping" trees undoubtedly is a forward-looking plan, but as yet obviously in its infancy.

Apparently in 1967, and continuing into the winter 1968-69 season, plaintiff made some changes in the manner of paying for its wood products, basing such on total weight (maintaining a differing winter and summer weight) rather than paying on volume basis, i.e., by the cord. This among other things appears to have caused some unrest among a substantial number of the operators. This and perhaps other grievances resulted in several meetings of the operators and other interested persons and ultimately in a request by the operators to meet jointly with some of plaintiff's officials to discuss alleged differences. **[*1019]** This request in any sort of a formal way was received after November 25, **[**7]** 1968, and plaintiff refused to discuss any grievances until what it termed the boycott was lifted, and the operators refused so to do until plaintiff would grant an audience to hear and discuss grievances. A deadlock has resulted. The court hopes that following this order discussions will ensue between the parties.

Principally the operators wish a raise in the prices paid for their pulpwood. They have never been organized on any sort of group basis before nor presented any concerted or uniform demands to plaintiff. They have historically made individual contracts year after year at varying times and (with minor exceptions due to distances involved in transportation) the same price has been rather uniformly paid by the plaintiff company as to all operators.

The operators have been determined not to be a labor organization, at least within the meaning of the National Labor Relations Act. An attempt to affiliate with the Teamsters Union (Local 615 Virginia, Minnesota) was thwarted by a letter from the Regional Director of the National Labor Relations Board dated October 29, 1968, which reads in part as follows:

> "As a result of the investigation, it appears that the unit **[**8]** of employees for which the Petitioner seeks to act as bargaining agent is inappropriate for collective bargaining purposes. [1] Consequently, further proceedings are not warranted and I am therefore dismissing the Petition in this matter."

About mid-November 1968 a group of operators met in a town near International Falls and concluded to attempt to take what it considered remedial measures. Witness Emery Carlson, a defendant, claims there was no formal organization of any association, but that because he was somewhat more vocal than others he was asked to assume the podium, and that by so doing plaintiff has designated him as President. The organization never formally elected any officers, and has adopted no constitution or by-laws. Membership cards were issued, however, to some number of persons who paid $3.00 dues to one of their number assuming the duties as treasurer. Defendant Parnham apparently acted as *ad hoc* secretary and so has been designated by plaintiff in the pleadings as an officer of the association. The name Northern Minnesota Pulpwood Producers Association was used and adopted.

Commencing on November 25, 1968 a group **[**9]** of men, mostly if not all operators estimated by various witnesses and at various times as between 15 and 40, gathered at the plaintiff's plant. They appear to have been careful not to trespass on plant property and it is clear they exercised no violence. They stopped, or attempted to stop trucks making delivery of pulpwood and wood chips to the plaintiff's plant, talked to the drivers, explained grievances, stated they were seeking a price of an additional $1.00 per cord for their wood, and dissuaded some substantial number of operators (and wood chip deliverers) from making delivery to the plant. Defendants Emery Carlson and Norman Warpula were prominent among the group and defendant James Parnham was identified as being present on one or more occasions or engaged in some of the activities. There is no testimony that the defendants ever actually blocked access by truckers to the plaintiff's weighing scale (the first stop for truckers

[1] "Independent Contractor. "

making deliveries to plaintiff's plant) but a number of parked cars did impede to some extent free and usual access to the scale. There is no evidence that any driver actually was forced away from the plant, and even as at date of the hearing of **[**10]** this matter, some witnesses testified they were still making deliveries. A number of untoward incidents occurred at a distance from plaintiff's plant or mill affecting damage to the equipment of some operators who insisted on making deliveries but no reliable evidence was presented connecting **[*1020]** such with the defendants. The court thus struck such evidence from the record, according plaintiff the benefit of *Rule 43(c) of the Federal Rules of Civil Procedure* relating to an offer of proof.

By way of comparison, it was testified and records were produced showing that for December 1967 plaintiff's plant received between 850 and 1800 cords of pulpwood a day from operators and that for the month of November 1968, up to November 25th, the plant had received an average approximating 1500 cords of pulpwood per day from operators.

Upon the advent of defendants' activities on November 25, 1968, receipts of pulpwood from operators virtually ceased. Three Hundred Seventy Five cords arrived November 25, but there were none for November 26 thru December 1st, thereafter increasing in irregular amounts to 408 cords on December 9th, the day this suit was filed. The activities of the **[**11]** group of operators obviously was and is being quite effective. There is no question or doubt in the court's mind, whether or not the Northern Minnesota Pulpwood Association be deemed a formal association but that a number of the operators have acted in concert and with a common joint purpose and have successfully diminished plaintiff's pulpwood deliveries.

Plaintiff claims irreparable damage and injury and the court permitted one of plaintiff's witnesses, general manager of the procurement or woodlands division, to testify over objection that an estimate of damage to date is $100,000. No detail was given for this figure, the bulk of which apparently represents increased prices paid to secure pulpwood by rail from other sources. The plant has not closed down to date and is still running 24 hours a day, 7 days a week, and has on hand 4 to 5 days of pulpwood supply. This reserve has been dwindling however. Much is made of the fact that the plant is International Falls' principal industry and employs some 2100 people with an annual payroll of $15,000,000 who would be out of work were the plant forced to close. As to what the court must find in order to grant a preliminary injunction, **[**12]** a quote from *McKesson and Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964)* is particularly apropos:

> "Preliminary, ***HN2***[] the request for a preliminary injunction, at the very outset of the litigation, is addressed to the sound discretion of the Court. *Joseph Bancroft and Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569 (3rd Cir. 1959)*. The plaintiff must show: (1) that the conduct to be enjoined is in furtherance of the alleged violations of the Sherman Act; (2) that there is a substantial likelihood the allegations of the complaint will be sustained at the trial of the cause; (3) that irreparable harm to the plaintiff will result if the injunction pendente lite is denied; (4) and that there is no conduct by McKesson which would bar the granting of equitable relief." *235 F. Supp. at 746*.

Further, these four rather specific burdens are concomitant with other well-established principles of equity, e.g., preservation of the status quo, public interest and the defense of unclean hands. *Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292 (3rd Cir. 1940)*; *B & W Gas, Inc. v. General Gas Corp., 247 F. Supp. 339 (N.D. Ga. 1965)*; *McKesson and Robbins, Inc.* ***[**13]*** *v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964)*; and *Fein v. Security Banknote Co., 157 F. Supp. 146 (S.D.N.Y. 1957)*.

At the outset it is clear that the court cannot by any sort of a mandatory injunction compel specific performance of the approximately 250 extant open market operators' contracts. From time immemorial, ***HN3***[] courts of equity have recognized the impossibility of enforcing a contract where personal services are involved, and have refused so to do. Certainly it is not feasible nor appropriate that the United States Marshal should go into the woods, stand over the operators and attempt to compel them to cut wood and deliver the same.

[*1021] Insofar as the relief sought by plaintiff is an order for specific performance of contracts to supply wood or compelling defendants and other pulpwood producers to cut, load and deliver their product to its mill, such are personal service contracts and the court should not, either directly or indirectly, by means of an injunction, compel the affirmative performance of any such contracts. *Rutland Marble Co. v. Ripley, 77 U.S.(10 Wall.) 339, 19 L. Ed. 955 (U.S. 1870)*; *Bennett v. Fox Film Corp., 149 Minn. 88, 182 N.W. 905* ***[**14]*** *(1921)*; *Paramount Pictures Corp. v. Holden, 166 F. Supp. 684* (D.C. Cal.); *King Features Syndicate v. Courrier, 241 Iowa 870, 43 N.W.2d 718 (1950)*; 28 Am. Jur., "Injunctions" § 108; 49 Am. Jur., "Specific Performance" § 134.

Also ***HN4***[] it is well established that any individual operator acting alone and not in concert with others is, and has been free, to sell his product or his labor to whom he will at such price as he cares to demand, or to withhold the same from the market as he pleases. He may ask any price he chooses and (assuming he is not breaching an existing contract) may cut his timber or refuse to do so. *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*.

The court is convinced that defendants' conduct may well be found to be in furtherance of an alleged violation of the Sherman Act and that plaintiff has shown a reasonable probability and substantial likelihood of success at a trial on the merits. Defendants placed much emphasis on the fact that if any group existed here it was an *ad hoc* group of individuals expressing common grievances against plaintiff and not a formal "association" conducting a group boycott. The statute however, ***HN5***[] *Section* ***[**15]*** *1* of the Sherman Act, requires no formal association but only a "combination or conspiracy," and this has always been interpreted to countenance some type of agreement among the parties to the conspiracy or combination, whether formal or informal. As stated in *Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965)*:

> "It ***HN6***[] is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy."

See, *Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*; *United States v. United States Gypsum Co., 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948)*; *United States v. Masonite Corp., 316 U.S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070 (1942)*; *Sugar Institute, Inc. v. United States, 297 U.S. 553, 80 L. Ed. 859, 56 S. Ct. 629 (1936)*; *Maple Flooring Mfgrs. Ass'n v. United States, 268 U.S. 563, 69 L. Ed. 1093, 45 S. Ct. 578* ***[**16]*** *(1925)*; and *United States v. American Linseed Oil Co., 262 U.S. 371, 67 L. Ed. 1035, 43 S. Ct. 607 (1923)*. In the case at bar, the evidence is uncontroverted that there was a combination of pulpwood producers outside the Boise Cascade paper mill on a daily basis starting on November 25, 1968. The named individual defendants were seen attending this group and giving instructions on several occasions. It is clear that many pulpwood producers have associated and acted together, albeit informally, under the name of the Northern Minnesota Pulpwood Producers Association.

The court is also convinced, at least for the purposes of passing on plaintiff's request for preliminary relief, that this "association" and the individuals named as defendants have engaged in a concerted group boycott the purposes of which have been to attempt to control the price of pulpwood which they sell to plaintiff. It is well settled that such group boycotts are illegal per se and unreasonable restraints of trade as a matter of public policy. *United States v. General Motors Corp., 384 U.S. 127,* ***[*1022]*** *16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S.* ***[**17]*** *Ct. 1051 (1964)*; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*; *Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; and *Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*.

The difficulty arises when two or more operators begin to act in concert, that is in jointly agreeing to withhold their products from market pending the ascertainment of a particular price. This is the evil at which the antitrust laws are aimed. If three or a dozen or fifty manufacturers of refrigerators, automobiles, steel, or any other products for instance, agree not to sell below a certain price and to withhold products from the market until that price is obtained, competition is destroyed, the incentive to make better products more cheaply is gone, and the evils of monopoly or oligopoly exist and tend to be created. The attempt in the present lawsuit is to bring the open market operators or pulp producers within the ambit of this principle and reasoning.

It is clear to the court that the conduct in which the operators have engaged since November **[**18]** 25, 1968 or thereabouts is likely to be in contravention of the principles and theories espoused by *Section 1* of the Sherman Act. The operators are attempting to withhold product to obtain a certain price ($1.00 more per cord of wood) and to accomplish this are attempting to induce other such operators to adopt a similar course of conduct. Such conduct clearly would be and has been condemned by sellers of books, milk, structural steel, electrical equipment, motion pictures and many, many other products. The antitrust laws are designed to condemn just such conduct.

It is true that the operators here are not United States Steel, General Motors or General Electric, but are back-woodsmen who by their own industry and sweat cut timber in the dead of winter and haul it to and sell it to their most immediate and perhaps in reality their only available market from a transportation standpoint, i.e., the plaintiff in this case. While they suffer a disparity of bargaining position, it seems to the court that under the teachings of *Meat Drivers v. United States, 371 U.S. 94, 9 L. Ed. 2d 150, 83 S. Ct. 162 (1962)* (grease peddlers) and *Columbia River Packers Ass'n, Inc. v. Hinton, 315 U.S. **[**19]** 143, 86 L. Ed. 750, 62 S. Ct. 520 (1942)* (fishermen) this court is bound and must hold that the identity or economic circumstances of the persons apparently violating *Section 1* of the Sherman Act by concentrated price fixing activities is not material and that the conduct of the operators here in all likelihood may well be found to be in contravention of the letter, principles and spirit of the Sherman Act.

This then brings the court to the question as to whether the open market operators can be found to be exempt from the antitrust laws. There are two possible bottoms for this claim:

(1) ***HN7***[] The Capper Volstead Act, *7 U.S.C. § 291* which reads in pertinent part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect **[**20]** such purposes . . . ."

It is difficult for the court to find that the operators are "farmers" or "planters" or "ranchmen" and clearly they are not " dairymen" or "nut or fruit growers."

[*1023] The term "agricultural products" is not defined within the Capper Volstead Act. The Co-operative Marketing Act, *7 U.S.C. § 451*, defines "agricultural products" to include only "the edible products of forestry." On the other hand, the Minnesota Cooperative Marketing Act, *Minn. Stat. § 308.52*, includes all "forestry" in its definition of "agricultural products." The court is willing to assume, *arguendo*, that trees, or at least the cutting and harvesting thereof, is within the term "agricultural products." Such does not however answer the question because even producers of agricultural products and their agricultural organizations are subject to the antitrust laws when they step outside the scope and purpose of these limited exemptions. See, Case- *Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 19 L. Ed. 2d 621, 88 S. Ct. 528 (1967)*; and *Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*. Therefore, if for no other **[**21]** reason, it would seem the Capper Volstead Act at a trial on the merits may well be found not to accord the operators an exemption from the operation of the antitrust laws.

(2) Apart from the Capper Volstead Act, the ***antitrust law*** itself, specifically *15 U.S.C. § 17*, creates certain exemptions. These are perhaps broader than those in the Capper Volstead Act. There is no doubt but what many, many activities of labor unions themselves might well be contrary to antitrust principles *if* Congress had not deemed that human labor is not a commodity in interstate commerce. ***HN8***[] *15 U.S.C. § 17* reads in part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, *agricultural*, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor

> shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, **[**22]** under the antitrust laws."

Labor and agricultural organizations thus may continue "for the purposes of mutual help" and may not be restrained "from lawfully carrying out the legitimate objects thereof." The question which may be before the trier of fact then is whether the present loosely organized Northern Minnesota Pulpwood Association can be said to be an agricultural organization. If so, then its activities are exempt from the umbrella of antitrust restrictions. From the standpoint of the operators it is easy to understand that they may look at their brothers employed in plaintiff's mill or plant and observe that they have the right to organize and to strike, even though irreparable harm ensues to the employer and perhaps to many persons not connected directly or involved with the strike. It is understandable that the operators deem themselves a part of plaintiff's labor force, not running a machine in the factory to be sure, but laboring in the woods to cut and produce the pulpwood which produces the raw material that keeps the factory running. Does the happenstance that historically their labor is rendered in the form of independent contractors vary this? Is form more **[**23]** important than substance? Can it not fairly be said that the Congress, had the issue been specifically pointed up, would have considered such a group as the operators an agricultural association and within the purview of the exemption?

The two cases of *Meat Drivers* and *Columbia River Packers Ass'n* above cited are distinguishable. Neither can be said to have an aura of agriculture, as does the case at hand; nor in either opinion was any reference made to the above exemption section of the Sherman Act. *Meat Drivers* **[*1024]** dealt with "grease peddlers," i.e., those who bought up used kitchen grease from hotel and restaurant kitchens and resold the same, largely for export. The *Columbia River* case comprised fishermen selling to a cannery, and the court struck down an organized attempt to withhold catch from the market. The court believes the trier of fact at a trial on the merits may well find that the operators have a right to be in an association and to speak and act collectively. It would appear that the association cannot represent anyone but its own *bona fide* members; it cannot purport to represent those who are not its members as can a labor union **[**24]** once a successful National Labor Relations Board election has been held. It would seem it can, however, speak for and represent its members; that when a new round of contracts is to be made with plaintiff, the members of the association might act collectively and only for their own members.

A determination however, if it is so made at a trial on the merits, that the Northern Minnesota Pulpwood Producers Association is an agricultural organization exempt from the Sherman Act, does not fully answer the question now before the court in this preliminary injunctive request. The antitrust exemption even for long existing and well established labor unions, for instance, does not permit it to engage in every type of activity, nor to conspire with others to use illegal means to achieve a result. A boycott is such an illegal means. Members of an organization can resist and withhold their own labor, but the use of a boycott by prevailing upon others so to do is condemned by statute and by court decisions as illegal per se.

The defendants here are not merely asserting demands for themselves and the members of their association, but are endeavoring to dissuade others either by persuasion **[**25]** or by what some might interpret as intimidation; this activity must be judged in light of the fact that some 250 operators already have contracts with plaintiff and, according to plaintiff's testimony, normally by this time of year approximately 400 operators would have entered into contracts. While it cannot in a technical sense be said that any operator yet has breached his contract, or been persuaded to by the operators, it is obvious historically that with 400 operators under contract the plaintiff company would have a normal daily flow of 1,000 to 1,500 cords of wood a day and this has been quite successfully and definitely interrupted; this has set back or deferred the normal and usual time schedule for performance by the operators and has been disruptive. The court believes that there is a real danger that if present conditions continue the plant may be forced to close. Certainly such will cause irreparable harm, not only to the parties but to many others not here involved.

Whether or not the court be upheld at a trial on the merits in its determination that the association is an agricultural organization exempt from the antitrust laws, it is clear that the defendants cannot **[**26]** continue their boycott in violation of their existing contracts, cannot assemble at the plant as for "peaceful picketing" to dissuade or interfere with those who wish to deliver products to the plant; nor can defendants persuade or attempt to persuade others not to perform their contracts or to refuse normal business relations with plaintiff. When and if the individual operators wish to renew their contracts, the association may be found at a trial on the merits to be permitted to speak for those who so authorize; but the association cannot speak for others and by the same token cannot dissuade or attempt to dissuade others or even its own members who have existing contracts from having normal business intercourse and relations with plaintiff.

The court is clear that the Norris-La Guardia Act, *29 U.S.C. § 104*, does not apply to the facts of this case so as to prevent preliminary injunctive relief. It would seem that this is not a "labor dispute" in the traditional sense and thus that Act has no application. *Columbia* ***[*1025]*** *River Packers Ass'n, Inc. v. Hinton, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520 (1942)*; *Meat Drivers v. United States, 371 U.S. 94, 9 L. Ed. 2d 150, 83* ***[**27]*** *S. Ct. 162 (1962)*. Rather what is presented in the case at hand is an apparent violation of the Sherman Act by virtue of what appears to be an illegal boycott by what the trier of fact ultimately may well find to be a legal organization.

This memorandum shall be in lieu of and shall be deemed to include the court's findings of facts for purposes of *Rule 52 of the Federal Rules of Civil Procedure*. A separate injunctive order has been entered.

International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.

United States District Court for the District of Hawaii

January 16, 1969

Civil No. 2754

Reporter

296 F. Supp. 920 *; 1969 U.S. Dist. LEXIS 13020 **; 1969 Trade Cas. (CCH) P72,691

International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. and Hawaiian Telephone Co.

Core Terms

acquisitions, anti trust law, laches, equitable, statute of limitations, affirmative defense, antitrust, injunctive relief, legal right, equitable remedy, Clayton Act, telephone company, public policy, violations, estoppel, parties, unclean hands, damages, treble damages, four year, predicated, stock

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Monetary Damages

Governments > Legislation > Statute of Limitations > Time Limitations

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Remedies, Damages**

The Clayton Act § 4B, *15 U.S.C.S. § 15(b)*, is limited to actions for money damages initiated under the Clayton Act § 4 or § 4A, *15 U.S.C.S. § 15* or *§ 15(a)*, by private parties or the federal government. The Clayton Act § 4B, *15 U.S.C.S. § 15(b)* does not in any way specifically curtail or attach limitations to private suits under the Clayton Act § 16, *15 U.S.C.S. § 26*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN2[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The doctrines of estoppel and waiver do not, in general, apply in transactions that are forbidden by statute or that are contrary to public policy.

Civil Procedure > ... > Equity > Maxims > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN3[] **Equity, Maxims**

The courts of equity apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.

Judges: [1]** Pence, D.J.

Opinion by: PENCE

Opinion

[*921] Memorandum Decision on Plaintiff's Motion to Strike the Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation

PENCE, D.J.:

Plaintiff is suing under Section 16 of the Clayton Act (Title *15 U.S.C. § 26*) and Section 11 of Act 190 of the Hawaii Laws of 1961 for injunctive relief from defendants' alleged violations of the federal and state antitrust laws. Defendant General Telephone & Electronics (GT&E) has asserted the doctrines of laches and/or statute of limitations, [1] estoppel, [2] and unclean hands [3] as affirmative defenses to some or all of plaintiff's charges. Plaintiff has moved to strike these defenses as insufficient and immaterial as a matter of law. Plaintiff's motion was granted orally on August 2, 1968, and this is but the formal written decision thereon.

[2]** I. *Second Affirmative Defense: Laches and/or Statute of Limitations*

Paragraph 1 of plaintiff's prayer for relief requests that the following acquisitions of GT&E be adjudged violations of *Sections 1* and *2* of the Sherman Act (Title *15 U.S.C. §§ 1*, *2*) and *Section 7* of the Clayton Act, as amended (Title *15 U.S.C. § 18*):

1. 1950 -- GT&E acquired the capital stock of Leich Electric Co.;
2. 1954 -- GT&E acquired the stock or assets of Automatic Electric Company;

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[1] Second Affirmative Defense, Answer To Amended Complaint and Counterclaim (filed February 20, 1968), paragraphs 31-32.

[2] Third Affirmative Defense, Answer, paragraphs 33-52.

[3] Fourth Affirmative Defense, Answer, paragraphs 53-67.

3. 1959 -- GT&E acquired the stock or assets of Lenkurt Electric Co., Inc.; and
4. 1964 -- GT&E acquired the stock of California Water & Telephone Company, West Coast Telephone Company, The Southwestern States Telephone Company, and Western Utilities Corporation (all referred to as the Western Utilities groups).

Defendant contends "such relief is barred by reason of laches *and* the statute of limitations (Section 4B of the Clayton Act . . .)." [4] **[**3]** **[*922]** Defendant has abandoned this defense insofar as it relates to the 1964 acquisition of the Western Utilities group, which occurred within four (4) years of the filing of this lawsuit (October 18, 1967). [5]

Clayton § 4B [6] provides that any "action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued." Since plaintiff initiated this lawsuit solely under Clayton § 16 for injunctive relief, the § 4B statute of limitations applied to Clayton Act actions for money damages is, by its very language, not, per se, applicable to this proceeding. Defendant's second affirmative defense is therefore limited to the equitable doctrine of laches, which, for the purposes of this action, defendant equates to the statute of limitations.

Defendant stated its position in the context of and relies primarily [7] on *Farbenfabriken Bayer, A.G. v. Sterling Drug, 197 F. Supp. 627 (D.N.J. 1961)*: (*Id. note 5 supra.*)

> "When I say laches here, I am talking about laches in the sense of an equitable remedy being linked to a legal **[**4]** right, the equitable remedy being Section 16 linked to a legal right, which is *Section 7* of the Clayton Act, and *Sections 1* and *2* of the Sherman Act.
>
> "The plaintiff isn't suing for damages. The one thing he is after is an equitable remedy of an injunction, divestiture, some equitable remedy. Now, it's linked to the legal rights given by statute, Clayton 7 and Sherman 1 and 2. Those legal rights in the Anti-trust laws, Sherman 1 and 2 and Clayton 7, are subject to Section 4, statute of limitations, Section 4B, four years.
> * * *
> " . . . [When] I say laches now, I am talking about laches which is the four-year period, because it is the statute of limitations of the legal rights upon which they ask for the equitable remedy."

[5]** Plaintiff urges that an action for divestiture under the antitrust laws is timely if, at the time of filing, there appears a reasonable likelihood any acquisition will lessen competition, citing *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957)*. Plaintiff maintains *du Pont* permits suit whenever "the acquisition threatens to ripen into a prohibited effect." [8] Defendant counters that *du Pont* is distinguishable since it was a government suit and immune from any laches defense. Defendant construes plaintiff's position as conceding that an acquisition which constituted a violation at the time made is subject to attack for laches, arguing that, at most, *du Pont* introduces a fact question (e.g., when the violation occurred) which precludes summary judgment as an alternative to a motion to strike.

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[4] Defendant has abandoned that portion of its pleading relating to § 22 of Act 190 of the Hawaii Laws of 1961, since plaintiff does not maintain that the listed acquisitions in any way violate that Act. (R.T. August 1, 1968 at 104-05.)

[5] R.T. August 1, 1968 at 42.

[6] Title *15 U.S.C. § 15b*.

[7] Defendants have also pointed to *United West Coast Theatres Corp. v. South Side Theatres, 86 F. Supp. 109 (S.D. Cal. 1949)* (defendant counterclaimed for treble damages and injunctive relief under Clayton §§ 4 and 16, and the court applied the state statute of limitations to the prayer for equitable relief), and *Hoopes v. Union Oil Co. of California, 374 F.2d 480* (9 Cir. 1967) (a suit for money damages only under Clayton § 4).

[8] Plaintiff's Reply To Memorandum In Opposition To ITT's Motion to Strike The Second, Third and Fourth Affirmative Defenses (filed June 12, 1968) at page 2, and du *Pont, supra, at page 597*.

[6]** ***HN1***[]

Clayton 4B is limited to actions for money damages initiated under Clayton 4 or 4A by private parties or the federal government. Clayton 4B does not **[*923]** in any way specifically curtail or attach limitations to private suits under Clayton 16. If there is any such limitation on private equity proceedings, it can therefore only derive from case law.

Sterling Drug, supra, is the primary authority relied upon by defendant to support its position that the Clayton 4B four year statute of limitations for Clayton 4 actions is by case law transmuted into laches and made applicable to this equitable proceeding under Clayton 16. In that case plaintiff sued on September 28, 1955, for money and injunctive relief as a result of defendant's Sherman 1 violation. A companion opinion found that such violation (an unlawful combination and conspiracy in restraint of trade in pharmaceutical products) had terminated on September 5, 1941. Previously the court had dismissed plaintiff's treble damage claim, leaving only a Clayton 16 claim for injunctive relief. In granting defendant's motion for summary judgment, the court said:

> "Section 4 of the Clayton Act . . . grants to 'any **[**7]** person * * * injured in his business or property by reason of anything forbidden in the antitrust laws' a right to maintain an action for treble damages. Section 16 of the Act . . . grants an *additional* right to maintain an action for injunctive relief 'against threatened loss or damage.' We are of the opinion that the equitable remedy available under Section 16 is *predicated* upon the legal cause of action created by Section 4. It is essentially an equitable remedy in aid of a legal right created by the statute.
>
> "The statute of limitations, by its express terms, applies only to actions at law and may not be invoked as a defense against a claim exclusively equitable. However, where the equity jurisdiction is invoked in aid of a legal right, or is predicated upon a legal cause of action, equity 'will withhold its remedy if the legal right is barred by the * * * statute of limitations.'" *197 F. Supp. at 629*. [9]

[8]** The history of sections 4, 16 and 4B does not permit this court to agree with the conclusion that a Clayton 16 claim "is predicated upon the legal cause of action created by Section 4." Private parties were originally granted the right to seek treble damages by the Sherman Act (passed July 2, 1890), which, however, did not establish the corollary right to injunctive relief. Congress reenacted the substance of the treble damage provision on October 15, 1914 as Section 4 of the Clayton Act. Significantly, Congress at that time made a concomitant expansion of the antitrust laws by giving private parties the right to sue for injunctive relief (Clayton § 16) separate and apart from any right to monetary recovery. It was not until July 7, 1955, that Clayton 4B, which pre-empted application of state statutes of limitation to the federal antitrust laws, was added.

While the right to such injunctive relief to redress antitrust grievances may be said to be "additional" to the right to damages in the sense that it may be conjoined therewith, it may also be an alternative. As the above history manifests, the equitable remedy of § 16 is in no way "predicated upon", incidental to or derived **[**9]** from the legal right of § 4. The two sections expressly create wholly independent remedies, in strikingly similar language. A litigant may pull either trigger of his shotgun independently, or, at his option, he may shoot both barrels together. This is abundantly clear from the instant complaint, in which plaintiff seeks only injunctive relief. No damage claim exists herein on which any equitable remedy could be predicated. Yet defendants have not challenged plaintiff's right to maintain this suit.

In *Sterling Drug* plaintiff originally sought *both* legal and equitable relief, **[*924]** and to support incorporation of the Clayton 4B four year limitations period into a laches defense applied to a Clayton 16 claim the court relied on the general principle that equity withholds its remedy when legal rights are barred. Moreover, the facts of *Sterling Drug* are markedly different from those alleged here. The violation in *Sterling Drug* consisted of a conspiracy among

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[9] It should be noted that the court initially reached the opposite conclusion. See *Farbenfabriken Bayer, A.G. v. Sterling Drug, 153 F. Supp. 589, 594 (D.N.J. 1957)*.

plaintiff's predecessors and the defendant and its predecessors, which included illegal contracts in 1920, 1923 and 1926, all of which terminated on September 5, 1941. The suit was filed in 1955. In **[**10]** contrast, the pleadings herein allege a cause of action growing out of successive and multiple acquisitions continuing to the year suit was brought. The prospective language of Clayton 7, in combination with, and when construed in the light of the Supreme Court's opinion in *du Pont* bring such acquisitions into the ambit of a continuing violation. Accordingly, the instant acquisitions may be challenged at any time within (and at least for four years after) the span of such alleged violation.

The Ninth Circuit's statement in *Hoopes, supra* note 7, *374 F.2d at 486*, is particularly relevant:

> "Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements . . . Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is **[**11]** considered to have been episodic rather than continuous."

The *Sterling Drug* doctrine, as applied, is in direct conflict with and contravenes the meritorious principle that equitable defenses are unavailable to defeat rights which are statutory and/or in furtherance of a strong public policy. [10] The right of private individuals to enforce the antitrust laws is both statutory and advances an important public policy. The rationale of the policy encouraging such private enforcement is to permit private parties to supplement governmental action. Private proceedings inure to the public benefit by eliminating unlawful restraints from interstate commerce. While treble recovery under § 4 provides an incentive or bonus to encourage private litigants to undertake an arduous task, in a suit for equitable relief under Clayton 16 the private plaintiff does not receive any comparable cash benefit. The elimination of an existing violation increases competition, thus benefiting the public and concurrently the private plaintiff. The law does not require that the public undergo continued subjection to antitrust violations when a champion appears, merely because of the passage of time. **[**12]** Antitrust violations do not become sacrosanct with age, and immunized from attack, when the public good dictates the contrary.

The force of the policy favoring private enforcement of the antitrust laws was again emphasized by the Supreme Court in *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)* when it stated:

> " . . . [The] purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral **[*925]** worth of the parties would only result in seriously undermining the usefulness **[**13]** of the private action as a bulwark of antitrust enforcement."

If a "morally reprehensible" plaintiff is not precluded from suing, certainly the contemplative, albeit tardy, one should not be subjected to harsher treatment. The private litigant, no less than the government, is entitled to the opportunity to ponder and evaluate the effect of acquisitions, and need not bull ahead indiscriminately to avoid the proscriptive doctrine of laches.

This court views the *du Pont* case as controlling. In that action the government sued in 1949 for alleged Clayton 7 violations resulting from du Pont's 1917-1919 purchase of a 23% interest in General Motors. The Supreme Court squarely ruled on the question of whether that action was late, holding:

> "The Senate declared the objective of the Clayton Act to be as follows:

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[10] *American Surety Company of New York v. Gold, 375 F.2d 523, 528* (10 Cir. 1967).

> '. . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices . . . to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation*. . . .'

> "'Incipiency' in this context denotes not the time the stock was acquired, **[**14]** but any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." *353 U.S. at 597*.

Defendant has not advanced any reason why this rule should not be available to private litigants in a like manner in a proceeding, such as this, which is primarily enforcement. If the congressional intent is accomplished by permitting government action against acquisitions thirty years following consummation, then permitting comparable private actions advances the same purpose.

II. *Third Affirmative Defense: Estoppel*

Plaintiff has prayed that the court find GT&E's acquisition of (1) California Water & Telephone Company, The Southwestern States Telephone Company, and the West Coast Telephone Company in violation of *§§ 1* and *2* of the Sherman Act and *§ 7* of the Clayton Act, and (2) Hawaiian Telephone Company in violation of the above listed provisions of the federal law and *§§ 2*, *5* and *7* of Act 190 of Hawaii Laws of **[**15]** 1961. Defendant answers that plaintiff had advanced actual or constructive notice of all such acquisitions, did not oppose such acquisitions before the appropriate state regulatory agencies, and is accordingly estopped from challenging such mergers in this forum. Plaintiff counters with the contention that the equitable doctrine of estoppel is not available as a matter of law in defense of private antitrust actions. Defendant replies that Clayton 16 provides that private litigants shall be entitled to injunctive relief "under the same conditions and principles" as in "courts of equity", which incorporates the defense of estoppel into the antitrust laws. Plaintiff responds that Clayton 16 merely provides when injunctions shall issue, but does not affirmatively provide antitrust defendants with all possible equitable defenses. The court is unaware of any reported decision considering this question.

Plaintiff's motion to strike defendant's third affirmative defense is granted. Even accepting (without affirming) defendant's general position that the language of Clayton 16 incorporates all equitable defenses into the antitrust laws, nevertheless the specific **[*926]** equitable **[**16]** principle that estoppel is precluded as a bar to statutory rights, or rights advancing a strong public policy is overriding and controlling here. In *American Surety Co. of New York v. Gold, supra, at 528*, an action against an insurer to recover punitive damages levied against the insured in a personal injury case, the insurer acknowledged responsibility for the compensatory damages, but denied liability for the punitive award, asserting such recovery was contrary to the pertinent public policy. The Tenth Circuit stated the general rule:

> ***HN2***[] "'The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.'" *375 F.2d at 528*.

Defendant's third affirmative defense is gored by each horn of this principle. The challenged acquisitions are illegal only if forbidden by federal and state statute, and, as noted above, the public policy favors private enforcement of the antitrust laws. [11] On both grounds, therefore, this defense must fall.

[17]** The same result is reached under Hawaii law. In order to minimize judicial construction of the statutory language by reference to an existing body of case law, the Hawaii antitrust statute substantially, almost verbatim,

[11] See *Perma Life Mufflers, supra.*

incorporated the federal statutes into the state act. [12] Accordingly, defendant's defense of estoppel to plaintiff's state law claim is similarly stricken down.

III. *Fourth Affirmative Defense: Unclean Hands*

Defendant asserts that plaintiff (a) manufactures and sells communication equipment to foreign telephone companies, including Puerto Rico and the Virgin Islands; (b) acquired much of its telecommunication manufacturing capacity through illegal mergers; (c) has attempted to acquire domestic telephone operating companies; and (d) has acquired numerous companies not engaged in the communications industry -- all of which constitutes unclean hands. Plaintiff insists such a defense is not available to antitrust defendants as a matter of law.

[18]** Although this defense is precluded in Clayton 4 damage actions, [13] whether or not it may be a defense in Clayton 16 proceedings is not yet definitely settled. [14] While it would appear to this court that the Supreme Court's discussion of *in pari delicto* in *Perma Life Mufflers*, as noted above, is equally applicable to the defense of unclean hands in a Clayton 16 action in the context in which that defense is here raised, it is not necessary for this court to reach that issue.

As appears from defendant's **[**19]** stated grounds for this defense, the alleged unconscionable acts on the part of the plaintiff do not arise out of anything involved in plaintiff's suit.

> ***HN3***[] "Courts of equity . . . apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks *in respect of the matter in litigation*. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect **[*927]** the equitable relations between the parties in respect of something brought before the court for adjudication." [15] **[**20]**

Moreover, where, as here, a suit in equity concerns the public interests as well as the private interests of the litigants, the court is permitted to use its broadest discretion in the application of the maxim, [16] and the determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

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[12] Laws of Hawaii, Chapter 205A, *§§ 1*, *2*.

[13] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*.

[14] *Singer v. A. Hollander & Son, 202 F.2d 55* (3 Cir. 1953); *Graham v. Triangle Publications, 233 F. Supp. 825 (E.D. Pa. 1964)*; and *Louisiana Petroleum Retail Dealers v. Texas Co., 148 F. Supp. 334 (W.D. La. 1956)*. Cases contra are: *Hawaiian Tuna Packers v. International L. & W. Union, 72 F. Supp. 562 (D. Haw. 1947)*; and *Magna Pictures Corp. v. Paramount Pictures Corp., 265 F. Supp. 144 (C.D. Cal. 1967)*.

[15] *Keystone Co. v. Excavator Co., 290 U.S. 240, 245, 78 L. Ed. 293, 54 S. Ct. 146 (1933)*.

[16] *Precision Co. v. Automotive Co., 324 U.S. 806, 815, 89 L. Ed. 1381, 65 S. Ct. 993 (1945)*. Cf. also *Graham v. Triangle Publications, supra* note 14, *233 F. Supp. at 832*, where Judge Higginbotham said:

> "Although the Third Circuit has in the past honored the defense in a private suit for injunction instituted under the antitrust laws (*Singer v. A. Hollander 202 F.2d 55, 59 (3rd Cir. 1953))*, it did not rely on the defense as the sole reason for dismissing the suit. If the unclean hands defense was the most persuasive argument for denying an injunction which should otherwise issue I would be inclined to hold under the facts and circumstances of this case that it would not be enough to thwart relief."

Plaintiff's claim is limited to GT&E's acquisitions. The facts pleaded by defendant's answer to support its defense of unclean hands do not relate "to misconduct in relation to the matter in litigation . . . ." [17] Therefore, even if the court felt that the plaintiff was guilty of misconduct, since that misconduct does not affect the equitable relations between the parties in respect **[**21]** to the issue posed for adjudication by the court, the defense of unclean hands has no application here. If plaintiff is also a violator of the antitrust laws, defendant's remedy lies in recourse to a separate proceeding (as is set forth in defendant's counterclaim).

The same result is reached with regard to defendant's fourth affirmative defense under the Hawaii ***antitrust law*** for the reasons stated in re defendant's Third Affirmative Defense.

Plaintiff's Motion To Strike The Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation is granted. Plaintiff will prepare the necessary Order.

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[17] *Hoehn v. Crews, 144 F.2d 665, 672* (10 Cir. 1944), cert. denied ***323 U.S. 773, 89 L. Ed. 618, 65 S. Ct. 132 (1944)***.

Interphoto Corp. v. Minolta Corp.

United States District Court for the Southern District of New York

January 30, 1969

No. 69 Civ. 130

Reporter

295 F. Supp. 711 *; 1969 U.S. Dist. LEXIS 13022 **; 1969 Trade Cas. (CCH) P72,694

Interphoto Corporation , Plaintiff v. Minolta Corporation, Defendant

Core Terms

distributors, products, dealers, terminate, customers, resale price, injunction, manufacturer, conspiracy, prices, Sherman Act, selling, adhere, preliminary injunction, irreparable, territorial, marketing, merits, alleged conspiracy, distributorship, restrictions, wholesale, allocate, military, wholesale distributor, unilateral, per se violation, anti trust law, photographic, price-fixing

LexisNexis® Headnotes

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Private Actions, Remedies**

Section 16 of the Clayton Act, 15 U.S.C.S. § 26 empowers a private person to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws and also authorizes the issuance of a preliminary injunction. The statute explicitly declares that injunction proceedings are governed by the same principles that are applied in courts of equity.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

An application for a preliminary injunction is addressed to the court's discretion.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Remedies, Injunctions**

In seeking a preliminary injunction under ***antitrust law***, if the plaintiff can show: (1) that the conduct to be enjoined is in furtherance of the alleged violations of the law; (2) that there is a substantial likelihood that the allegations of the complaint will be sustained at the trial on the merits; and (3) that irreparable and immediate harm to the plaintiff will result if the injunction pendente lite is denied, then an injunction should issue

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 > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Without inquiry into their purpose or effect, many agreements have been held to be illegal per se under the antitrust laws. Among these per se illegal practices are horizontal price-fixing; division of markets; customer allocation; and resale price maintenance. The presence of a contract, combination or conspiracy is essential to make out these per se violations of *§ 1* of the Sherman Act, and mere unilateral action is insufficient.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In determining whether a given scheme falls within the proscription of resale price maintenance under *§ 1* of the Sherman Act, considerable weight is placed on the extent to which a manufacturer's practices operate coercively on distributors who refuse to cooperate.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN6[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Horizontal arrangements among competitors to divide territories are unlawful per se.

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

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

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertically imposed territorial limitations, which are not an integral part of a price-fixing scheme, are not unlawful per se, but are subject to a rule of reason inquiry.

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

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Where vertical territorial restraints are ancillary to price-fixing, or where the price-fixing is an integral part of the distribution system, the price-fixing "infects" the distribution restrictions, and renders them per se unlawful.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN9[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Even absent any price-fixing scheme, where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results.

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 > Per Se Violations

HN10[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

An agreement to allocate customers among competitors is a per se violation of the Sherman Act.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN11[] **Injunctions, Preliminary & Temporary Injunctions**

Where interlocutory relief is sought, all that plaintiff must prove is that there is a reasonable probability that it will prevail on the merits and that the danger of irreparable damage is immediate. Plaintiff need not show to a certainty that it will prevail.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN12[] **Grounds for Injunctions, Balance of Hardships**

A preliminary injunction should issue in an antitrust action, where plaintiff sustains the burden of showing that the balance of hardships tips decidedly toward plaintiff, and has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN13[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Unilateral action, which in the absence of the alleged conspiracy would be lawful, is nonetheless regarded as transgressing the antitrust laws where it is the result of a conspiracy in restraint of trade and undertaken pursuant to conspiratorial aims. The test is whether the refusal to deal does further the conspiracy to maintain prices, allocate markets and divide customers, and in the application of the test, a party is held to have intended a natural consequence of its actions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

It is not open to doubt that, where a refusal to deal is in furtherance of an illegal conspiracy, the circumstance that the manufacturer or supplier has a contractual right to terminate the agreement is irrelevant. This rule applies to defendants who have a right to cancel under a contract; to defendants who are simply choosing not to renew contracts; and even where there is in fact no contract but merely a history of dealing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Where the court is satisfied that an illegal conspiracy exists and that the refusal to deal is in furtherance of this conspiracy, it will issue an injunction to preserve the relationship.

Judges: [1]** Herlands, District Judge.

Opinion by: HERLANDS

Opinion

[*714] HERLANDS, District Judge:

Plaintiff, Interphoto Corporation (hereinafter "Interphoto"), moving for a preliminary injunction under *15 U.S.C. § 26*, *§ 16* of the Clayton Act, seeks to restrain *pendente lite* defendant Minolta Corporation (hereinafter "Minolta"), its agents, servants, employees and those persons in active concert or participation **[*715]** with any of them (a) from refusing to sell Minolta photographic equipment to Interphoto, and (b) from terminating Interphoto's distributorship of Minolta's products. The gist of plaintiff's charge is that Minolta is terminating Interphoto's distributorship agreement in order to preserve and further a combination and conspiracy with other distributors under which Minolta allocated territories and customers and determined and maintained resale prices.

Plaintiff Interphoto, a Delaware corporation, is engaged primarily in the wholesale distribution of photographic equipment throughout the United States.

Defendant Minolta, a New York corporation, distributes and sells, in the United States, photographic equipment made in Japan under the Minolta name. Minolta has distributed **[**2]** and sold Minolta products both through its own sales organization and through independent wholesale distributors and retail dealers.

The complaint charges violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1964)*. For present purposes, only the alleged violation of *§ 1* need be considered. [1] The relief demanded in the complaint is that the Court declare that there has been a violation by Minolta of *§ 1* of the Sherman Act; that Minolta be enjoined from continuing such violation; and that Interphoto receive treble damages for injuries sustained by reason of such violation. Interphoto has demanded a trial by jury.

[3]** This opinion contains the findings of fact and conclusions of law which constitute the grounds of the Court's action in granting Interphoto's motion for an interlocutory injunction. *Fed. R. Civ. P. 52(a)*. The findings of fact are, for the most part, based upon statements in the affidavits and documents submitted by plaintiff and not denied by defendant.

Statement of Facts

Except as may be otherwise indicated, the facts stated in this opinion represent facts found by the Court.

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[1] In addition to charging the existence of a combination and conspiracy in restraint of trade, plaintiff alleges that defendant has unlawfully attempted to monopolize the sale and distribution of defendant's products throughout the United States and that defendant's refusal to continue to deal with plaintiff was in furtherance of that attempt. Such monopolistic behavior, if established, would constitute a violation of *Section 2* of the Sherman Act. Because the Court finds that there is clear and convincing proof of the existence of a combination to achieve resale price maintenance and other *per se* illegalities, it is unnecessary to resolve the complex questions presented by the alleged violation of *Section 2*.

Raygram-Hornstein, Inc. (hereinafter "Raygram"), is a division of Interphoto, having been acquired in July, 1967. It is engaged in the wholesale distribution in the United States of Japanese manufactured equipment, including cameras, lenses and related products. From about 1963 until July, 1967, Raygram was defendant Minolta's largest wholesale distributor.

In July, 1967, after Interphoto's acquisition of Raygram, Interphoto entered into a contract with Minolta for the nonexclusive distribution of Minolta products. The agreement had no express termination date; it provided that either company had the right to cancel without cause on thirty days' notice. In a letter accompanying the contract, **[**4]** Mr. Nakamura, Minolta's president, stated that it was his intention to terminate the contract on January 31, 1968.

On December 21, 1967, however, the parties entered into a new agreement which was also terminable by either party without cause on thirty days' notice; but it did have an express termination date of January 31, 1969.

In the sales agreement of December 21, 1967, Minolta enumerated thirteen states in which Interphoto was prohibited from selling Minolta products. This area included states where Minolta acted as its own distributor and sold its products directly to dealers.

Minolta apparently has entered into similar agreements with other distributors, prohibiting them from selling Minolta **[*716]** products in certain geographic areas. (Zimet moving Affidavit, Exh. E.)

Minolta has prepared and circulated price lists for Minolta products, suggesting the prices at which its products should be sold by the distributors to the dealers and also at which they should be resold by the dealers. (Nakamura opposing Affidavit, para. 3.)

Minolta has, "from time to time, when the orderly marketing of Minolta goods has been seriously threatened, made objection to wholesale distributors **[**5]** and retail dealers who have not honored territorial areas or adhered to suggested prices . . . ." (Nakamura Affidavit, para. 3.)

On March 19, 1968, Minolta wrote to Mr. Zimet, Raygram's president, complaining of the following:

> "During the past few months, your marketing programs have deviated from our present sales agreement and have caused problems in our relationship with the regional distributors. Continuation of this type of marketing can only cause a deterioration in our business relationship, as in essence you have been fluctuating the costs of Minolta merchandise to the photographic dealers.
>
> * * *
>
> Your present marketing programs are indicating to dealers that they can bargain for better prices. This type of merchandising must be stopped as early as possible by all concerned in your company. Otherwise, you will leave me no other alternative but to take such drastic steps that I do not feel are necessary at this moment to end this type of reckless selling methods.
>
> In the future, it is important that my company be consulted at least thirty days prior to any program that you plan to set up that includes Minolta merchandise. Minolta must have the right to **[**6]** approve, or disapprove, any program which reflects a discount other than normally allowed dealers obtaining their Minolta requirements through all our distributors." (Zimet Affidavit, Exh. B.)

On March 27, 1968, Minolta forwarded a confidential bulletin to all distributors designated as "Minolta Dealer Price Schedule."

The substance of the bulletin follows:

> "In accordance with our sales agreement, the scheduled dealer prices must be adhered to by your respective companies.
>
> Therefore, so as to prevent any possible deterioration in the established dealer costs on all our products, all proposed programs must be submitted to this office for approval at least thirty days prior to your planned date of announcement. There must not be any program designed that will cause confusion to our dealers in their respective costs for any of our Minolta products." (Zimet Affidavit, Exh. C.)

Interphoto refused to agree to control the prices at which it or its dealers resold Minolta products. It also refused to abide by Minolta's 30-day approval program. (Carney opposing Affidavit, Exh. A). Nevertheless, Minolta continued to police the pricing activities of Interphoto and its **[**7]** dealers, requesting reports from Interphoto when dealers sold or advertised Minolta products at less than Minolta's list prices. (Zimet Affidavit, Exhs. X, Y and Z).

Similarly, Minolta attempted to enforce its territorial prohibitions upon Interphoto, which, if adhered to, would restrain plaintiff from selling Minolta products in the West in competition with Minolta. In fact, Interphoto distributes and sells a wide variety of other brands of photographic equipment in that region.

For example, Minolta received reports from its sales representatives concerning sales by Interphoto in the forbidden areas, and advised Interphoto to terminate such activity. (Zimet Affidavit, Exhs. E and F.)

[*717] A customer of Interphoto wrote Minolta concerning its difficulty in not being able to purchase Minolta products from Interphoto within the restricted area, and requested that it be allowed to do so. (Zimet Affidavit, para. 13 and Exh. D). In response to this letter, Minolta outlined the territorial restrictions which existed in all the contracts with all its distributors; and, noting its strict adherence to these restrictions, Minolta refused to permit Interphoto to sell Minolta products **[**8]** in that area. (Zimet Affidavit, para. 13 and Exh. D).

In addition, Minolta attempted to prohibit its distributors and dealers from competing for sales to United States Military Exchanges. It warned them not to sell to persons who might resell to such agencies. On September 5, 1968, Minolta wrote:

> "Under no circumstances is Raygram-Hornstein to solicit or accept orders from the military or sell to organizations who re-sell to the exchange system.
>
> We specifically wish to alert you about two organizations in the re-sale category:
>
> 1. Jack's Military Sales
> 2. Lester Greenfield Associates
>
> Your cooperation is of utmost importance and any exception to our policy could endanger our national military sales program. We would appreciate your passing the above information to all parties concerned." (Zimet Affidavit, Exh. G).

On December 26, 1968, Minolta notified Interphoto that, effective January 30, 1969, it was cancelling the distributorship contract.

Plaintiff thereupon commenced this lawsuit and moved for a temporary injunction.

Discussion

HN1[] *Section 16* of the Clayton Act, *15 U.S.C. § 26* relevantly empowers a private person "to sue for and have injunctive **[**9]** relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ." This section also authorizes the issuance of a preliminary injunction. The statute explicitly declares that injunction proceedings are governed by the same principles that are applied in courts of equity.

HN2[] An application for a preliminary injunction is addressed to the Court's discretion. See, e.g., *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 869-70 (2d Cir. 1964)*; *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., 235 F. Supp. 743, 746 (E.D. Pa. 1964)*. ***HN3***[] If the plaintiff can show: (1) that the conduct to be enjoined is in furtherance of the alleged violations of the Sherman Act; (2) that there is a substantial likelihood that the allegations of the complaint will be sustained at the trial on the merits; and (3) that irreparable and immediate harm to the plaintiff will result if the injunction *pendente lite* is denied, then an injunction should issue. See, e.g., *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., supra at 746*; *Kay Instrument Sales Co., Inc. v. Haldex Aktiebolag, 296 F. Supp. 578 (S.D.N.Y. 1968)*.

The Alleged Conspiracies

Interphoto **[**10]** contends that "defendant's own documents tell a squalid story of conspiratorial price-fixing of the resale prices of its distributors to whom it sells and with whom it competes ". Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, at 9. According to Interphoto, the undisputed documentary evidence discloses the unlawful imposition by defendant of territorial restrictions and customer allocations, -- all of which constitute *per se* violations of the antitrust laws. Plaintiff urges a finding that Minolta's decision to terminate plaintiff's distributorship contract, because plaintiff continuously refused to acquiesce in these unlawful arrangements, constitutes an illicit refusal to deal in furtherance of an illegal conspiracy.

HN4[] Without inquiry into their purpose or effect, many agreements have **[*718]** been held to be illegal *per se* under the antitrust laws. See, e.g., *United States v. Container Corporation of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526, 37 U.S.L.W. 4077 (1969)*. Among these *per se* illegal practices are horizontal price-fixing, see, e.g., *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129* ***[**11]*** *(1940)*; division of markets, see, e.g., *Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*; *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*; customer allocation, see, e.g., *United States v. Arnold, Schwinn & Co., supra at 375-6, 379*; and resale price maintenance, see, e.g., *Dr. Miles-Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*.

The presence of a contract, combination or conspiracy is essential to make out these *per se* violations of *§ 1* of the Sherman Act, and mere unilateral action is insufficient, see, e.g., *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 46-7, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *United States v. McKesson & Robbins, 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 (1955)*; *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*.

Price-Fixing [2]

[12]** Minolta has in no way attempted to controvert any of Interphoto's documentary proof of the existence of unlawful resale price maintenance. Moreover, Minolta admits that it has voiced objections when its dealers or wholesale distributors did not adhere to suggested prices but apparently believes that such objections were innocuous because necessary to preserve the "orderly marketing" of Minolta goods (Nakamura Affidavit, para. 3) and to prevent fluctuation in the costs of Minolta merchandise (Zimet Affidavit, Exh. B.)

Stabilization of prices has never been a permissible objective under the Sherman Act, and is merely a euphemism for manipulative price-fixing. See, e.g., *United States v. Container Corporation of America, supra, 393 U.S. at 337, 37 U.S.L.W. at 4078*; *United States v. Socony-Vacuum Oil Co., supra 310 U.S. at 223*.

In *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*, the Supreme Court laid down a rule which recognized the general right of a businessman to select his customers and refuse to deal. However, in successive decisions, the Court has considerably narrowed the right of a manufacturer to maintain resale prices by

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[2] Because Minolta competes with many of its distributors in the sale of photographic equipment, plaintiff claims that the conspiracy is not only vertical. See, e.g., *United States v. McKesson & Robbins, 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 (1955)*. The presence of vertical agreements would not be essential to the establishment of a horizontal combination to fix prices if substantial price uniformity were achieved at the distributor level. See *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. Plaintiff does not, however, stress the horizontal aspects of price-fixing by Minolta and its co-distributors. The greater part of the record consists of proof of vertical constraint and coercion to achieve resale price maintenance.

The Court notes, however, that proof of the existence of unlawful resale price maintenance, where the manufacturer is also a distributor -- as Minolta is -- makes the antitrust violation even more pernicious, see, *United States v. McKesson & Robbins, supra*, for unlawful cartel activity then co-exists with the attempt to vertically control the discretion of the independent businessman.

refusing to deal **[**13]** with price-cutters. The controlling authorities have distinguished between situations, on the one hand, in which the manufacturer simply announced a suggested resale price and refused to sell to distributors and dealers who charged less (this being lawful unilateral action), and, on the other hand, those situations in which the manufacturer took further steps to effectuate compliance **[*719]** with the suggestion about resale price. See, e.g., *Simpson v. Union Oil Co. of California, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *United States v. Parke, Davis & Co., supra*; *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922)*.

The Supreme Court has clearly manifested an increasing concern for the preservation of the unfettered discretion of the independent distributor. ***HN5***[] In determining whether a given scheme falls within the proscription of resale price maintenance under *§ 1* of the Sherman Act, the Court has placed considerable weight on the extent to which a manufacturer's practices operate coercively on distributors who refuse to cooperate. See generally, The Goals of Antitrust: A Dialogue on Policy; Toward a Three-Dimensional Antitrust Policy, **[**14]** H. M. Blake and W. K. Jones, 65 Colum. L. Rev. 422, 432-34 (1965).

Today, a manufacturer can avail himself of the *Colgate* doctrine only where he suggests a resale price and does not make any attempts to enforce his suggestion, and he then refuses to sell to dissident distributors. Anything beyond this act of "Doric simplicity" is more than a unilateral refusal to deal and constitutes a *per se* violation of the antitrust laws. *George W. Warner & Co., Inc. v. Black & Decker Manufacturing Co., Inc., 277 F.2d 787* (2 Cir. 1960). As the court in *United States v. Parke, Davis & Co., supra at 46-7*, said:

> "If a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence . . . and takes affirmative action to achieve uniform adherence by inducing each customer to to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product . . . . The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act."

Accord *Albrecht v. Herald Co., supra*; *United States v. General Motors* ***[**15]*** *Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*.

The facts of record before this Court -- disclosed by Minolta's own communications and in no way denied -- persuasively establish the existence of unlawful resale price maintenance. The blatant and crude techniques utilized by Minolta in its attempt to coerce Interphoto into adherence to the suggested price list do not bear reiteration; they are detailed above in the Court's statement of the facts.

The great weight of the credible evidence demonstrates the existence of an elaborate policing system whereby Minolta apparently was continuously apprised by its own sales representatives [3] of Interphoto's deviations from Minolta's policies and directives. In an effort to keep Interphoto in line, Minolta threatened Interphoto that its failure to cooperate in the future might call for drastic action.

[16]** *Territorial Restrictions*

In addition to the price-fixing conspiracy, Minolta has combined and conspired to divide and allocate geographic markets. This appears on the face of the sales agreement with Interphoto (Zimet Affidavit, Exh. A). Similar restrictions apparently exist between Minolta and its other distributors **[*720]** (Zimet Affidavit, Exh. E). The effect of such contracts is to eliminate competition among the distributors and with Minolta. See, e.g., *Addyston Pipe & Steel Co. v. United States, supra*; *United States v. Arnold, Schwinn & Co., supra 388 U.S. at 379* (holding that such

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[3] Mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting and selective discounting are not enough to imply a combination in violation of *§ 1*, for such complaints arise in the normal course of business. *Carbon Steel Products Corp. v. Alan Wood Steel Co., 289 F. Supp. 584 (S.D.N.Y. 1968)*.

Where, however, the manufacturer takes action and relays these complaints to the distributors with accompanying words of "advice", a combination to maintain resale prices can be implied. Minolta has gone even further by employing its sales representatives to police the market.

action constitutes a *per se* violation of the Sherman Act). [4] As pointed out in the Court's statement of facts, Minolta policed the market allocations and persistently advised Interphoto against unwanted incursions into restricted areas.

[17]** Again, Minolta does not deny any of these facts. It simply asserts that objection to the dishonoring of territorial areas was necessary for the orderly marketing of Minolta goods (Nakamura Affidavit, para. 3).

Customer Restrictions

HN10[] An agreement to allocate customers among competitors is a *per se* violation of the Sherman Act. See, e.g., *United States v. Arnold, Schwinn & Co., supra 388 U.S. at 379*; *United States v. Consolidated Laundries Corp., 291 F.2d 563, 574-75 (2d Cir. 1961)*. Minolta's letter of September 5, 1968 prohibited Interphoto from soliciting or accepting orders for United States Military Exchanges and discloses the existence of an understanding that Minolta alone was to have the right to sell to the exchange systems. (Zimet Affidavit, Exh. G). Minolta offers the following explanation:

> "Mr. Zimet's objections to Minolta's policy of selling Minolta products to the United States military exchange systems, shows a complete lack of awareness and understanding on Mr. Zimet's part as to what is required in that particular sphere of distribution. Suffice it to say that the sale of Minolta products to United States military exchange systems is **[*721]** **[**18]** a specialty and necessarily requires special handling arrangements by the manufacturer." (Nakamura Affidavit, para. 7).

This precise type of customer exclusion has been held unlawful, see, e.g., *United States v. Klearflax Linen Looms, 63 F. Supp. 32 (D. Minn. 1945)*. Minolta's explanation that it has expertise in this area (Carney Supplementary Affidavit, para. 2) does not legitimatize the elimination of competition that flows from the restriction.

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[4] The territorial restrictions can be viewed in several ways but the Court finds them unlawful under all applicable theories.

HN6[] Horizontal arrangements among competitors to divide territories are unlawful *per se*. See, e.g., *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*; *Addyston Pipe & Steel Co. v. United States, supra.* Since Minolta is not only a manufacturer but also a distributor of its own goods, its several contracts with co-distributors which restrict the area of distribution amount to a horizontal combination in restraint of trade.

In *White Motor Co. v. United States, 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*, the Supreme Court refused to apply the *per se* standard, on the record before it, ***HN7***[] to vertically imposed territorial limitations where they were not an integral part of a price-fixing scheme; and the Court proposed a rule of reason inquiry. The rationale is apparently that, where a manufacturer restricts the territory of his distributors, there may be some justifiable purpose other than that of stifling competition, and therefore a *per se* rule would be inappropriate. Accord, *Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964)* (applying the rule of reason to uphold a scheme of exclusive territories where the manufacturer was a failing company utilizing the scheme to insure its survival).

In *United States v. Arnold, Schwinn & Co., supra 388 U.S. at 374*, the court indicates, without elaboration, that *White Motor* survives and, therefore, some vertical territorial restraints may be "sheltered" by the rule of reason because they are not anticompetitive.

The Court, however, restates the established rule that, ***HN8***[] where vertical territorial restraints are ancillary to price-fixing, or where the price-fixing is an integral part of the distribution system, the price-fixing "infects" the distribution restrictions, and renders them *per se* unlawful. *388 U.S. at 375-76*. Minolta's activities fall within this established rule and are, therefore, *per se* unlawful even if the combination to divide territories is not viewed as being horizontal in nature.

Moreover, *Schwinn* ultimately holds, ***HN9***[] that even absent any price-fixing scheme, "where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results", *388 U.S. at 379*. Whether *White Motor* retains any vitality after this holding, despite the majority's insistence that it does, remains to be seen (see opinion of Stewart, J., concurring in part and dissenting in part, *388 U.S. at 388-89*). In any event, Minolta's distribution agreement falls squarely within the proscription of *Schwinn*.

The Court concludes that Interphoto has established by clear and convincing proof that Minolta illegally conspired and combined to fix resale prices and to allocate markets and customers.

The Termination

However, in order for Minolta's termination of Interphoto's distributorship to be unlawful there must be some causal connection between the alleged conspiracy and the refusal to deal. See, e.g., *McKesson & Robbins, Inc. v. Charles Pfizer & Co., supra 235 F. Supp. at 749*; *Deltown Foods, Inc. v. Tropicana Products, Inc., 219 F. Supp. 887 (S.D.N.Y. 1963)*; cf. *SCM Corporation v. Radio Corporation of America, 407 F.2d 166* (2d Cir. Jan. 9, 1969).

Minolta asserts that its termination of the distributorship is totally unrelated to **[**19]** the alleged antitrust violations and that, therefore, the requisite causation is absent. The reason offered for termination is that Minolta has unilaterally decided to effectuate a change in its methods of distributing and selling Minolta products and that it plans to distribute them directly to retail dealers throughout the United States "except for the Northeastern States and Hawaii", and, "[accordingly], Minola is terminating its wholesale distribution arrangements with its Mountain States and Southwest wholesale distributors and its Southeast wholesale distributors, as well as its wholesale distribution agreement with the plaintiff". (Nakamura Affidavit, para. 4).

Minolta avers that it has been contemplating the elimination of distributors for some time and that its final decision to change its methods was "dictated entirely by business considerations" (Nakamura Supplementary Affidavit, para. 3) namely, the success of its West Coast distribution, and the confidence that it could do the job well.

Upon an analysis of the record, the Court rejects Minolta's claim that the decision to terminate the distribution agreement was the result of such a business policy.

Minolta has **[**20]** submitted no affidavits indicating that it has notified other distributors of impending cancellations. No affidavits were procured from any distributors evidencing their awareness of Minolta's plans -- which defendant claims were well-known. Minolta offers the naked assertion of the existence of a plan. It fails to submit an iota of evidence of its existence or execution. [5]

Furthermore, Minolta specifically states **[**21]** that it does not plan to take over distribution in the Northeastern region. The only two distributors who operate in this area are plaintiff and Ace Photo Supply Corporation, located in Boston. (Zimet Affidavit, Exh. E). Minolta offers no explanation as to why, if the Northeastern region does not fall within its plans, it is terminating its contract with Interphoto. [6]

[22]** **[*722]** There is always the possibility that, at the trial on the merits, Minolta will be able to prove that its refusal to deal with Interphoto was the result of lawful business reasons and not an unlawful act in furtherance of the alleged conspiracy. [7]

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[5] Minolta claims that, in furtherance of the asserted plan, several officers of Minolta made contact with its New York bank regarding the possibility of acquiring a substantial line of credit. (Nakamura Affidavit para. 3). No affidavits are submitted from any of the named bank officials with whom the plans were allegedly discussed.

Defendant does annex four exhibits purporting to represent Minolta's plans which were reviewed by the bank. (Nakamura Affidavit, Exhs. E, F, G and H). The exhibits are unaccompanied by any explanation of their content, the significance of which eludes the Court.

[6] Minolta claims that it has distrusted Interphoto since 1967, when apparently Interphoto sold a large block of Minolta products on the West Coast at a discount. Minolta urges that it should not be forced to deal with a distributor in whom it lacks confidence (Nakamura Affidavit, para. 5), and points to this distrust as a factor entering into its decision to terminate the distributorship.

The Court rejects this argument. The distrust is, in reality, nothing but the fear that Interphoto will not adhere to suggested resale prices. This is precisely the violation of the antitrust laws which Interphoto has established. Minolta cannot be heard to say that it distrusts Interphoto on this account. Moreover, Minolta cannot with good conscience claim a lack of confidence in Interphoto, which, by Minolta's own admission, has been a highly successful distributor. (Zimet Affidavit, Exh. N).

However, ***HN11***[] where interlocutory relief is sought, all that plaintiff must prove is that there is a reasonable probability **[**23]** that it will prevail on the merits and that the danger of irreparable damage is immediate. Plaintiff need not show to a certainty that it will prevail. See, e.g., *Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725* (3 Cir. 1962); *Kay Instrument Sales Co., Inc. v. Haldex Aktiebolag, 296 F. Supp. 578 (S.D.N.Y. 1968)*; *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., supra 235 F. Supp. at 747*. Interphoto has demonstrated that there is such a probability of success on the merits.

It has been frequently repeated in this Circuit that ***HN12***[] a preliminary injunction should issue in an antitrust action, where plaintiff sustains the burden of showing that "the balance of hardships tips decidedly toward plaintiff", and has "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation". *Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)*. Accord *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., supra 235 F. Supp. at 747*; *Kay Instrument Sales Co., Inc. v. Haldex Aktiebolag, supra*; *Bergen Drug Co. v. Parke, Davis & Co., supra.* Interphoto has raised such **[**24]** "serious" questions; and the balance of hardship does "tip decidedly toward plaintiff".

In face of the evidence offered by Interphoto, Minolta's assertion that there is no nexus between its refusal to deal and the alleged conspiracy is regarded by the Court as incredible.

The fact that Minolta's refusal to deal may indeed have been made unilaterally is, at this point, immaterial because " . . . ***HN13***[] unilateral action, which in the absence of the alleged conspiracy would be lawful, is nonetheless regarded as transgressing the antitrust laws where it is the result of a conspiracy in restraint of trade and undertaken pursuant to conspiratorial aims". *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., supra 235 F. Supp. at 749*. The test is whether the refusal to deal "does further" the conspiracy to maintain prices, allocate markets and divide customers, and in the application of the test, "[a] party is held to have intended a natural consequence of its actions". *Id. at 749*.

[*723] The termination of a relationship with a distributor or dealer who refuses to adhere to prices in the face of the manufacturer's affirmative efforts to secure compliance, is a traditional method **[**25]** of furthering a conspiracy. See, e.g., *United States v. Parke, Davis & Co., supra.* Cancellation of Interphoto's distributorship will manifestly advance Minolta's resale price maintenance scheme and fortify the territorial restrictions.

In addition to relying on the asserted absence of any nexus between the refusal to deal and the alleged conspiracies, Minolta claims its contractual right to terminate as a basis and justification for denying injunctive relief. This reliance on contract is misplaced. ***HN14***[] It is not open to doubt that, where a refusal to deal is in furtherance of an illegal conspiracy, the circumstance that the manufacturer or supplier has a contractual right to terminate the agreement is irrelevant. See, e.g., *Osborn v. Sinclair Refining Company, 324 F.2d 566, 575 n. 17* (4 Cir. 1963); *Albrecht v. Herald Co., supra*; *United States v. Arnold, Schwinn & Co., supra.* This rule applies to defendants who have a right to cancel under a contract, see, e.g., *Osborn v. Sinclair Refining Company, supra*; *McKesson and Robbins v. Charles Pfizer & Co., Inc., supra*; to defendants who are simply choosing not to renew contracts, see, e.g., *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. **[**26]** 2d 98, 84 S. Ct. 1051 (1964)*; and even where there is in fact no contract but merely a history of dealing, see, e.g., *Beverage Distributors, Inc. v. Olympia Brewing Co., 1968 Trade Cas. (CCH) P72,530* (N.D. Cal. Sept. 19, 1967), modified on other grounds, *395 F.2d 850, 1968 Trade Cas. (CCH) P72,531* (9 Cir. May 17, 1968); *Kay Instrument Sales Co., Inc. v. Haldex Aktiebolag, supra*; *Osborn v. Sinclair Refining Company, supra* at fn. 17. The Court may appropriately require that the defendant maintain plaintiff as a distributor pending the determination of a trial on the merits.

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[7] The Court recognizes that a manufacturer may exploit his monopoly by selling his product directly to the ultimate consumer if he chooses. Similarly, he may eliminate existing distributors, establish new ones, or vary his distribution program without violating the antitrust laws but only "so long as such power is not being exercised as part of or in aid of something else which is prohibited by the antitrust laws". *Industrial Building Materials, Inc. v. Interchemical Corp., 278 F. Supp. 938, 958-59, 964 (D.C. Cal. 1967)*. On the record before the Court, Minolta has not shown that its conduct falls within the permissible, lawful channels.

Defendant Minolta cites cases which it claims support *HN15*[] the rule that a court will not use a preliminary injunction to create a new contract between the parties but only to preserve the status quo. This is true as a general proposition. But where, as here, the court is satisfied that an illegal conspiracy exists and that the refusal to deal is in furtherance of this conspiracy, it will issue an injunction to preserve the relationship, i.e., the status quo. In the cases relied upon by defendant, the Court either was not satisfied that the alleged conspiracy existed, e.g., *Carbon Steel Products Corp. v. Alan Wood* ***[**27]*** *Steel Co., 289 F. Supp. 584 (S.D.N.Y. 1968)*; *Deltown Foods, Inc. v. Tropicana Products Inc., supra, 219 F. Supp. at 891-92*; *Franklin Sewing Machine Co., Inc. v. Necchi Sewing Machine Sales Corp., 1960 Trade Cas. (CCH) P69,768 (S.D.N.Y. 1960)*; *Liberty Broadcasting System v. Nat'l League Baseball Club of Boston, 1952 Trade Cas. (CCH) P67,278 (N.D. Ill. 1952)*, or was not convinced that irreparable and immediate injury would result from denial of the injunction, see, e.g., id. *Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941 (E.D. Pa. 1968)*.

Irreparable Injury

After careful analysis of the entire record considered as a whole, the Court is firmly convinced that Interphoto will suffer irreparable and immediate injury if the status quo is not maintained.

In *Bergen Drug Co. v. Parke, Davis & Co., supra*, and *McKesson and Robbins, Inc. v. Charles Pfizer & Co., Inc., supra*, the court pointed out that the evidence disclosed that drug retailers prefer to deal with full line, full service wholesalers, and that if a wholesaler is unable to fulfill all of their requirements, they are apt to take their business permanently to a wholesaler who can. Cf. *Madsen v. Chrysler Corporation,* ***[**28]*** *261 F. Supp. 488 (N.D. Ill. 1967)*. Interphoto has submitted convincing proof that its customers may take their business elsewhere if **[*724]** Minolta products are not available. [8] **[**29]** (Zimet Affidavit, Exh. AA; Behrendt Affidavit, Exhs. J and K). In such a situation, it would be impossible to estimate or compute Interphoto's damages for the loss of good will it will suffer as a result of being unable to provide its retail customers with Minolta's products. See, e.g., *Bergen Drug Co. v. Parke, Davis & Co., supra*; *McKesson and Robbins, Inc. v. Chalres Pfizer & Co., Inc., supra*; *Beverage Distributors, Inc. v. Olympia Brewing Co., supra.* The issuance of a preliminary injunction is, therefore, proper. [9]

[30]** Minolta has not shown that it will suffer irreparable injury if an injunction is issued pending a trial on the merits. It simply states that the orderly distribution of Minolta products would come to an end if an injunction were issued. The record does not support such a conclusion, for there is, on the contrary, ample proof that Minolta was extremely satisfied with Interphoto's successful distribution of Minolta's goods. Minolta does not even assert the possibility of financial damage resulting from the grant of an injunction, for it is non-existent.

The Court does not now adjudicate the ultimate questions, which will be decided at a plenary trial. Enough has been shown by Interphoto, however, to establish the probability of its success on the merits and irreparable and immediate injury to Interphoto with no consequent irreparable injury to Minolta if the preliminary injunction is granted, and thus to require the exercise of the Court's discretion to preserve the status quo.

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[8] Plaintiff states that Minolta accounts for 40% of plaintiff's sales of Japanese-made cameras and lenses. In addition, 40% of the orders received by plaintiff for such Japanese products apparently specify some Minolta brand product. (Behrendt Affidavit, para. 4). Defendant does not refute any of these contentions. If Interphoto cannot furnish Minolta products to its retail customers, immediate loss of customers may follow. Indeed, plaintiff has already received complaints about the possible absence of Minolta goods from its inventory, accompanied by threats to do business elsewhere.

[9] Much of Minolta's proof on the question of irreparable harm consists of its insistence that Interphoto knew that Minolta had plans to become its own distributor and was thereby forewarned of the eventual termination of the distributorship. Interphoto denies such knowledge; the affidavits on this particular point are conflicting. However, looking at the documentary proof, the Court finds that the communications from Minolta to Interphoto in no way reveal the existence of a relationship which is about to terminate. Minolta, in fact, admits that it did not make any final plans to terminate until December 1968. In any event, Minolta would not have to show that Interphoto knew of its plans to cancel the distributorship, if the cancellation were lawful and pursuant to the contract, for Interphoto could not then rely on the fact that it assumed the relationship between the parties would continue. But the cancellation by Minolta is not lawful, because it is in furtherance of a conspiracy. Minolta cannot claim that Interphoto has not suffered irreparable harm because the threat of cancellation was known to it.

Either party may, if so advised, apply for a preference for trial under Calendar Rule 10(e) of this Court.

It is hereby ordered that, pending final disposition of this action, defendant Minolta Corporation, **[**31]** its agents, servants, employees and those persons in active concert or participation with any of them are restrained and enjoined from refusing to sell to plaintiff as a Minolta distributor, upon customary and non-discriminatory terms and conditions of sale, and from imposing or attempting to impose any unlawful restraint or requirement upon plaintiff. Plaintiff shall file a bond in the amount of $25,000., upon which filing this order shall become effective.

So ordered.

Alberto-Culver Co. v. Andrea Dumon

United States District Court for the Northern District of Illinois, Eastern Division

January 31, 1969

Civil Action No. 68 C 544

Reporter

295 F. Supp. 1155 *; 1969 U.S. Dist. LEXIS 13284 **; 160 U.S.P.Q. (BNA) 822 ***; 1969 Trade Cas. (CCH) P72,793

Alberto-Culver Co., Plaintiff v. Andrea Dumon, Inc., Defendant

Core Terms

counterclaim, trademark, malicious, feminine, damages, hygiene, spray, infringement, deodorant, patent, motion to dismiss, anti-trust, label, Sherman Act, excluding, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

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

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

HN1[] **Remedies, Damages**

In a private antitrust action, the complaining party must allege specific damage to itself arising from the allegedly wrongful acts of the party being sued.

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

Torts > Business Torts > General Overview

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

HN2[] **Sherman Act, Remedies**

15 U.S.C.S. § 15, allowing private parties treble damages for injury accruing to their business from violation of the Sherman Anti-Trust Act, *15 U.S.C.S. § 1 et seq.*, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded.

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

HN3[] **Private Actions, Remedies**

The mere existence of an anti-trust violation is not sufficient ipso facto to support a private action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act.

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

HN4[] **Private Actions, Remedies**

In not specifying injury to defendant's business or property, an allegation appears insufficient to support a private anti-trust action.

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

HN5[] **Private Actions, Remedies**

The failure to specify in the complaint the impact of defendant's wrongs on plaintiff renders an antitrust allegation insufficient.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Summary Judgment > General Overview

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

HN6[] **Entitlement as Matter of Law, Appropriateness**

Fed. R. Civ. P. 12(b) provides that if matters outside the pleading are presented to the court in connection with a motion to dismiss for failure to state a claim upon which relief can be granted, the motion shall be treated as one for summary judgment.

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN7[] **Intentional Torts, Abuse of Process**

Abuse of process, sometimes called malicious abuse of process, is the misuse of legal process to accomplish some purpose outside the proper scope of the process itself. There are two essentials to an action for abuse of process: an ulterior purpose and an act in the use of legal process not proper in the regular prosecution of the proceedings.

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN8[] **Intentional Torts, Abuse of Process**

Regular and legitimate use of process, though with bad intentions, is not a malicious abuse of process. The mere institution of civil suits, though groundless and malicious, does not constitute a malicious abuse of process. That action lies for the improper use of process after it has been issued, but not for maliciously causing process to be issued. The most common form of such abuse is by working upon the fears of a person after having him arrested, for the purpose of extorting money, or other property, or of compelling him to sign some paper, to give up some claim, to pay a debt or control of the prosecution.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Torts > ... > Malicious Prosecution > Elements > Favorable Termination

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN9[] **Pleadings, Counterclaims**

In civil cases where actions for malicious prosecution do lie, one of the essentials which must be established is the legal termination of the prosecuted suit in the plaintiff's favor.

Judges: [1]** Marovitz, D.J.

Opinion by: MAROVITZ

Opinion

[*822] [*1156]** Memorandum Opinion

MAROVITZ, D.J.

This is an action for label copyright infringement, trademark infringement, unfair competition and dilution. The action arises out of defendant's use of a label for a deodorant spray for feminine hygiene allegedly copied from plaintiff's label for a similar product, and defendant's use of the letter trademark PS, alleged to be confusingly similar to plaintiff's trademark FDS.

Defendant's Answer basically denies the material allegations of the Complaint and pleads affirmative defenses.

[*823]** Defendant has also filed two Counterclaims. The first claims that plaintiff has violated Section 2 of the Sherman Act, and the second claims abuse of process in the institution of the present action. Defendant's Counterclaim for violation of the Sherman Act is based on the conclusion that plaintiff has monopolized or attempted to monopolize the manufacture and sale of deodorant spray for feminine hygiene by (1) obtaining United States Trademark Registration No. 831,204 for FDS for deodorant spray for feminine hygiene by misrepresentation in submitting to the Patent Office labels which had not been used in commerce; **[**2]** (2) threatening defendant with suit and instituting suit for trademark infringement, unfair competition and dilution caused by defendant's adoption of its trademark PS and trade dress for a deodorant spray for feminine hygiene for the purpose of intimidating defendant and excluding it from the market; (3) disparaging defendant's product; and (4) filing suit against the Emko Company, another competitor of plaintiff in the manufacture and sale of deodorant spray for feminine hygiene to prevent the sale of such a spray by Emko.

Defendant's Second Counterclaim, for abuse of process, is based on the allegation that plaintiff brought this suit without reasonable cause and for the purpose of "intimidating defendant and wrongfully excluding defendant from the manufacture and sale of deodorant spray for feminine hygiene . . . ."

[*1157] Plaintiff has moved to dismiss defendant's First Counterclaim for violation of the Sherman Act on the ground that defendant fails to state a claim upon which relief can be granted in that defendant has failed to allege damage to itself arising from plaintiff's alleged acts. Plaintiff is correct in saying that ***HN1***[] in a private antitrust action, the complaining **[**3]** party must allege specific damage to itself arising from the allegedly wrongful acts of the party being sued. The requirement has long been recognized in this Circuit.

> "*Section 15*, ***HN2***[] (*15 U.S.C. § 15*), allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. ***HN3***[] The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful **[**4]** act. "
>
> *Beegle v. Thomson, 138 F.2d 875, 881 (7th Cir. 1943)*.

The only allegation of damage set forth in defendant's First Counterclaim is in Paragraph 56:

> "By reason of the acts of plaintiff performed in furtherance of its monopolization and attempt to monopolize in violation of Section 2 of the Sherman Act within the four years immediately preceding the filing of this counterclaim, defendant has been injured in its business or property in an amount not determined. An amendment of this counterclaim will be offered at or before trial stating the damage that has accrued to defendant."

This is really a generalization, a conclusory statement. ***HN4***[] In not specifying injury to defendant's business or property, the allegation appears insufficient. In other cases, anti-trust claims or counterclaims have been dismissed for similar lack of specificity. See, e.g., *Merrimac Hat Corp. v. Crown Overall Mfg. Co., 91 F. Supp. 49, 52 (S.D.N.Y. 1950)*, aff'd *186 F.2d 505 (2d Cir. 1951)*; *Sheldon-Claire Co. v. Judson Roberts Co., 88 F. Supp. 120, 122 (S.D.N.Y. 1949)*.

Defendant attempts to avoid the impact of these last cases by stating that they are from other jurisdictions and have **[**5]** been "overruled" in this circuit by *Dairy Foods Inc. v. Dairy Maid Products Cooperative, 297 F.2d 805 (7th Cir. 1961)*. First, while we recognize that the various different circuits sometimes have developed different approaches to the similar problems, we do not think that situation, in itself, is a good thing or to be desired or encouraged. The federal law should be applied equally to all throughout the country. To that end, cases from other districts may prove useful as guiding precedents.

Second, we are not clear as to how *Dairy Foods* "overrules" the requirement for an allegation of specific **[***824]** damages. *Dairy Foods* began as a patent infringement action and defendant, in addition to contesting the validity and infringement of the patent, counterclaimed alleging patent misuse in violation of the Sherman Act. The District Court dismissed the counterclaim for failure to allege sufficient facts to show injury to business or property. The Court of Appeals reversed, holding that the defendant had adequately alleged an injury.

> **[*1158]** "The injury is the necessity that defendant make a choice among alternatives each of which has an adverse economic or financial impact **[**6]** on its instant milk business. It was allegedly compelled either to cease production with consequent loss of sales of the product, pay tribute with consequent increase in production cost, or incur the financial burden of expenses incident to the defense of litigation. Each of these alternatives had its particular adverse economic or financial effect on defendant's instant milk business. To place a person in such a situation is an injury to his business. True, it is the defendant's choice which determines the nature of the resulting damages but it is the necessity of having to choose from such alternatives that is the injury. The congressional enactments here involved were designed to afford a legal right to engage in business free from conspiratorial compulsion such as here alleged. A violation of that right is a legal injury to the business adversely affected. Section 4 of the Clayton Act by its reference to the person 'injured' recognizes that it is the 'injury' which gives rise to the consequent liability to respond in three-fold 'damages.'" *297 F.2d at 808*.

Neither this nor any other statement in *Dairy Foods* reduces or overrules the requirement to allege specific **[**7]** injury or damages. At the most, the *Dairy Foods* decision allows litigation expenses to be considered an element of the damages. It then merely holds that the allegations which were made were adequate. *Id.*

Defendant, then, argues that it, like the defendant in *Dairy Foods*, has been put to time and expense in defending a baseless suit. It argues that it has been improperly forced to choose between going out of the feminine deodorant spray business or surrendering valuable trademark rights. Yet, defendant's characterization of its plight is not an accurate one for the consequences of a label copyright or trademark infringement case are different than those of a patent infringement case. Where the defendant in *Dairy Foods* was in danger of being forced out of business, being deprived of a real opportunity to compete by virtue of accepting a restrictive patent license or defending the litigation, defendant in this case is not in such an onerous situation. Even if successful, plaintiff's suit could not exclude defendant from participating in the feminine hygiene market. Nor is plaintiff seeking to force defendant to subscribe to a licensing agreement.

Further, we **[**8]** note that the *Dairy Food* decision has been mentioned very rarely and then not uniformly or wholeheartedly received. *Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25, 35 (7th Cir. 1967)*; American Infra-*Red Radiant Co. v. Lambert Industries, Inc., 360 F.2d 977, 996-97 (8th Cir. 1966)*; *Laitram Corp. v. Deepsouth Packing Co., 279 F. Supp. 883, 891 (E.D.La. 1968)*; *Malta Manufacturing Co. v. Osten, 215 F. Supp. 114, 122-23 (E.D. Mich. 1963)*. No decision approving or following *Dairy Foods* is a trademark or copyright case. All are patent cases which, as we have pointed out, have the potentially unique consequence of excluding a party from a particular market.

Conversely, a District Court recently dismissed an action wherein plaintiff asked for damages for alleged anti-trust violations arising out of the use of his trademark on the ground that he failed to specify the extent of alleged injury. The Court's holding was a simple one.

> "The ***HN5***[] failure to specify in the complaint the impact of defendant's wrongs on plaintiff renders an antitrust allegation insufficient."
>
> *Sam S. Goldstein Industries, Inc. v. General Electric Co., 264 F. Supp. 403, 407 (S.D.N.Y. 1967)*.

[9]**

Even if we were to accept defendant's characterization of the alternatives available to it as an accurate one and even if we were to find that the *Dairy Foods* rationale applied to trademark and copyright situations, still we would have to dismiss the counterclaim. **[*1159]** The simple fact which distinguishes this case from *Dairy Foods* is the counterclaim in *Dairy Foods* specifically alleged the expenditure of time and money in defending the patent litigation while in the instant action no such allegation has been made. *Dairy Foods Inc. v. Dairy Maid Products Coop., 297 F.2d 805, 808 (7th Cir. Wis. 1961)*. All that has **[***825]** been alleged by defendant in paragraph 56 of the counterclaim is that it has been injured. That is simply not enough under *Dairy Foods* or any other standard.

Plaintiff is, of course, asking that the defendant stop using its present trademark and label. Defendant's interest here may be a valuable one. However, once again, defendant has not specifically alleged that it has a valuable right or, if it has, the extent of its value. At best, it has promised to amend its counterclaim to state damages allegedly accrued.

In sum, we do not believe that **[**10]** the *Dairy Foods* decision is applicable to this, a non-patent case, or that defendant has met the standards set forth in the *Dairy Foods* case, in any event. For that reason, defendant's first counterclaim should be dismissed for failure to specifically allege damages. Consequently, it is not necessary to discuss defendant's allegations of anti-trust violations.

Defendant has suggested that plaintiff's motion to dismiss must be treated as a motion for summary judgment. ***HN6***[] *Rule 12(b), Fed. R. Civ. P.*, provides that if matters outside the pleading are presented to the court in connection with a motion to dismiss for failure to state a claim upon which relief can be granted, the motion shall be treated as one for summary judgment. Plaintiff has submitted affidavits in this case. However, the evidence submitted by plaintiff is not related to the motion to dismiss which we have discussed. Rather, it is in support of plaintiff's alternative motion for summary judgment, which was submitted for consideration in the event that the motion to dismiss was denied. There is no authority for the position that *Rule 12(b)* precludes the effective use of alternative motions in these situations. **[**11]** Yet this would be the result of defendant's position for it would present movant with an option of filing an unsupported alternative summary judgment motion or foregoing an opportunity to present an alternative motion to dismiss.

Defendant's second counterclaim charges that plaintiff has abused the process of this court by employing process "for the purpose of excluding defendant from the manufacture or sale of deodorant spray for feminine hygiene." (Defendant's Second Counterclaim para. 66). Plaintiff has moved to dismiss this counterclaim on the ground that it fails to state a claim upon which relief can be granted.

Since jurisdiction is based on diversity and the alleged abuse took place in Illinois, we must look to Illinois law to determine what constitutes an abuse of process. *Erie Ry. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*.

> "Abuse ***HN7***[] of process, sometimes called malicious abuse of process, is the misuse of legal process to accomplish some purpose outside the proper scope of the process itself. There are two essentials to an action for abuse of process: an ulterior purpose and an act in the use of legal process not proper in the regular prosecution **[**12]** of the proceedings. *Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234, 119 NE 265*; *Bonney v. King, 201 Ill. 47, 66 NE 377*; *Ammons v. Jet Credit Sales, Inc., 34 Ill. App.2d 456, 181 N.E.2d 601*." *March v. Cacioppo, 37 Ill.App.2d 235, 243, 185 N.E.2d 397 (1962)*.

Accord, *Caspers v. Chicago Real Estate Board, 58 Ill.App.2d 113, 120, 206 N.E.2d 787 (1965)*.

Counterclaimant has repeatedly alleged an ulterior purpose on the part of Alberto-Culver "in filing and prosecuting this suit." (Defendant's Second **[*1160]** Counterclaim, para. 63). For instance, it alleges that plaintiff filed this suit without reasonable cause to believe there was any copyright infringement, but with the purpose and intent of intimidating and harassing defendant and excluding it from the feminine hygiene market. (*Id.* paras. 64, 65, 66, 68).

Yet, if defendant's counterclaim does charge an ulterior purpose, it fails to allege an improper act in the use of legal process. Defendant suggests that the institution of this suit is a sufficient act. (Defendant's Memorandum in Opposition to Plaintiff's Motion to Dismiss or For Summary Judgment, at 15). However, this is not enough.

> "Regular ***HN8***[] and legitimate **[**13]** use of process, though with bad intentions, is not a malicious abuse of process. The mere institution of civil suits, though groundless and malicious, does not constitute a malicious abuse of process. That action lies for the improper use of process after it has been issued, but not for maliciously causing process to be issued. The most common form of such abuse is by working upon the fears of a person after having him arrested, for the purpose of extorting money, or other property, or of compelling him to sign some paper, to give up some claim, to pay a debt or control of the prosecution. *Bonney v. King, 201 Ill. 47, 66 N.E. 377*; *Jeffery v. Robbins, 73 Ill.App. 353*; *Emery v. Ginnan, 24 Ill.App. 65*, supra."
>
> *Ruehl Bros. Brewing Co. v. Atlas Brewing Co., 187 Ill.App. 392, 397 (1914)*.

Accord, *Bonney v. King, 201 Ill. 47, 51, 66 N.E. 377 **[***826]** (1903)*; *John Allan Co. v. Brandow, 59 Ill.App.2d 328, 335, 207 N.E.2d 339 (1965)*. Defendant has not alleged any action which plaintiff has taken against defendant other than or since the institution of this suit. It has not alleged an arrest or a seizure of property. Cf. *John Allan Co. v. Brandow, 59 Ill.App.2d 328, 335, 207 N.E.2d 339 **[**14]** (1965)*. Consequently, it has alleged no improper act in the use of process.

Because defendant has alleged that plaintiff started this suit without probable cause, the second counterclaim could be considered an action for the malicious use of process or malicious prosecution. *Ammons v. Jet Credit Sales, Inc., 34 Ill.App.2d 456, 461-62, 181 N.E.2d 601 (1962)*. This action arises from an allegedly baseless demand or accusation. *Id.* However, "(in) ***HN9***[] civil cases where actions for malicious prosecution do lie, one of the essentials which must be established is the legal termination of the prosecuted suit in the plaintiff's favor. " *Id.* The suit brought by Alberto-Culver has not been terminated in its favor as yet, and, consequently, defendant's counterclaim, considered as an action for the malicious use of process, must fail.

Thus, viewed either as an action for abuse of process or malicious use of process, defendant's second counterclaim fails to state a cause of action against the plaintiff and must be dismissed.

End of Document

Hiram Walker, Inc. v. A & S Tropical, Inc.

United States Court of Appeals for the Fifth Circuit

January 31, 1969

No. 26012

Reporter
407 F.2d 4 *; 1969 U.S. App. LEXIS 9108 **; 1969 Trade Cas. (CCH) P72,698

HIRAM WALKER, INCORPORATED, and South Florida Liquor Distributors, Inc., Appellants, v. A & S TROPICAL, INC., Appellee

Subsequent History: **[**1]** Rehearing Denied March 4, 1969.

Disposition: Reversed

Core Terms

Robinson-Patman Act, seller, price discrimination, distributors, retail, interstate commerce, Beverage, commerce, sales, transactions, purchasers, summary judgment, liquor, buyer

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN1[] **Price Discrimination, Competitive Injuries**

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2[] **Robinson-Patman Act, Claims**

Under section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, the complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers. The prevailing view is that "Purchasers" within the meaning of section 2(a) does not necessarily mean purchasers buying direct from the seller charged with discrimination.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN3[] Robinson-Patman Act, Claims

The thrust of the so-called "indirect purchaser" doctrine is that a manufacturer, by utilizing the subterfuge of a "dummy" wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN4[] Robinson-Patman Act, Claims

In order to come within the provisions of the Robinson-Patman Act, the appellee must demonstrate that the discriminatory sales were "in commerce." *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN5[] Robinson-Patman Act, Claims

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, at least one of the two transactions which, when compared, generate a discrimination must cross a state line.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN6[] Price Discrimination, Buyer Liability

When the supplier himself does not engage in sales transactions across state lines, by deploying his franchised distributors or bona fide independent subsidiaries so that each satisfies only local market demands, Robinson-Patman liability may be minimized, for any price differentials made by an autonomous local subsidiary or distributor solely as between customers within the state would arise from a sale on the part of the intrastate distributor or subsidiary rather than of the supplier, beyond the commerce criteria of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*.

Judges: Tuttle and Ainsworth, Circuit Judges, and Mitchell, District Judge.

Opinion by: AINSWORTH

Opinion

[*6] AINSWORTH, Circuit Judge: Appellee, a retail liquor store doing business in Broward County, Florida, brought this action against Hiram Walker, Inc., South Florida Liquor Distributors, Inc., and the Florida Beverage Corporation for damages and injunctive relief, alleging that defendants engaged in granting quantity discounts in the sale of liquor products to appellee's retail competitors in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a)*: [1]

> "(a) ***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 either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * *, and where the effect **[**2]** 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: * * *." [2]

Both Hiram Walker and South Florida moved for summary judgment [3] on the ground that the allegedly discriminatory sales had not taken place in interstate commerce, and that, hence, those transactions were not within the scope of the Robinson-Patman Act. In addition, Hiram Walker contended that it should not be held liable as a seller under the Robinson-Patman Act because it had never sold any products directly to appellee. The District Judge denied the motions for summary judgment, but, finding that his order involved "controlling questions of law as to which there is substantial ground for difference of opinion," held "that an immediate appeal from this Order as authorized by *28 U.S.C. § 1292(b)* may materially advance the ultimate termination of this litigation. * * *" On March 23, 1968, a panel of this Court granted appellants' application for **[**3]** leave to appeal from the interlocutory order of the District Court. After full consideration of the undisputed facts and the applicable law, we conclude that the District Court erred in denying the appellants' motions for summary judgment.

Appellant Hiram **[**4]** Walker is a manufacturer of alcoholic beverages, [4] which it sells in interstate commerce to wholesale distributors throughout the United States, including South Florida and Florida Beverage Corporation in Florida. The latter distributors store the liquor in warehouses for varying periods of time, and resell it to retail stores in Florida, including appellee. Hiram Walker does not sell directly to retail stores, and it is undisputed that it does not fix the price or establish the terms and conditions of resale. Rather, Hiram Walker's activities are limited to **[*7]** promotional work by "missionary" men who provide retailers with advertising materials and generally act to

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[1] Ten of the original thirteen defendants were either not served with process, or were dismissed from the suit on various grounds. In addition, the original complaint alleged violation of the Sherman Act, but this count was dismissed without prejudice and is not before the Court on this appeal.

[2] The provisos in Section 2(a), relating, inter alia, to the defense of cost justification, are not necessary to our decision in this case.

[3] Florida Beverage did not file a motion for summary judgment and thus technically it is an appellee in this appeal. However, the issues raised by appellant South Florida apply with equal force to Florida Beverage; and in its brief, Florida Beverage expressly adopts the positions taken by Hiram Walker and South Florida.

[4] The term "manufacturer" is employed by us as a matter of convenience. We are admonished by the appellant Hiram Walker that it is in actuality "the exclusive sales agent of an affiliated corporation which manufactures the products sold by Hiram Walker." It is conceded, however, that this fact is without legal significance in the present context.

supplement a national advertising effort designed to promote Hiram Walker products. These "missionary" men are not salesmen, and do not take orders for liquor.

[5]** The basic purpose of Section 2(a) of the Robinson-Patman Act was to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. *F.T.C. v. Sun Oil Company, 371 U.S. 505, 519, 83 S. Ct. 358, 367, 9 L. Ed. 2d 466 (1963)*. [5] Thus, ***HN2***[] the complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers. *Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 45, 68 S. Ct. 822, 827-828, 92 L. Ed. 1196 (1948)*. See also *Chicago Sugar Co. v. American Sugar Refining Co., 7 Cir., 1949, 176 F.2d 1, 7*; *Jones v. Metzger Dairies, Inc., supra*, citing *Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947)*; *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D. Mass., 1955, 129 F. Supp. 736, 739*. The prevailing view is that "'Purchasers' within the meaning of Section 2(a) does not necessarily mean purchasers buying direct from the seller charged with discrimination." Austin, **[**6]** Price Discrimination and Related Problems under the Robinson-Patman Act, p. 37 (2d rev. ed. 1959). See also *Skinner v. United States Steel Corporation, 5 Cir., 1956, 233 F.2d 762*; *American News Company v. F.T.C., 2 Cir., 1962, 300 F.2d 104, 109*, and cases cited therein; *Tri-Valley Packing Association v. F.T.C., 9 Cir., 1964, 329 F.2d 694, 709*; *Purolator Products, Inc. v. F.T.C., 7 Cir., 1965, 352 F.2d 874, 883*; *Elizabeth Arden, Inc. v. Federal Trade Commission, 2 Cir., 1946, 156 F.2d 132*; Rowe, Price Discrimination Under the Robinson-Patman Act § 4.5, pp. 57-59 (1962); Stickells, Legal Control of Business Practice § 119 (1965). As the Seventh Circuit has stated:

> "If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. *If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination.* If the seller cannot in some manner control the sale between his immediate buyer and a **[**7]** *buyer once removed, then he has no power by his own action to prevent an injury to competition*." (Emphasis added.)

Purolator Products, Inc. v. F.T.C., 7 Cir., 1965, 352 F.2d 874, 883. See also *American News Company v. F.T.C., supra*, and cases cited therein; *Tri-Valley Packing Association v. F.T.C., supra*; *Skinner v. United States Steel Corporation, supra*; Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, p. 37 (2d rev. ed. 1959). Cf. *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D. Mass., 1955, 129 F. Supp. 736, 739*. ***HN3***[] The thrust of this so-called "indirect purchaser" doctrine is that a manufacturer, by utilizing the subterfuge of a "dummy" wholesaler or distributor, should not be able to evade the price discrimination provisions of the *Robinson-Patman Act.* ***[*8]*** *American News Company v. F.T.C., supra at 109-110*.

[8]** In the present case, however, the record fails to disclose that Hiram Walker ever sold products directly to the appellee, nor did it do so indirectly by controlling the price or terms of resale. In his deposition submitted on the motion for summary judgment, William G. Benjamin, Sr., president and sole stockholder of plaintiff, admitted that he did not know of a single instance in which Hiram Walker sold directly to any retailer. Furthermore, Binford H. Sykes, General Manager of South Florida, and Elliott Feinberg, President of Florida Beverage, stated in their depositions that prices were set entirely by their own companies and without consultation with Hiram Walker. There was no evidence to the contrary and the facts were undisputed. Under these circumstances, appellant Hiram Walker cannot be held liable as a seller within the meaning of the Robinson-Patman Act. *American News Company v. F.T.C., 2*

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[5] See also *Hartley & Parker, Inc. v. Florida Beverage Corporation, 5 Cir., 1962, 307 F.2d 916, 921*; *Jones v. Metzger Dairies, Inc., 5 Cir., 1964, 334 F.2d 919, 924*; *Purolator Products, Inc. v. F.T.C., 7 Cir., 1965, 352 F.2d 874, 883*; *American News Company v. F.T.C., 2 Cir., 1962, 300 F.2d 104, 109*; *Shreveport Macaroni Manufacturing Company v. F.T.C., 5 Cir., 1963, 321 F.2d 404, 408*. See generally Austin, Price Discrimination and Related Problems under the Robinson-Patman Act (2d rev. ed. 1959); Austern, Presumption and Percipience about Competitive Effect under Section 2 of the Clayton Act (1964); Kronstein, Miller and Dommer, Major American Antitrust Laws Ch. 6 (1965); Patman, Complete Guide to the Robinson-Patman Act (1963); Seidman, Price Discrimination Cases, in Hoffman and Winard (eds.), 2 Hoffman, ***Antitrust Law*** and Techniques, p. 409 (1963).

Cir., 1962, 300 F.2d 104, 110; Klein v. Lionel Corporation, 3 Cir., 1956, 237 F.2d 13, 14-16; Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D. Mass., 1955, 129 F. Supp. 736, 739; Purolator Products, Inc. v. F.T.C., 7 Cir., 1965, 352 F.2d 874, 883; **[**9]** Skinner v. United States Steel Corporation, 5 Cir., 1956, 233 F.2d 762, 764; Rowe, Price Discrimination Under the Robinson-Patman Act § 4.4, p. 56 (1962); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, p. 37 (2d rev. ed. 1959). Thus, considering the depositions and affidavits as a whole, there is "'no genuine issue as to any material fact,'" and Hiram Walker "'is entitled to a judgment as a matter of law.'" Keating v. Jones Development of Missouri, Inc., 5 Cir., 1968, 398 F.2d 1011, 1013, citing Fed.R.Civ.P. 56(c). See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); National Labor Relations Board v. Smith Industries, Inc., 5 Cir., 1968, 403 F.2d 889; Sheets v. Burman, 5 Cir., 1963, 322 F.2d 277. See generally 6 Moore, Federal Practice para. 56.16 (2d ed. 1965).

We next inquire whether the distributors South Florida and Florida Beverage, as the actual sellers, under the circumstances may be liable. However, ***HN4***[] in order to come **[**10]** within the provisions of the Robinson-Patman Act, the appellee must demonstrate that the discriminatory sales were "in commerce." 15 U.S.C. § 13(a). In this regard,

> "The cases recognize a distinction between the commerce which is covered by the Sherman Act and that covered by the Robinson-Patman Act. 'In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce.' * * * *Accordingly, cases involving liability under the Sherman Anti-Trust Act where it was sufficient to show that the sales affected interstate commerce are not applicable to our present case*." (Emphasis added.) [6]

Willard Dairy Corp. v. National Dairy Products Corp., 6 Cir., 1962, 309 F.2d 943, 946. See Burke v. Ford, 389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967) (per curiam); Foremost Dairies, Inc. v. F.T.C., 5 Cir., 1965, 348 F.2d 674, 676; Shreveport Macaroni Manufacturing Company v. F.T.C., 5 Cir., 1963, 321 F.2d 404, 408; **[**11]** Jones v. Metzger Dairies, Inc., 5 Cir., 1964, 334 F.2d 919, 922 n. 3 (dicta); Rowe, Price Discrimination Under the Robinson-Patman Act § 4.9, p. 78 (1962), citing H.R.Rep.No. 2951, 74th Cong., 2d Sess. 6 (1936); Patman, Complete Guide to the Robinson-Patman Act, pp. 46-47 (1963). Thus, ***HN5***[] the Robinson-Patman Act is applicable only where the **[*9]** allegedly discriminatory transactions took place in interstate commerce. [7] **[**12]** That is, "* * * at least one of the two transactions which, when compared, generate a discrimination must cross a state line." Rowe, supra at 79. [8]

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[6] Thus the District Court's reliance on United States v. South Florida Asphalt Company, 5 Cir., 1964, 329 F.2d 860, was misplaced.

[7] The fact that a firm manufactures products which are later sold to distributors in another state is not dispositive on the issue as to whether a subsequent sale to a retailer is in interstate commerce. Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D.Mass., 1955, 129 F. Supp. 736, 738; Food Basket, Inc. v. Albertson's, Inc., 10 Cir., 1967, 383 F.2d 785, 787, and cases cited therein.

[8] See also Borden Company v. F.T.C., 7 Cir., 1964, 339 F.2d 953, 955; ***Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp., 6 Cir., 1967, 370 F.2d 332*** (per curiam), affirming W.D.Mich., 1965, 243 F. Supp. 331; Jones v. Metzger Dairies, Inc., 5 Cir., 1964, 334 F.2d 919; Abramson v. Colonial Oil Company, 5 Cir., 1968, 390 F.2d 873, 874 (per curiam); Food Basket, Inc. v. Albertson's, Inc., 10 Cir., 1967, 383 F.2d 785, 787; Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 236-237, 71 S. Ct. 240, 243, 95 L. Ed. 239 (1951); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 7 Cir., 1961, 287 F.2d 265, 267; Baldwin Hills Bldg. Mat. Co. v. Fibreboard Paper Prod.Corp., C.D.Cal., 1968, 283 F. Supp. 202, 203; Industrial Building Materials, Inc. v. Interchemical Corp., C.D.Cal., 1967, 278 F. Supp. 938, 973; LaPointe v. Schweigert Meat Co., D.Minn., 1966, 282 F. Supp. 974, 976; Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D. Mass., 1955, 129 F. Supp. 736, 738. See generally Stickells, Legal Control of Business Practices § 117 (1965); Austin, Price Discrimination and Related

[13]** The undisputed facts demonstrate that South Florida and Florida Beverage sold only to retail customers within the State of Florida. Under these circumstances, there is no merit to the contention that those sales, including sales to the appellee, were made in interstate commerce.

> "When ***HN6***[] the supplier himself does not engage in sales transactions across state lines -- by deploying his franchised distributors or bona fide independent subsidiaries so that each satisfies only local market demands -- Robinson-Patman liability may be minimized. *For any price differentials made by an autonomous local subsidiary or distributor solely as between customers within the state would arise from a sale on the part of the intrastate distributor or subsidiary rather than of the supplier, beyond the commerce criteria of the* [Robinson-Patman] *Act*." (Emphasis added.)

Rowe, Price Discrimination Under the Robinson-Patman Act, p. 81 (1962). See also *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co., D. Mass., 1955, 129 F. Supp. 736, 739*. Cf. *Shreveport Macaroni Manufacturing Company v. F.T.C., 5 Cir., 1963, 321 F.2d 404, 408-409*. **[**14]** Thus, as a matter of law, the sales made by South Florida and Florida Beverage to the appellee and other retailers were not within the scope of the Robinson-Patman Act, and the District Court erred in denying summary judgment. *Fed.R.Civ.P. 56(c)*; *Baldwin Hills Bldg. Mat. Co. v. Fibreboard Paper Prod. Corp., C.D.Cal., 1968, 283 F. Supp. 202, 205*. See *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Keating v. Jones Development of Missouri, Inc., 5 Cir., 1968, 398 F.2d 1011, 1013*; *National Labor Relations Board v. Smith Industries, Inc., 5 Cir., 1968, 403 F.2d 889*.

Reversed.

Problems under the Robinson-Patman Act, pp. 14-18 (2d rev. ed. 1959); Note, Robinson-Patman Treatment of Interstate Firms Injured by Local Competitors, 67 Yale L.J. 1073, 1074-1075 (1958).

Arthur Murray, Inc. v. Reserve Plan, Inc.

United States Court of Appeals for the Eighth Circuit

February 5, 1969

Nos. 18,970 and 18,971

Reporter

406 F.2d 1138 *; 1969 U.S. App. LEXIS 9059 **; 1969 Trade Cas. (CCH) P72,700

Arthur Murray, Inc., v. Reserve Plan, Inc.; Educational Credit Bureau, Inc., and Tuition Plan, Inc., v. Reserve Plan, Inc.

Core Terms

damages, licensees, finance company, studios, handle, expenses, district court, discount, trial court, contracts, estimate, financing, records, Sherman Act, collection, installment, annual, arrive, calculated, computing, profits, decree, defendants', franchise, exhibits, salary, audit, financial institution, amount of damages, record evidence

LexisNexis® Headnotes

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

HN1[] **Monopolies & Monopolization, Conspiracy to Monopolize**

It is not necessary to find a specific intent to restrain trade or to constitute a monopoly in order to find ***antitrust law*** violations.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

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

HN2[] **US Department of Justice Actions, Criminal Actions**

Explicit agreement is not a necessary part of a Sherman Act, *15 U.S.C.S. § 1 et. seq.*, conspiracy -- certainly not where joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN3[] **Sherman Act, Claims**

A private treble damage complaint asserting a per se violation of the Sherman Act, *15 U.S.C.S. § 1 et. seq.*, need not allege or offer proof of public injury.

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

HN4[] **Private Actions, Remedies**

The right of recovery of a plaintiff in a treble damage antitrust case does not depend on proving an economic injury to the public.

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

Torts > Remedies > Damages > General Overview

HN5[] **Private Actions, Remedies**

Once the fact of damage has been established, courts are allowed considerable leeway in arriving at the amount of damages. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result is only approximate. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complaint that they cannot be measured with the same exactness and precision as would otherwise be possible.

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

HN6[] **Private Actions, Remedies**

A plaintiff is entitled to recover damages that accrue after the filing date, provided they are proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed, and provided that they are proved with reasonable certainty and are not merely speculative or remote.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN7[] **Jury Trials, Province of Court & Jury**

The trial court is the judge of the credibility of the witnesses.

Judges: [1]** Matthes, Mehaffy and Lay, Circuit Judges.

Opinion by: MEHAFFY

Opinion

[*1140] MEHAFFY, Circuit Judge.

This is a private antitrust suit brought under *§§ 1* and *2* of the Sherman Act seeking treble damages under § 4 of the Clayton Act. [1] The parties waived a jury trial and the case was tried to the District Court for the Western District of Missouri. Plaintiff-appellee, Reserve Plan, Inc., was awarded treble damages in the amount of $697,500.00, plus costs, and an attorneys' fee of $40,000.00. After submission here, Reserve Plan moved for an additional attorneys' fee of $21,300.00.

For clarity, Reserve Plan, Inc. will hereafter be referred to as plaintiff. Defendants Arthur Murray, Inc., Educational Credit Bureau, Inc. and Tuition Plan, Inc. will be referred to collectively as defendants and individually as AMI, ECB and TPI, respectively. Plaintiff and ECB and TPI are finance companies. AMI is engaged in franchising Arthur Murray Dance Studios throughout **[**2]** this country and abroad, and in 1955 and 1956 had franchise agreements with some 325 to 350 studios in the United States. These studios will be sometimes referred to herein as licensees. Under terms of the franchise agreements, the licensees pay royalties to AMI, which usually amount to approximately 10% of the gross receipts of each studio, for the use of the Arthur Murray name and method of teaching dancing.

On March 28, 1956, AMI issued a release to all of its studios restricting the financing of loans for dance lessons sold by its franchised studios to three finance companies -- the defendants TPI and ECB (of Kansas City) and a third company ECB of New York, which latter company was dissolved prior to this suit and the stock acquired by defendant ECB of Kansas City. [2] All three of the aforementioned finance companies were sponsored by AMI, which loaned the companies capital and whose officials assisted in the corporate organization. The stockholders of AMI and the three finance companies were composed of people from the same groups -- members of the Murray family, officers and employees **[*1141]** of the companies and their families, and Arthur Murray licensees. [3] Plaintiff **[**3]** was one of twenty-seven independent finance companies and banks doing business with the AMI licensees on the date of the March 28, 1956 release. By April of 1956, plaintiff had lost all of the Arthur Murray business with the exception of two accounts, one in Jackson, Mississippi and the other in Waco, Texas, which were later lost.

[4]** Broadly stated, the issues here are (1) the liability of the defendants and (2) the alleged excessiveness of the damages as computed by the district court.

We agree with the district court's conclusion as to defendants' liability and also agree with the method utilized by the district court in computing damages, but we think the district court erred in failing to include in plaintiff's expenses any part of the executive salary in its handling of the AMI business which we think should have been considered

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[1] *15 U.S.C.A. §§ 1*, *2* and *15*.

[2] The release sent out by AMI to its licensees on March 28, 1956 appears in Appendix Number 1.

[3] David Teichman, a brother of Arthur Murray, testified that in 1955 and 1956 approximately 55% of the stock of AMI was owned by AMI licensees, approximately 20% by members of the family of Arthur Murray and Kathryn Murray, his wife (although Arthur and Kathryn did not own any of the stock themselves), and that the remainder of the stock was owned by AMI and its employees. (At that time, Teichman was Vice-President, Treasurer and Business Manager of AMI.)

In 1956, Arthur Murray, Teichman and his wife, Robert Norman (Kathryn Murray's brother), and Rebecca Roman (Arthur and Kathryn Murray's daughter) together owned over 40% of the stock in ECB-KC and W.E. Gregory, Manager of ECB-KC, owned over 10%. (Teichman, Robert Norman and Kathryn Murray were members of the Board of Directors of ECB-KC in 1956 and Norman was its Vice-President.) Teichman and his wife owned 55% of the stock of ECB-NY and Kathryn Murray's brother had an additional 20%. Two brothers of Arthur Murray and the wife of one owned over 22% of the stock of TPI and Gregory and Charles E. Redhair, Manager of TPI, owned over 7% each. (Teichman managed ECB-NY and Teichman and Redhair were members of the Board of Directors of TPI.) *Reserve Plan, Inc. v. Arthur Murray, Inc., 38 F.R.D. 23, 29-30 (W.D. Mo. 1965)*.

and added to plaintiff's expenses in order to properly compute the amount of damages. We also note what appears on the surface, at least, to be a failure on the part of the district court, in computing the income which plaintiff lost from AMI accounts during the three-year, ten-month period for which it was awarded damages, to take into consideration the record evidence concerning the deferred discount income which plaintiff received from AMI accounts during this period. For these reasons, we vacate the judgment entered in the district court and remand the case for recomputation of the damages to be awarded.

This case, a complex one, has had a thorny history since its inception. **[**5]** It was nearly four years after the suit was filed before the case finally came to trial on January 7, 1964. Thereafter, in a memorandum opinion issued on July 21, 1965 in a case styled *Reserve Plan, Inc. v. Arthur Murray, Inc., 38 F.R.D. 23 (1965)*, Judge Oliver held that the defendants had violated the Sherman Act as charged and were liable to plaintiff for treble damages, but did not fix the amount of the damages. The court stated that in order to arrive at a reasonably accurate amount of damages, it would be necessary for the case to be referred to a master who was an accountant, with directions to receive particular accounting evidence and make an appropriate report which would enable the court to render a just verdict. Defendants petitioned this court for a writ of mandamus or prohibition to prohibit the district court from carrying out its order to appoint a special master to examine not only the evidence adduced by the parties at the trial but in addition to engage in a scrutiny of other indicated material consisting of "'all accounting records, income tax returns, balance sheets, contract documents, business and accounting correspondence and the like,' which **[**6]** could be reflective of the profits derived by defendants Educational Credit Bureau, Inc., and Tuition Plan, Inc., from the business which plaintiff had been deprived **[*1142]** of, involving some 45 accounts." *Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 30 (8th Cir. 1966)*. In the opinion of this court in *Arthur Murray, Inc. v. Oliver, supra*, we held that the district court had the authority under the Federal Rules of Civil Procedure to refer the case to a special master to make an accounting analysis, even though the trial had been concluded and the case submitted to the court for its determination, but that the court could not engage in a prospecting quest for other evidence to add to the record nor appoint a master to do so unless such evidence should appear to be important as a matter of preventing injustice and, also, reasonably available. We held that under the particular factual situation involved, the reference should not be permitted to stand except as to the auditing of the plaintiff's books and records. Therefore, the petition for the writ prohibiting reference to the master for auditing the books was denied, and as to the other aspects **[**7]** of the reference the district court's order was directed to be vacated.

On September 12, 1966, Judge Oliver issued his modified order of reference to a master wherein he referred to the master the plaintiff's audit records and income tax returns with directions that the master report as to whether from these records he could make a reasonably accurate calculation of the profits earned by plaintiff on its Arthur Murray studio business in the years prior to April 1, 1956. Thereafter, the master filed his report with the district court stating that it was impossible for him to calculate a reasonably accurate profit earned on the Arthur Murray business. This, however, can be readily understood in view of the fact that in the operation of plaintiff's business it did not segregate the expenses which it incurred in handling the Arthur Murray accounts from its expenses on other accounts, and there was no reason why it should do this in order to keep a proper set of books. This, however, precluded a certified public accountant from stating with precise definiteness the exact amount of profits which plaintiff realized from the Arthur Murray accounts.

Thereafter, Judge Oliver did the only **[**8]** thing left for him to do, that is, he waded through the various accounting records and exhibits in an effort to make a reasonable calculation himself. He was able to ascertain from them plaintiff's gross income from the Arthur Murray business for the year preceding April 1, 1956, and also the ratio of expenses to income in prior years. By applying this formula, which will be discussed in more detail hereafter, he arrived at a total damage of $232,500.00 and directed that a judgment be prepared trebling the damages, fixing a fee of $600.00 for the special master, and directing that counsel submit appropriate data in support of a reasonable attorneys' fee. Upon agreement of the parties, the court later fixed the attorneys' fee at $40,000.00, with the further agreement that if the judgment were reduced the fee would be reduced proportionately. The district court's memorandum opinion, with the supplemental findings of fact and conclusions of law, is reported as *Reserve Plan, Inc. v. Arthur Murray, Inc., 262 F. Supp. 565 (W.D. Mo. 1967)*.

Judge Oliver found from a study of the evidence and the reasonable inferences drawn therefrom that plaintiff's gross annual income **[**9]** received from Arthur Murray business for the calendar year immediately preceding April 1, 1956 was $120,000.00. Based on the plaintiff's audit reports, Judge Oliver determined that $60,000.00 annually was a reasonable estimate of the additional expense incurred in the handling of the AMI accounts. Thus, the court concluded that plaintiff's annual profit for the year on AMI accounts would be approximately $60,000.00 and used this figure as the estimated annual profit which plaintiff lost from AMI business from March 28, 1956, when the release was sent out, to February 9, 1960, when the suit was filed, which was for a period of three years and ten months, or a total of $230,000.00. The court further found that plaintiff was entitled to $2,500.00 for the **[*1143]** Arthur Murray coupon books which plaintiff had purchased but had not used, making plaintiff's damages $232,500.00, said damages to be trebled, which amounted to $697,500.00.

In his first opinion reported at *38 F.R.D. 23, 26-30*, Judge Oliver made forty-one findings of fact relating to the liability issue and concluded therefrom that AMI's letter of March 28, 1956 to its licensees requiring that they do business **[**10]** with one of the three named finance companies was in violation of *§ 1* of the Sherman Act by compelling contracts in restraint of commerce among the several states. He also concluded that ECB and TPI, whether having knowledge that the letter was being sent or not, accepted the benefits which resulted therefrom and joined and actively participated in carrying out the combination in restraint of commerce in violation of *§ 1*. Additionally, Judge Oliver found that the defendants combined with each other to monopolize part of the commerce among the several states in violation of *§ 2* of the Sherman Act.

Justification for the March 28, 1956 release was asserted by reason of habits of some of the studios in using different devices to report their gross receipts, thereby reducing royalty payments to AMI. It is singular to note that it was not even contended that plaintiff was guilty of any such practice and the trial court expressly rejected the interposed defense in its finding of fact numbered 41. In addition, AMI contended that certain of the finance companies were using objectionable collection tactics, such as bludgeoning collection letters, but again there is no contention that **[**11]** plaintiff or some of the other finance companies or banks were guilty of any such practice. [4]

Teichman, a brother of Arthur Murray and vice-president, treasurer and business manager of AMI, was in charge of the day-to-day business of AMI and he was responsible for sending out the release, as well as the sponsorship of financial help afforded ECB and TPI, on whose boards of directors he served.

In brief, the trial court's findings traced the relationship of plaintiff and its key employees, W.E. Gregory and Charles E. Redhair, to defendant AMI; their later association with ECB and TPI; the number of AMI studios plaintiff had as customers in 1946 when it was incorporated; its outstanding note balance; the growth of plaintiff's business; Teichman's organization **[**12]** of ECB of New York in 1948 to handle Arthur Murray studio notes and his employment of Gregory to manage it (he had previously left plaintiff's employ to manage an Arthur Murray studio in Kansas City); Gregory's organization of ECB of Kansas City six months later; the AMI-ECB loan agreement which provided, *inter alia*, that AMI would use its best efforts to assist ECB of New York to obtain as customers the various Arthur Murray studios to be operated in the future; the loans made by AMI to ECB; Gregory's introduction of Teichman to Redhair while the latter was still employed by plaintiff; AMI's decision to form yet another finance company; the making of arrangements with Redhair to handle said company; the AMI-TPI loan agreement; its omission of the provision contained in the AMI-ECB agreement that AMI would use its best efforts to obtain Arthur Murray studios as customers; the restrictions placed on TPI regarding purchases and loans it could make; the provision for AMI approval of compensation to be paid to officers, employees, attorneys and auditors; the initial AMI loan and its subsequent increase as needed; the testimony of former licensee customers of plaintiff that they would **[**13]** not have changed their business to the other companies except for the release of March 28, 1956; the relationship of the **[*1144]** Murray family to defendants ECB and TPI, their stock interests and directorships therein; and Teichman's testimony to the effect that as a result of the aforementioned release the three companies were expected to get all the business of the Arthur Murray studios except the business from the permanent franchisees.

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4 Mr. Teichman wrote Mr. C.C. Hart, plaintiff's president, on April 13, 1956 that it was certainly not AMI's intention when issuing the March 28th release to imply that plaintiff was not operating properly or that it had not cooperated with AMI in the past.

We have no difficulty in agreeing with the district court that, from the facts found, defendants' actions constituted a stifling of competition to the point of eliminating its competitors, that the collaboration of ECB and TPI was monopolistic in purpose, and that the direct and necessary effect of the combination or conspiracy was to restrain legitimate competition. Defendants cite *Crawford Transport Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964)*, asserting that it is on all fours with the instant case and that its rationale establishes immunity from the Sherman Act provisions. There are significant differences, however, in the factual situation in the *Crawford* case and in the case at bar. In *Crawford* the action **[**14]** was brought by the Transport Company against Chrysler for damages based on Chrysler's alleged violation of the Sherman Act through controlling the method of transportation of vehicles to dealers. Chrysler adopted a plan providing for reducing the number of carriers whose services would be retained from 80 to 16. The object of this plan was to obtain a more efficient and economical system of distribution of Chrysler products to its dealers. It was estimated that by this plan Chrysler would save several million dollars in shipping costs.

One significant difference in *Crawford* and the case before us is the fact that Chrysler had a meeting attended by all of its carriers at which it announced the basis upon which the carriers would be selected and gave each carrier a right to compete for the business. It permitted consolidations, etc. and no carrier was discriminated against. Beyond that, Chrysler had no financial interest in the carriers, no interlocking directorships, and all in all the facts in *Crawford* are a far cry from those here where AMI merely announced that after April 30, 1956 only the three AMI-sponsored companies would be approved for financing installment contracts **[**15]** for Arthur Murray dance instructions. The licensees were deprived of the right to either finance their own paper or select any other finance company, regardless of the satisfactory method of its operation.

On December 3, 1958, AMI sent to its licensees a copy of a consent decree entered into with the Government. [5] In the cover letter AMI stated that its sole concern was to make sure that Arthur Murray pupils were not harassed by strong-arm collection methods. In conclusion, the letter stated that any provision of any franchise or contract which would prevent the licensees from financing with other financial institutions approved by AMI was waived as per the decree, but that AMI reserved the right to disapprove of the use by a licensee of any financial institution on the sole ground that it engages in oppressive or deceptive practices which would be substantially injurious to AMI's good will and reputation.

[16]** It is quite clear from the record that by any reasonable criteria for the selection of finance companies, the plaintiff would be qualified to handle Arthur Murray accounts. The fact that from 45 to 48 AMI studios were using plaintiff at the time of the release indicates that a substantial number of licensees preferred to have plaintiff handle its financing.

While the three finance companies approved by AMI were not a part of AMI, there was such a mutuality of ownership as to make this case analogous to the line of cases concerning tying arrangements involving the products or services of the same company or a subsidiary thereof. In many respects, this case is **[*1145]** similar to *United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941)*, where General Motors attempted to tie to the sale of its motor vehicles the financing thereof to the purchaser through General Motors Acceptance Corporation, a wholly-owned subsidiary engaged in the business of automobile financing. The court there held that the General Motors arrangement was in violation of the Sherman Act and the evidence there, as here, shows that the course of conduct was not intended to discriminate **[**17]** against an inferior or unreliable finance service, but rather its entire force and effect was directed against any use of an independent finance company.

It is argued that ECB and TPI did not know of AMI's intention to create a monopoly. We do not see how ECB and TPI can legitimately claim total ignorance of the letter sent out by Teichman, which is the basis of this litigation, when Teichman was a member of the board of directors of each company. Even if the finance companies had no knowledge of a combination or conspiracy, they collaborated with AMI, participated in the combination, were

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5 This consent decree appears in Appendix Number 2-A and the letter sent out by AMI to its licensees in regard thereto appears in Appendix Number 2-B.

beneficiaries thereof, and, therefore, must share responsibility for the resulting damage. *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 212 (9th Cir. 1964)*.

The Supreme Court has long held that ***HN1***[] it is not necessary to find a specific intent to restrain trade or to constitute a monopoly in order to find ***antitrust law*** violations. *United States v. Griffith, 334 U.S. 100 at 105, 106, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. A more recent decision appropriate for mention **[**18]** here is *United States v. General Motors Corp., 384 U.S. 127, 142-143, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, where the Court, speaking through Mr. Justice Fortas, said:

> " . . . it has long been settled that ***HN2***[] explicit agreement is not a necessary part of a Sherman Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan."

Defendants also contend that the leniency with which they enforced the directive is evidence that there was no violation of the Sherman Act and they cite one or two instances where they gave licensees permission to use other finance companies. Such argument was rejected in *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.

Defendants contend further that there was no evidence of public injury and, therefore, the court erred in concluding that defendants' conduct violated the Sherman Act. ***HN3***[] A private **[**19]** treble damage complaint asserting a *per se* violation of the Sherman Act need not allege or offer proof of public injury. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. It is our opinion that the allegations in the instant case constitute a *per se* violation of the Act. See *Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879, 883-884 (1st Cir. 1960)*.

There is dictum in the Supreme Court's opinion in *In re McConnell, 370 U.S. 230, 231, 8 L. Ed. 2d 434, 82 S. Ct. 1288 (1962)*, as follows:

> " . . . we have held that ***HN4***[] the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public."

See also *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*.

We hold that there was no necessity in the instant case to prove public injury but that as was said in **[**20]** *United States v. General Motors Corp., supra, 121 F.2d 376 at 401*: "The best security to the public lies in the immediate removal of the finance restrictions."

Subsidiary arguments advanced by defendants include the assertion that the trial court made no findings of the **[*1146]** key elements of a *§ 2* offense such as relevant market power and intent. As to the market involved, Mr. Justice Jackson said in *International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*: " . . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market." To the same effect, see *United States v. Griffith, supra 334 U.S. at 107*.

We have carefully considered all of the other attacks defendants have made upon the judgment entered by the trial court and find them to be without merit. Defendants contend that there is a deficiency in the evidence and in the findings of the district court to support its conclusions. We do not agree, as in our view there is a proper evidentiary basis for the court's findings, and the findings in their totality are sufficiently comprehensive for the ultimate **[**21]** conclusions. See *Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962)*; *Carr v. Yokohama Specie Bank, Ltd., 200 F.2d 251, 255 (9th Cir. 1952)*.

Damages.

The most vexatious problem for the trial court was the computation of damages once liability had been found. The trial court anticipated this from the inception of the case and constantly exhorted plaintiff to adduce evidence in direct support of a consistent theory of damages. This was to no avail, the plaintiff huing to the broad generality that it was entitled to an amount due for "loss caused by defendants' illegal conduct, not only of future profits reasonably to be expected and reasonably estimated, but also capital investments." We assume that plaintiff, in using the expression "capital investments," referred to loss of the $2,500.00 in AMI coupon books, which will be more fully discussed later.Thus, the trial proceeded with a multitude of exhibits, some hurriedly prepared on the night before their introduction and later withdrawn, depositions, and live testimony, all of which constitute several volumes of record evidence. It was in this setting that the trial court **[**22]** referred the case to a master with the hopeful notion that a certified public accountant would be able to pinpoint with certainty the exact damages to which plaintiff was entitled. This court's ruling, however, confined the master to record evidence as the case was already under submission. The master reported to the court that he was unable to calculate a reasonably accurate profit earned on the Arthur Murray business. This, of course, he could not do because of the method utilized by plaintiff in its bookkeeping which did not segregate its expenses involving the Arthur Murray accounts from the expenses of the other individual accounts handled by plaintiff. It would have been expecting too much to arrive at a precise figure of damages based on the audit reports, etc. which in turn failed to segregate the expenses relating to the individual accounts.It is sometimes extremely difficult for an attorney and an accountant to achieve rapport, even as it is with an attorney and a civil engineer who will not give a definitive answer on most problems without resort to his slide rule. This is not to say, however, that reasonable damages based on record evidence are not to be awarded merely **[**23]** because they are incapable of mathematical certainties. For example, in a personal injury action, there is no possible way to compute to a mathematical certainty an amount of damages -- fair, reasonable, and supported by the evidence -- on such elements of recovery as conscious pain and suffering.

In *Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652, 660-661 (8th Cir. 1968)*, this court said:

> "It is settled law that ***HN5***[] once the fact of damage has been established courts are allowed considerable leeway in arriving at the amount of damages. This principle was firmly recognized in *Eastman Kodak Company of New York v. Southern Photo Materials Company, 273 U.S. 359, 47 S. Ct. 400,* ***[*1147]*** *71 L. Ed. 684 (1927)*, where the Supreme Court stated:
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> ""Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." * * * Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise **[**24]** damages suffered by the plaintiff, is not entitled to complaint that they cannot be measured with the same exactness and precision as would otherwise be possible.' *273 U.S. at 379, 47 S. Ct. at 405*."

At first blush, it would appear to any court that the award of damages in this case when equated with the income tax returns is inordinate, but we learn from other evidence which is without dispute that the Arthur Murray business was plaintiff's most profitable business; that plaintiff's bookkeeping method did not take into account payments on the installment notes until the notes were paid in full; and that plaintiff actually lost money on dentist accounts and others, all of which combined to make the income tax exhibits meaningless insofar as computing damages in this case is concerned. [6]

Cued by our opinion, the trial court adopted the approach approved by the Supreme **[**25]** Court in *Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927)*, and from all of the record evidence arrived at an amount which it concluded was fair and just. The Court said in *Eastman, supra*:

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[6] Also, plaintiff's books were kept on an accrual basis and the income for tax purposes was reported on a cash basis.

> "'The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business.'" *273 U.S. at 379*.

In our view, there is ample evidence to support the court's finding that the annual discount income attributable to Arthur Murray's accounts was approximately $120,000.00. This figure is slightly smaller than that of the master but, as stated in its opinion, the district court did not use the master's report in arriving at its figures but made its own computations from the various audit reports and all of the evidence in the case. [7]

[26]** We note, however, that the master appeared to have no difficulty in ascertaining to his satisfaction the approximate amount of the discount income attributable to Arthur Murray's accounts. The court primarily based its findings on defendants' Exhibit 106 which in turn was based on audit reports introduced by plaintiff. According to defendants' own exhibits, plaintiff's total discount income for the fiscal year ending July 31, 1955 was $230,617.90, and for the fiscal year ending July 31, 1956 was $253,804.43. There was evidence to the effect that about one-half of the accounts handled by plaintiff during this period were Arthur Murray accounts and if the discount income attributable to Arthur Murray is figured on a 50% basis, it would amount to $115,308.96 for the 1955 fiscal year and $126,902.21 for the 1956 fiscal year.

There is very little, if any, disagreement between the conclusion reached by defendants in preparing Exhibit 106 from the plaintiff's records and between the conclusions reached by Judge Oliver. In any event, a consideration of all the evidence leads us to the conclusion that Judge Oliver's finding that plaintiff's discount income from Arthur Murray accounts **[**27]** during the year preceding the issuance of the directive was approximately **[*1148]** $120,000.00 is amply supported by the evidence.

This $120,000.00 figure, however, was obtained from exhibits, all of which were based on an accounting procedure described as a "deferred discount method," whereby the installments collected by plaintiff on AMI contracts were not entered on plaintiff's books at the time of collection but entry thereof was deferred until all installments had been paid, at which time the total of the installments on each particular contract involved was entered on the books as "discount income." Therefore, despite plaintiff's loss of new AMI business commencing with the Arthur Murray release, it continued to collect installments on many of the contracts then in force with Arthur Murray students and to enter the discount income on its books when the installment contracts were fully paid, thereby showing a substantial income from AMI accounts during each of the years of the damage period. For example, plaintiff's Exhibit 67, which is a report to plaintiff by its accounting firm, Peat, Marwick, Mitchell & Co., reflects that the amount of discount income received by plaintiff **[**28]** on its Arthur Murray installment contracts for the fiscal year ending July 31, 1957 was $57,241.36. Thus, it would appear that since the $120,000.00 figure was obtained from audit reports based on the same deferred accounting method or procedure, the amount of deferred income entered on the books during the three-year, ten-month period for which damages were awarded probably should be deducted from the $120,000.00 estimate of gross annual income in order to arrive at a figure which would more realistically reflect the actual loss. If the district court should so find, then, of course, the annual expenses for handling the additional business would necessarily be reduced proportionately. It could well be that, in studying the district court's opinion and the multitude of exhibits, we may have misinterpreted the court's theory of damages and its method of computing them in its effort to arrive at a just verdict, and we point up this particular matter only with instructions to the district court that it consider the same in its recomputation of damages to be awarded.

Having determined that the gross annual income from the Arthur Murray business for the year immediately prior to April 1, 1956 was **[**29]** approximately $120,000.00, Judge Oliver then set out to determine how much additional in operating expenses it would cost plaintiff to handle that increase in business, by considering the ratio of expenses to income in prior years. Upon examination of the records, Judge Oliver found that the increase in the discount income received by plaintiff from all accounts between the years 1951-1952 and 1954-1955 was $106,132.94, and

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[7] The special master's calculation of the discount income attributable to Arthur Murray accounts for the fiscal year ending July 31, 1955 was $124,764.29 and for the year ending July 31, 1956 it was $120,303.30.

he used the increase in total expenses during this period as a yardstick in estimating the cost to plaintiff of handling $120,000.00 annual income from Arthur Murray accounts in addition to its non-Arthur Murray accounts, which comprised about one-half of its business in 1956. The records revealed that during this period, when the discount income increased approximately $106,000.00, the operating expenses increased approximately $58,000.00.

Plaintiff contended, however, that it would cost only $22,800.00 in additional expenses per year to handle the Arthur Murray accounts along with the rest of plaintiff's business. As Judge Oliver pointed out in his opinion, the estimate of $22,800.00 annual expenses is far too low a figure for handling $120,000.00 annual income, **[**30]** or even $106,000.00 income.

We have prepared a table from the figures set out in Judge Oliver's opinion showing how he made his calculations and this table appears as an appendix to this opinion. [8] Most of his figures were taken from defendants' Exhibit 106, which Arthur Murray or its counsel prepared **[*1149]** from the auditor's reports for the benefit of the court, showing a comparative statement of income and summary of note purchases by plaintiff from 1947 through 1963, and from plaintiff's Exhibit 58, which was the estimate prepared by plaintiff of the additional operating costs it would have to expend annually in order to handle the Arthur Murray accounts.

In making its computation of expenses, the district court made no allocation to expense for any part of Mr. C. C. Hart's executive salary. Mr. Hart and his wife owned all the stock in plaintiff corporation and Mr. Hart managed the business. [9] It is uncontradicted by the evidence in this case that this **[**31]** type business was a particularly high risk business and it is obvious from the evidence that it takes great expertise for a profitable operation. The lack of success of some of the licensees who engaged in their own financing operations attests to this. Mr. Hart had spent all his adult life in the finance business and was responsible for the success of the plaintiff company. When he incorporated the plaintiff company in 1946, all nine of its accounts were AMI studio accounts. This business was not profitable in the beginning but at the time of the release it was the most profitable part of plaintiff's business. By that time, plaintiff enjoyed the business of between 45 and 48 AMI studios, despite the fact that ECB-KC and ECB-NY had been in business since 1948. Additionally, Gregory, who was trained in the business by plaintiff, was the manager of ECB of Kansas City, and AMI thought enough of Redhair, who was then employed by plaintiff, to employ him away from plaintiff and install him as manager of TPI. Businesses such as this do not succeed except under the guidance and administration of someone knowledgeable in the field, and for these reasons we think a substantial part of **[**32]** Mr. Hart's salary, as, for example, perhaps in proportion to the ratio that AMI's business bears to plaintiff's total business, is properly chargeable as an expense item in computing plaintiff's net income from AMI business. In no sense, however, do we mean to imply by reference to an example that said proportion serve as a rigid guideline to be followed by the district court. The amount thereof is solely a matter for the court's discretion, and we are fully cognizant that the learned trial judge here, having lived with this case for years as he did, is necessarily in a much better position than this court to make a fair judgment on this item.

Defendants contend that the damage to plaintiff's business was not caused by the AMI release restricting the finance business to three companies as it was inevitable that it would have lost all of this business in any event by reason of the AMI-sponsored finance companies offering stock in their business to the licensees. We will not

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[8] The table appears in Appendix Number 3.

[9] Judge Oliver said:

> "It should be noted that this calculation does not take into account the fact that the pattern generally reflected by plaintiff's full business experience in regard to the amount of executive salary paid plaintiff's president was that, generally speaking, he drew a salary in excess of the $25,000 when the volume of annual discount income was greater than it was in the 1951-1952 period (the year 1953 was an exception; plaintiff's president elected to draw no salary in that year). Such was certainly true in fiscal year 1954 in which plaintiff's president was paid $40,402.58. We do not agree with the suggestion in some of the briefs, as distinguished from any evidence adduced by defendants, that a portion of plaintiff's president's executive salary should properly be allocated to the expense of handling the additional discount income. We find that plaintiff properly omitted that item from those listed in PX 58. " *Reserve Plan, Inc. v. Arthur Murray, Inc., 262 F. Supp. 565, 569 (W.D. Mo. 1967)*.

speculate on what might have occurred, but it is singular to note that despite the operations of ECB-KC and ECB-NY plaintiff was able to maintain a substantial volume of AMI studio business until the release of **[**33]** March 28, 1956. Furthermore, we are not concerned with what might possibly have occurred but what **[*1150]** did occur and the defendants did not opt to choose the suggested route, but rather adopted a course which we find to be violative of the antitrust laws and damaging to plaintiff's business.

[34]** The trial court held that the amount of damages should be calculated to February 9, 1960, the day suit was filed. Defendants, on the other hand, contend that the cut-off date should have been either November 21, 1958, the date the consent decree was entered, or January 31, 1959, the date when the defendant companies terminated all contracts with Arthur Murray licensees in accordance with the requirements of the consent decree. In *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661 (6th Cir. 1965)*, damages were allowed which accrued even after the filing date of the suit. In that case it was said that the rule is that the ***HN6***[] plaintiff should be entitled to recover damages that accrue after the filing date, provided they are proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed, and provided that they are proved with reasonable certainty and are not merely speculative or remote. See also *A.C. Becken Co. v. Gemex Corp., 314 F.2d 839, 840-843 (7th Cir. 1963)*, cert. denied, *375 U.S. 816, 84 S. Ct. 49, 11 L. Ed. 2d 51 (1963)*. **[**35]** We think the trial court was warranted in holding that damages should be recovered to the date suit was filed, since the evidence does not show that a substantial number of AMI studios had returned their business to plaintiff at that time.

We next come to the question of whether the entire Arthur Murray business was lost to plaintiff, and, if so, whether it was entirely attributable to the March 28 release or to other factors as well.

Judge Oliver found in his original opinion reported as *Reserve Plan, Inc. v. Arthur Murray, Inc., supra, 38 F.R.D. 23 (1965)*, that all of the contracts which plaintiff had with Arthur Murray studios were terminated in April, 1956, except two. In the light of this finding by the trial court, there is certainly an evidentiary basis to justify a conclusion that the loss of this business was attributable to the March 28 release.

Defendants also contend that the trial court committed clear error in finding that plaintiff was damaged in the amount of $2,500.00 for coupon books which plaintiff threw away in 1959. This finding was based on the testimony of Mr. C. C. Hart, President of plaintiff, who stated that he had thrown away blank **[**36]** Arthur Murray studio coupon books amounting to approximately 250 boxes of 100 each, which, at ten cents each, would have cost $2,500.00. He did not count them but merely estimated the number. Defendants contend that since these books were in blank they could have been used for any Arthur Murray school with which plaintiff might do business in the future, and, further that Mr. Hart's testimony is suspect because he failed to count the books although, at the time, he was preparing the antitrust action for damages.

There was no contradictory testimony on this question, however, and the court, on the basis of Mr. Hart's testimony, awarded the amount of his estimate in damages. ***HN7***[] The trial court is the judge of the credibility of the witnesses, and the holding on this point will be affirmed.

From what has been said above, it is our holding that a portion of the executive salary paid to Mr. Hart for his managerial services for plaintiff be allocated as operational expenses and added to the $60,000.00 expense figure which the district court calculated, said combined amount to be subtracted from **[**37]** the annual discount income attributable to the AMI business in arriving at the proper amount of net profits which plaintiff received from said business during the fiscal year ending April 1, 1956.

We direct the district court to reexamine the record evidence, including the exhibits, in order to ascertain whether **[*1151]** an adjustment should be made in the amount of income from AMI accounts which plaintiff actually lost, in view of the evidence concerning deferred discount income received by plaintiff from AMI accounts during the period of time for which plaintiff was awarded damages, i.e., from March 28, 1956 to February 9, 1960, and further direct the court to make the adjustments necessary, if any, in its recomputation of damages.

We vacate the judgment and direct the trial court, upon a recomputation of the damage figure in accordance with this opinion, to enter a new judgment which shall bear interest from the date of its entry. It is also directed that the $40,000.00 judgment for attorneys' fee in the trial court be reduced proportionately as per the parties' agreement.

The plaintiff's petition for the award of additional attorneys' fee for this appeal is denied, and, **[**38]** because this opinion affirms on the liability issue, the costs of this appeal shall be taxed one-half against plaintiff and one-half against defendants.

It is so ordered.

Appendix

Number 1

The release sent by AMI to its licensees on March 28, 1956 reads as follows:

"After a number of years of experience in auditing bank plan records of our Licensees, we have come to the conclusion that the only way we can properly audit such records without substantially increasing the audit department in our office and without going into extensive field audits of both Licensees' records and finance company or bank records, is to have bank plans handled by finance companies whose records are uniform with ours and are kept in accordance with our suggestions and requirements.

"Up to now, we have accepted information supplied to us in various forms by various banks and finance companies, including companies operated by our Licensees. However, we have found many of these reports to be incomplete and we have found some of them to be inaccurate, thereby creating a considerable amount of unnecessary correspondence and re-auditing.

"Your franchise agreement provides that all installment contracts **[**39]** will be handled by banks or financial institutions approved by us.

"We have, therefore, decided that after April 30, 1956, we will approve only Educational Credit Bureau of New York, Educational Credit Bureau of Kansas City and Tuition Plan, Inc., a new company now being formed to handle business solely for Arthur Murray studios.

"Licensees may place their bank plan business with any one of these companies which are all fully qualified to service Licensees' bank plan contracts. Accordingly, after the new company is in operation, we will not permit any of the Licensees to engage in finance company operations.

"March 28, 1956.

Arthur Murray, Inc."

Appendix

Number 2-B

The letter sent by AMI to its licensees notifying them of the consent decree and revoking its March 28, 1956 release reads as follows:

"In March of 1956, we sent a release to our licensees advising them that their **[*1156]** bank plan contracts should be handled by banks or finance companies approved by us.

"In the same release we stated that Educational Credit Bureau of Kansas City, Educational Credit Bureau of New York and Tuition Plan of Kansas City were the companies approved by us for the handling **[**40]** of bank plan contracts of our Licensees.

"With the growth of our licensing system over the past few years, it became increasingly difficult for us to keep track of collection methods used by numerous finance companies in every part of the United States. It was therefore thought both desirable and lawful that we should suggest that Licensees use only finance companies whose collection methods and general operational procedures were familiar to us.

"The primary purpose therefore, of the above mentioned release was to make sure that the companies which handled bank plan contracts did not use objectionable tactics in collecting payments due under pupils' contracts.

"However, the Government advised us a few months ago that it intended to institute an action against Educational Credit Bureau of Kansas City, Educational Credit Bureau of New York, Tuition Plan of Kansas City and us, under the Federal 'Anti-Trust' Laws. Rather than become involved in litigation with the Government, we voluntarily consented to the entry of a decree in the form enclosed, in the Federal Court.

"Our sole concern is to make sure that Arthur Murray pupils are not harassed by strong-arm collection methods **[**41]** and it is our understanding that the decree consented to by us gives the pupils this protection.

"Accordingly, any provision of any franchise, contract, agreement or understanding which prevents any of our Licensees from financing through any financial institution other than a financial institution named, designated or approved by us is hereby irrevocably waived, provided however, that in accordance with the procedures outlined in the enclosed decree, we reserve the right to disapprove of the use by a Licensee of any financial institution on the sole ground that it engages in oppressive or deceptive practices substantially injurious to our good will and reputation.

"Dec. 3, 1958.

Arthur Murray, Inc. "

[*1157] Appendix

Number 3

The following table was prepared from Judge Oliver's opinion showing the figures on which he based his calculations in estimating plaintiff's annual net profit for the year preceding April 1, 1956:

Item					
Discount					
Income			**Average for**		
Average	**1951**	**1952**	**1951 & 1952**	**1954**	**1955**
	$110,642.85	$120,810.85		$213,101.67	$230,617.92
			$115,726.85		
Expenses					
Salaries (other than executive)	$28,333.68	$32,257.91		$63,547.91	$75,318.42
Average			$30,295.79		
Postage	4,985.40	8,849.42		10,980.51	21,448.26
					8,955.00

Item Discount Income Average	1951	1952	Average for 1951 & 1952	1954	1955
					12,493.26
Average			6,917.41		
Stationery	12,819.55	10,429.59		13,573.90	17,221.79
Average			11,624.57		
Payroll Tax					
Additional					
Travel					
Miscellaneous					
Telephone					
Collection					
Entertainment					
Service and					
Maintenance					
Totals					

[42]**

Item Discount Income Average	Average for 1954 & 1955	Increase 1954-55 over 1951-52	Plaintiff's Estimate of Annual Expenses for Handling Arthur Murray Income (PX 58) [1]
	$221,859.79	$106,132.94	
Expenses			

[1] Reserve Plan estimated that it would take only $22,800.00 in extra operational expenses per year to handle $90,000.00 to $100,000.00 additional income per month.

Item Discount Income Average	Average for 1954 & 1955	Increase 1954-55 over 1951-52	Plaintiff's Estimate of Annual Expenses for Handling Arthur Murray Income (PX 58) [1]
Salaries (other than executive) Average	$69,433.16	$39,137.37	$ 9,900.00
Postage			
	(Not used)		
$ Average	11,736.88	4,819.47	5,000.00
Stationery Average	15,397.84	3,773.27	4,000.00
Payroll Tax		229.97	400.00
Additional			
Travel		2,846.45	1,000.00
Miscellaneous		2,096.92	1,000.00
Telephone		3,069.91	300.00
Collection		1,297.23	600.00
Entertainment		520.86	300.00
Service and Maintenance		.00	300.00
Totals		[2] $57,791.45	$22,800.00

Item

[2] This appears in Judge Oliver's opinion as $57,791.55, which is evidently a typographical error.

Expenses	Discount Income Average	Under estimate by Plaintiff	Overestimate by Plaintiff
Salaries (other than executive) Average		$29,237.37	
Postage Average			$180.53
Stationery Average			226.73
Payroll Tax			170.03
Additional Travel			1,846.45
Miscellaneous			1,096.92
Telephone			2,769.91
Collection			697.23
Entertainment			220.86
Service and Maintenance			300.00
Totals		$35,868.74	$877.29

[43]**

Stiftung v. Zeiss

United States District Court for the Southern District of New York

March 12, 1969

No. 62 Civ. 850

Reporter

298 F. Supp. 1309 *; 1969 U.S. Dist. LEXIS 10971 **; 161 U.S.P.Q. (BNA) 414 ***; 1969 Trade Cas. (CCH) P72,734

Carl Zeiss Stiftung, d/b/a Carl Zeiss and Zeiss Ikon A.G. v. V.E.B. Carl Zeiss, Jena, Steelmasters, Inc., Ercona Corp., Exakta Camera Co., Inc. and Camera Specialty Co., Inc. (Carl Zeiss, Inc., Additional Defendant on Counterclaims)

Core Terms

trademarks, antitrust, dealers, instruments, misuse, manufactured, anti trust law, merchandise, registrant, cameras, prices, sales, registration certificate, subsidiary, products, distributors, patent, marks, conclusive evidence, incontestable, infringement, collateral, employees, exclusive right to use, Lanham Act, ownership, antitrust violation, anti-competitive, plaintiffs', conditions

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

HN1[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

See the Lanham Act, *15 U.S.C.S. § 1115(b)(7)*.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

HN2[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

A court in the exercise of its equity powers may deny enforcement of a trademark on the part of one who has used that trademark in violation of the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > Judgments > Relief From Judgments > Independent Actions

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN3[] **Regulated Practices, Intellectual Property**

The forces favoring exercise of equity power in a trademark suit are much weaker than those calling for its exercise in patent litigation.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN4[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

To make out an antitrust misuse of trademark defense, it is not enough merely to prove that merchandise bearing a trademark, however valuable the trademark, has been used in furtherance of antitrust violations.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN5[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

An essential element of the antitrust misuse defense in a trademark case is proof that the mark itself has been the basic and fundamental vehicle required and used to accomplish the violation.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

HN6[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

The burden of establishing a direct antitrust misuse is a heavy one.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Commercial Use > Affixation Required

Trademark Law > Conveyances > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

HN7[] **Commercial Use, Affixation Required**

To establish a antitrust misuse defense, defendant must show that plaintiffs denied, or threatened to deny, a dealer the right to use its trademarks unless he consented to engage in the alleged antitrust activities.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Trademark Law > Subject Matter of Trademarks > Terms Requiring Secondary Meaning > Grades & Styles

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

HN8[] **Regulated Practices, Intellectual Property**

To establish an antitrust misuse defense, defendant must also show that the trademarks were used as an instrument of unlawful price discrimination, such as by charging a different price for branded and unbranded instruments of like grade and quality.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN9[] **Piercing the Corporate Veil, Alter Ego**

Although the existence of a parent-subsidiary relationship is entitled to considerable weight in determining whether the parent is legally responsible for antitrust misconduct of its subsidiary, the separate corporate entities will not be disregarded unless it appears that the subsidiary is independent of the parent in form only, with the result that the subsidiary is merely the alter ego of the parent.

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

HN10[] **Antitrust, Interlocking Directorates**

Defendants must establish by a fair preponderance of the evidence the degree of dominion and control required to disregard the separate corporate entities.

Judges: [1]** Mansfield, D.J.

Opinion by: MANSFIELD

Opinion

[*415]** **[*1310]** Decision with Respect to Antitrust Misuse Defense

MANSFIELD, D.J.:

On November 7, 1968, the Court filed its decision and findings of fact with respect to plaintiffs' claims against defendants in the above-entitled action, holding that the plaintiff Carl Zeiss Stiftung has the sole and exclusive right to the use of the Zeiss name and trademarks in dispute and that plaintiff Zeiss **[*1311]** Ikon A.G. has the sole and exclusive right to use the Zeiss Ikon name and mark *293 F. Supp. 892*. The Court further held that defendant V.E.B. Carl Zeiss, Jena, Steelmasters, Inc. and Ercona Corporation have, since at least 1953, infringed plaintiffs' trademarks, unfairly competed with plaintiffs through the use of various names and marks found to be similar to those owned by plaintiffs, and, in violation of § 43(a) of the Lanham Act, falsely described and designated the origin of goods imported by them into the United States. All defenses except the antitrust misuse defense asserted by defendants were dismissed, **[***416]** and subject to resolution of that defense, the Court held that plaintiffs were entitled to enforcement of their rights in the marks **[**2]** and tradenames against defendants.

Following a hearing on December 4, 1968, we ordered trial of the antitrust defense to be severed from trial of the antitrust counterclaim and damage issues, and on February 25, 26 and 27, 1969, the antitrust misuse defense was separately tried to the Court. After careful review and appraisal of the testimony and documentary evidence received by the Court, we conclude that the antitrust misuse defense must be dismissed.

As and for their "antitrust misuse" defense, defendants assert that plaintiffs and their American subsidiary corporations, Carl Zeiss, Inc. (Zeiss, N.Y.) and Zeiss Ikon Voigtlaender of America, Inc. (ZIV, Inc.) have used their Zeiss trademarks in various ways to violate the antitrust laws in the United States, including the following:

(1) Combining with American distributors and franchise dealers to maintain prices established by Zeiss, N.Y. and ZIV, Inc. for Zeiss goods;
(2) Restricting sale of Zeiss goods by certain dealers to limited territories;
(3) Restricting sales of Zeiss goods by dealers to certain customer classes;
(4) Tying in the sale of certain Zeiss goods to purchase of other Zeiss products;

(5) Unlawful price **[**3]** discrimination;
(6) Precluding distributors from selling competitive goods;
(7) Submission of artificial bids to governmental agencies; and
(8) Organizing ZIV, Inc. to eliminate competition in the sale of certain Zeiss Ikon products.

Defendants further allege that plaintiffs' antitrust misuse of the Zeiss trademarks precludes entry of judgment in this action in favor of plaintiffs.

At the outset it is important to define the material issues raised by the foregoing antitrust misuse defense, especially since plaintiffs, prior to trial of that defense, moved pursuant to *Rule 12(f), F.R.C.P.*, to dismiss the defense as a matter of law. Plaintiffs' argument in support of that motion goes essentially as follows: prior to the enactment of the Lanham Act in 1946, antitrust misuse did not bar enforcement of a valid trademark. The Lanham Act then provided that ownership of a federally registered trademark would become incontestable after five years of registration unless it was subject to certain defenses, including misuse of the trademark in violation of the antitrust laws, in which event such registration would not be deemed conclusive evidence of ownership. Therefore, argue **[**4]** the plaintiffs, the sole effect of the antitrust misuse defense is to defeat the incontestability that would otherwise attach to registration of the trademarks under the Lanham Act, and the defense cannot be used to preclude enforcement of the trademarks in the present case for the reason that plaintiffs have already independently established their ownership of the marks to the satisfaction of the Court.

Both the express language of § 33(b)(7) of the Lanham Act and its legislative history reveal strong support for plaintiffs' contention that the intent and effect of the Act is merely to make the **[*1312]** defense of antitrust misuse available to defeat the conclusive evidentiary force that would otherwise attach to a trademark certificate under the Act. The relevant portion of the section provides:

> ***HN1***[] "The certificate shall be conclusive evidence of the registrant's exclusive right to use . . . except when one of the following defenses or defects is established:
> * * *
>
> "(7) That the mark has been or is being used to violate the antitrust laws of the United States." (*15 U.S.C. § 1115(b)(7)*)

The principal author of the Act, Representative Lanham, in explaining the Senate-House **[**5]** Conference Report with respect to the Act, stated:

> "However, section 33(b) contains seven exceptions to the rule that the certificate of registration shall be conclusive evidence of the rights of the registrant even where the provisions of section 15 have been met. Some doubt has been expressed on the following points:
> "First. Do these seven exceptions, including the amending paragraph (7) with reference to the violation of the antitrust laws of the United States, lay down substantive rules of law or substantive defenses which go to the validity and enforceability of the mark, or do they relate only to the weight of evidence to be given to the certificate of registration?
> "Second. What is the meaning of the words 'used to violate the antitrust laws,' as found in paragraph (7) of paragraph (b) of section 33?
>
> "It is clear from the language of **[***417]** the act and from the congressional history of the act as it is found in the hearings and reports that the seven 'defenses or defects' listed under paragraph (b) of section 33 are *intended to relate to and to affect the weight of the evidence to be given to the certificate of registration where the owner claims the benefit of the incontestable* **[**6]** *rule* . . . but *these seven paragraphs are not intended to enlarge, restrict, amend, or modify the substantive law of trademarks either as set out in other sections of the act or as heretofore applied by the courts under prior laws. A trade-mark registrant who is shown to have used his mark to violate the antitrust laws is denied the benefit of the rule that his certificate of registration is conclusive evidence of his right of ownership and his right to the exclusive use of the mark*. Under these circumstances, his certificate of registration is only prima facie evidence of his right and he must be prepared to carry the additional burden of proof as is necessary under the laws and statutes as they existed prior to the passage of this act. One of the valuable new rights created by the act is the incontestable right after 5 years' use of the mark and the corollary thereto that the certificate of registration is conclusive evidence of ownership and the right to the exclusive use of the mark. *This new and valuable right is denied to any trademark registrant who is shown to have used his mark to violate the antitrust laws, but this provision does not and is not intended to deprive* **[**7]** *the registrant of any rights he would possess or enjoy if this act were not enacted into law. Stated in other terms, proof of violation of the antitrust laws of the United States by a registrant in the use of his mark does not under this act destroy the validity of or the right of the registrant to continue to use the mark*, but it places on him a burden of proof in the event of litigation which others do not have to carry, by diluting the weight the court is to give to his certificate of registration as evidence of ownership and the right to use the mark. *This is the intent and effect and the only intent and effect of the seven subparagraphs of paragraph (b) of section 33*." (92 Cong. Rec. 7524)

[*1313] The same views were expressed by the managers of the bill in presenting the Senate-House Conference Report with respect to the bill. Senator Hawkes, one of the three Senate conferees, and Representative Lanham, one of the three House conferees, both read the following statement drafted by the managers of the bill in the House:

> "Amendment No. 28: This amendment provides that the use of a registered mark in violation of the antitrust laws shall constitute a defense **[**8]** to a suit by the registrant. The House recedes with an amendment substituting the words 'to violate' for the words 'in violation of.' This amendment provides an additional defense to the conclusive evidence rule of a certificate of registration of a mark which has become incontestable under section 15. It does not and is not intended to enlarge, restrict, amend, or modify the substantive law of

> trademarks either as set out in other sections of this Act or as heretofore applied by the Courts. *The amendment does not and is not intended to affect the validity of the mark nor affect the right of the registrant to continue use or enforce his rights in the mark*. If it is established that a registrant has used or is using his registered mark, which has become incontestable, as the legal, causal, and efficient instrumentality to violate the antitrust laws of the United States, such registrant is denied the benefit of the rule that the certificate of registration is conclusive evidence of his exclusive right to use the mark. Under such circumstances, the certificate is only prima facie evidence of his exclusive right to use and he must be prepared to carry the additional burden of proof **[**9]** as though his mark had not become incontestable." (92 Cong. Rec. 7523)

The foregoing statements as to the scope and intent of the various defense provisions of the Lanham Act were affirmed by another conferee, Senator Pepper, upon submission of the Conference Report to the Senate, and the intent expressed by the authors has since been accepted by commentators. Note, The Besmirched Plaintiff and the Confused Public: Unclean Hands in Trademark Infringement, 65 Colum.L.Rev. 109, 114-115 (1965); Steed and Hunter, Trademarks Assignments and Restraints of Trade: The Maola Ice Cream Case, 45 T.M.R. 886 (1955); but see Handler, Trademarks and Antitrust Laws, 38 T.M.R. 387, 394-395 (1948).

It is true that Senator Hawkes when commenting upon the Conference Report with which he expressed agreement added the following qualification with respect to § 33(b)(7):

> **[***418]** "I should like to add that the exception is that when the trade-mark is used to violate the antitrust laws, then such violation of the laws can be used as a defense against one who sues for infringement.
> "I should like to read this statement:
>
> "This exception means, and should mean, that a trademark owner who sues another **[**10]** user for infringement must come into court with clean hands, and if he is using the mark to violate the ***antitrust law*** he is subject to be contested and to have his violation used as a defense." (92 Cong. Rec. 7636)

There are, furthermore, general statements by Senator O'Mahoney upon the floor of the Senate, 92 Cong.Rec. 7872, 7873, and by the Senate Committee on Patents, Sen. Rep. No. 1333, 79th Cong., 2d Sess., p. 2 to the effect that the use of a trademark to violate the antitrust laws is, by virtue of § 33(b)(7), a defense in an infringement suit. At best, however, these statements, while seemingly contrary to the more detailed written statements previously cited, are ambiguous as to the precise scope of the defense. In view of the plain language of the Act and the detailed and explicit statements of those primarily responsible for drafting it and managing its passage, we cannot accept the ambiguous **[*1314]** and general statements of Senator Hawkes, who expressly indicated his agreement with the more explicit statement of the House managers, Senator O'Mahoney and the Senate Committee on Patents as altering or enlarging in any way the intent and effect of the relevant **[**11]** provisions of the Act.

Insofar as defendants here rest their antitrust misuse defense upon § 33(b)(7) of the Lanham Act, therefore, the defense must be rejected. However, the limited purpose for which the defense may be invoked under § 33(b)(7) does not automatically call for dismissal of the defense in this case. Although the issue is not free from doubt, we believe that ***HN2***[] a court, in the exercise of its equity powers, may deny enforcement of a trademark on the part of one who has used that trademark in violation of the antitrust laws. We recognize that ***HN3***[] the forces favoring exercise of such power in a trademark suit are much weaker than those calling for its exercise in patent litigation, and that decisions upholding an antitrust misuse defense in the latter are not necessarily authoritative in the trademark field. See, for example, *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*. The distinction arises from the fact that a patent represents a grant of a limited monopoly that in most instances would, absent its legalization by Congress, constitute an unlawful restraint of trade. The limited monopoly is granted in exchange for disclosure **[**12]** of the patented invention to the public so that it may be utilized in free competition upon expiration of the patent. A valid trademark, on the other hand, merely enables the owner to bar others from use of the mark, as distinguished from competitive manufacture and sale of identical goods bearing another mark, or even no mark at all, since the purpose of trademark enforcement is to avoid public confusion that might result from imitation or similar unfair competitive practices rather than to authorize restraints upon trade.

Thus, although misuse of a patent almost inevitably is accompanied by unlawful restraints, the opportunity for effective antitrust misuse of a trademark, as distinguished from collateral anti-competitive activities on the part of the manufacturer or seller of the goods bearing the mark, is so limited that it poses a far less serious threat to the economic health of the nation. As a result, it has been recognized that a sharp distinction must be drawn between the antitrust misuse defense in patent infringement suits, on the one hand, and its use in trademark suits, on the other. See *Waco-Porter Corp. v. Tubular Structures Corp. of America, 222 F. Supp. 332 (S.D.* ***[**13]*** *Calif. 1963)*. Although we do not accept the view that the defense should be unavailable as a matter of law, see, e.g., *Folmer Graflex Corp. v. Graphic Photo Service, 41 F. Supp. 319, 320 (D. Mass. 1941)*, it is significant that in almost every reported instance where the antitrust misuse of a trademark has been raised as a defense, it has been rejected. In the great majority of such cases the evidence revealed the antitrust activities to be collateral and did not demonstrate that the trademark, as distinguished from collateral activities with respect to goods bearing the trademark, was itself being used as the prime and effective instrument to effectuate the antitrust activity. E.g., *O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 622-623 (6th Cir. 1917)*, cert. denied, *246 U.S. 664, 62 L. Ed. 928, 38 S. Ct. 334 (1918)*; *Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 697 (7th Cir. 1914)*; *Prest-O-Lite Co. v. Davis, 215 Fed. 349, 351 (6th Cir. 1914)*; *Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 726 (6th Cir. 1912)*, cert. denied, *229 U.S. 613, 33 S. Ct. 773, 57 L. Ed. 1352 (1913)*; *Coca-Cola Co. v. Deacon Brown* ***[***419]*** *Bottling Co., 200 Fed. 105 (N.D. Ala. 1912)*; *Weyman-Burton Co. v. Old Indian* ***[**14]*** *Snuff Mills, 197 Fed. 1015 (S.D.N.Y. 1912)*; *Independent Baking Powder Co. v. Boorman, 130 Fed. 726 (D.N.J. 1904)*.

> "The difficulty, however, is that defendant does not allege that the mark is being used in violation of the anti-trust **[*1315]** laws. Instead, it charges the plaintiff with a boycott, with conspiring to establish retail price control, and with various other matters, which taken together constitute a claim that the plaintiff is violating the anti-trust laws in certain respects, but not that it is using the trade-mark to do so. Such a defense is insufficient in a trade-mark infringement case. See *Vitagraph, Inc. v. Grobaski, D.C.W.D. Mich. 1931, 46 F.2d 813, 814*; cf. *15 U.S.C.A. § 1115*." (*Forstmann Woolen Co. v. Murray Sices Corp., 10 F.R.D. 367, 370 (S.D.N.Y. 1950))*

Since denial of a plaintiff's exclusive right to the use of his trademark is not essential to the restoration of competition, ***HN4***[↑] it is not enough merely to prove that merchandise bearing a trademark, however valuable the trademark, has been used in furtherance of antitrust violations. If this is all that were required, any antitrust violation in the distribution of such merchandise would result **[**15]** in a forfeiture of the trademark with a consequent unnecessary frustration of the policy underlying trademark enforcement. ***HN5***[↑] An essential element of the antitrust misuse defense in a trademark case is proof that the mark itself has been the basic and fundamental vehicle required and used to accomplish the violation. Although ***HN6***[↑] the burden of establishing such a direct misuse is a heavy one, it is not insuperable. For instance, in *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966)*, it was claimed that after a conspiracy between fraternities and others to monopolize the market in fraternity jewelry had failed, and the conspiracy could not be enforced against independent jewelry manufacturers and dealers, the fraternities began to register their insignia as trademarks for the very purpose of eliminating independent competition, and the court quite properly and understandably concluded that, if these allegations were proven, the trademarks were used as a causal instrumentality to violate the antitrust laws.

When the evidence in the present case is considered in the light of the foregoing principles, it reveals a complete failure to establish that plaintiffs **[**16]** used the Zeiss trademarks to violate the antitrust laws. The deficiency in proof lay in defendants' erroneous assumption that if they could show that the Zeiss trademarks were considered a valuable asset by dealers in Zeiss-manufactured products, and that merchandise bearing the Zeiss trademarks had been used in furtherance of collateral antitrust violations, the antitrust misuse defense would be established. As we have already noted, however, the law is to the contrary, and it requires more than proof of a collateral violation.

Unquestionably the Zeiss trademarks, when affixed to merchandise of the type manufactured by plaintiffs, have value because they identify the merchandise to dealers and retail customers as manufactured by Zeiss in West Germany according to its high quality standards, and we have already found that these various Zeiss trademarks have considerable value (page 3, decision filed Nov. 7, 1968). When defendants further offered to prove that the merchandise to which the marks were affixed was the subject of various collateral anti-competitive activities of the type alleged in the affirmative defense (all of which were vigorously denied by plaintiffs) and it appeared **[**17]** that proof with respect to such activities would be voluminous and necessitate a long trial, we, in the exercise of our discretion, directed defendants first to adduce the proof relied upon by them (1) to establish the alleged antitrust misuse of the Zeiss trademarks, as distinguished from collateral antitrust violations involving use of merchandise bearing the marks, and (2) to show that the plaintiffs should be held responsible for the alleged antitrust activities of Zeiss, N.Y. and ZIV, Inc. Defendants were not precluded, however, from offering any proof with respect to **[*1316]** alleged antitrust activities that appeared relevant to these two basic threshold issues.

The proof offered by defendants convinces us that dealers in Zeiss-manufactured merchandise have valued the opportunity to sell such merchandise not because of the trademarks but because of the reputation of the manufacturer. Viewing the evidence as a whole, including defendants' offers of proof, we do not find that the trademarks were a competent producing cause which made possible the alleged antitrust violations. There was no credible evidence, for instance, to the effect that if the Zeiss trademarks had been **[**18]** removed from the merchandise and some other identification affixed which would show its **[***420]** origin (such as a mark reading "Made by Zeiss, West Germany"), sales would decline or dealers and purchasers would refuse to buy the merchandise. Nor was there any ***HN7***[] proof that plaintiffs ever did deny, or threatened to deny, a dealer the right to use the Zeiss trademarks unless he consented to engage in the alleged antitrust activities, or any proof that defendants sought to tie in the use of the Zeiss trademarks with such activities. See, e.g., *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*. Nor was there any attempt to show that ***HN8***[] the trademarks were used as an instrument of unlawful price discrimination, such as by charging a different price for branded and unbranded instruments of like grade and quality, *Federal Trade Commission v. Borden Co., 383 U.S. 637, 16 L. Ed. 2d 153, 86 S. Ct. 1092 (1966)*. There was no proof that the trademarks, as distinguished from the merchandise manufactured by plaintiffs, were ever even the subject of discussion with dealers, customers or anyone else. For instance, plaintiffs never threatened to withhold the right to use **[**19]** the trademarks from a dealer or distributor unless he assisted in anti-competitive activities. In contrast to the complete absence of evidence that the trademarks were used as a causal instrumentality in the perpetration of any antitrust activities, there was proof that during some of the years when defendant Ercona was denied the use of the Zeiss trademarks (at the instance of the Office of Alien Property) in selling East German merchandise in the United States, its annual sales were higher than during earlier years when it used the Zeiss trademarks.

Some idea of the paucity and unconvincing nature of the proof offered by defendants is their heavy reliance on the testimony of Ben Rosenberg, an operator of a very small curiosity shop in Manhattan, who deals, among hundreds of other unrelated items, in used microscopes, cameras and telescopes. In response to a question from the Court, he testified that unless he could be assured of the Zeiss trademarks, he would not accept a Zeiss dealership. However, after observing his demeanor and giving careful consideration to his entire testimony, we believe that it is virtually worthless on the fundamental issue. He is essentially a dealer **[**20]** in used merchandise (all but 2% of his sales are used goods) and as such would, of course, be more interested in proof of identification of a used item as Zeiss-made than would be an authorized Zeiss dealer who is recognized by the public and has the right to advertise himself as such. Furthermore, his testimony is at best speculation, since he has never been a Zeiss dealer and hardly appears to enjoy any prospect of becoming one, since he is essentially engaged in an unrelated business, namely the sale of used art goods, bric-a-brac, paintings and the like (amounting to only $50,000 annually, of which only a small percentage consists of used equipment of the type manufactured by Zeiss).

Defendants' reliance on various documents containing the word "ZEISS" (such as dealership agreements alleged to contain anti-competitive terms) as evidence of antitrust misuse, is misplaced. The term "Zeiss" was used in such documents to identify the manufacturer of the merchandise, and not to denote the trademark.

[*1317] Defendants' antitrust misuse defense also suffers from another fatal defect: failure to connect plaintiffs sufficiently with the alleged antitrust activities to establish **[**21]** their legal responsibility for such activities. The activities relied on by defendants were entirely conducted by officers and employees of two New York corporations, Zeiss, N.Y. and ZIV, Inc., neither of which is a plaintiff. Zeiss, N.Y. is a wholly-owned subsidiary of plaintiff Carl Zeiss Stiftung, and ZIV, Inc. is indirectly a subsidiary, 80% of its stock being owned by Zeiss, N.Y., 10% by Zeiss Ikon, A.G., and 10% by Voigtlaender of Germany. ***HN9***[] Although the existence of a parent-subsidiary relationship is entitled to considerable weight in determining whether the parent is legally responsible for antitrust misconduct of its subsidiary, the separate corporate entities will not be disregarded unless it appears that the subsidiary is independent of the parent in form only, *National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965)*, vacated on other grounds, *384 U.S. 883, 86 S. Ct. 1913, 16 L. Ed. 2d 995 (1966)*, with the result that the subsidiary is "merely the alter ego of the parent," *Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 544 (S.D.N.Y. 1957)* (wholly owned distributing subsidiary held independent). For instance, in the *National Dairy Products* **[**22]** case the court found:

> "Chapman received National's approval before making capital investments; Chapman's *personnel policies* were established by National; Chapman's key employees had stock option plans to purchase National stock; Wise, a National official, had *power to override* Chapman's president . . .; Wise was kept *informed on all decisions* made by Chapman's president; Chapman's **[***421]** products were sold under the Sealtest trade name [National's trademark]; Wise spent many months in Kansas City (where Chapman Dairy was located); Chapman's production reports were submitted to National for approval and National's officials often conducted the monthly sales department meetings where prices, market conditions, costs and competitors' prices were discussed." (*350 F.2d at 326*)

In contrast to the control exercised by the parent over its subsidiary's activities in *National Dairy Products Corp.*, the proof here reveals that the operations and activities of Zeiss, N.Y. and ZIV, Inc. were conducted independently by them and not directed or controlled by plaintiffs. Although one of the five directors of Zeiss, N.Y. has been a member of the Board of Management of the Stiftung, **[**23]** and two others were formerly employed by it, Zeiss, N.Y. purchases instruments from plaintiffs for its own account at the same prices charged to distributors throughout the rest of the world, including those not affiliated with plaintiffs, and it resells the instruments to dealers and other purchasers in the United States in accordance with terms established by it, not the plaintiffs. Although most of its stock in trade consists of merchandise purchased from the Stiftung, it also sells merchandise manufactured by other firms bearing trademarks other than the Zeiss marks. Furthermore, certain instruments bearing the Zeiss trademarks are distributed in the United States by Keuffel & Esser, Inc. and Transcontinental Corp., in which neither Zeiss, N.Y. nor the Stiftung has any interest.

In the case of ZIV, Inc. none of its officers or directors are officers or directors of either of the plaintiffs, except that one member of its Board is an officer of plaintiff Zeiss Ikon. Like Zeiss, N.Y., ZIV, Inc. buys cameras and other photographic equipment from Voigtlaender of Germany for its own account and resells to dealers.

The independence of the operations of Zeiss, N.Y. and ZIV, Inc. is **[**24]** further evidenced by proof that their employees are hired and paid by them and not by plaintiffs. Zeiss, N.Y. and ZIV, Inc. also keep their own separate books and **[*1318]** records in New York, prepare their own financial statements and tax returns, pay their own operating expenses, have their own pension and health insurance plans, and their own bank accounts in New York. It is particularly significant that neither Zeiss, N.Y. nor ZIV, Inc. has consulted with either of the plaintiffs, Voigtlaender or with any other affiliate of plaintiffs, with respect to appointment or termination of dealers, establishment of prices to customers in the United States or determination of discounts or bids on public contracts in the United States. Although Zeiss, N.Y. and ZIV, Inc. from time to time make written and oral reports to the Stiftung and to suppliers in Germany with respect to the results of the company's operations in the United States and conditions in the United States market, including competitive and price conditions, there is no proof that the competitive practices, prices or other distribution activities of Zeiss, N.Y. or ZIV, Inc. were directed or controlled by either of the **[**25]** plaintiffs.

Viewing the circumstances in their entirety, including the parent-subsidiary relationship, the limited inter-locking directorates, and the periodic reports as to operations, we conclude that ***HN10***[] defendants have failed to establish by a fair preponderance of the evidence the degree of dominion and control required to disregard the separate corporate entities. See *Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957)*.

For the foregoing reasons it is unnecessary to determine whether the parties engaged in any of the alleged violations of the antitrust laws. The antitrust misuse defense is stricken and judgment may be entered in favor of plaintiffs in accordance with the Court's decision filed on November 7, 1968.

The foregoing shall, in accordance with *Rule 52(a), F.R.C.P.*, constitute the findings of fact and conclusions of law supplementing the separate findings of fact filed with respect to the antitrust misuse defense.

Settle order.

Findings of Fact with Respect to Antitrust Misuse Defense

1. The various "Zeiss" and "Zeiss Ikon" trademarks are world-renowned and valuable, and identify various scientific instruments and optical goods as manufactured **[**26]** by plaintiffs according to their traditional high quality standards.

2. Neither plaintiffs nor Carl Zeiss, Inc. (Zeiss, N.Y.) nor Zeiss Ikon Voigtlaender of America, Inc. (ZIV, Inc.) used or are using the "Zeiss" or "Zeiss Ikon" trademarks to violate the antitrust laws in the United States.

3. There is no evidence of any agreement or any communication or discussion between Zeiss, N.Y. or ZIV, Inc. and any of their respective dealers relating in any way to the use of any of the "Zeiss" or "Zeiss Ikon" trademarks. The evidence is that references in such communications and discussions to "Zeiss" instruments and "Zeiss Ikon" products were to products manufactured by plaintiffs and not to any of the "Zeiss" or "Zeiss Ikon" trademarks.

4. While the "Zeiss" and "Zeiss Ikon" trademarks are world-renowned and valuable trademarks, there is a failure to establish by a fair preponderance of the evidence that they were used by either of the plaintiffs, or by Zeiss, N.Y. or ZIV, Inc., as a means of coercing American dealers to engage in any anticompetitive activities.

5. Dealers have accepted dealerships from Zeiss, N.Y. and ZIV, Inc. because they wish to have the opportunity to sell products **[**27]** manufactured by plaintiffs.

6. The sales of defendant Ercona for the year 1956 were approximately $149,000; in 1955 Ercona was permitted to use the trademarks, and sales were approximately $108,000. After 1956 the figures were $89,000 in 1957; $79,000 in 1958; $135,000 in 1959; $143,000 in 1960; $129,000 in 1961. In the years prior to 1956 there were considerable fluctuations in the volume of sales by Ercona.

7. During the period from approximately 1956 to 1959 defendants sold goods in the United States manufactured by V.E.B. Carl Zeiss Jena from which the Zeiss trademarks had been obliterated and on which only the symbol "CZJ" appeared. Prior to 1956 and after 1959 instruments bearing the Zeiss trademarks were sold by Ercona in the United States. A comparison of Ercona's volume of sales of such instruments for the entire period fails to show any causal connection between the Zeiss trademarks and Ercona's sales volume. The annual sales volume fluctuated up and down from year to year, revealing that two of the years (1956, 1959) in which the marks were obliterated produced a greater annual volume than five of the years (1952-1955 and 1961) in which the marks were on the instruments.

[28]** 8. Neither Zeiss, N.Y. nor ZIV, Inc. has offered to sell unmarked instruments to dealers who refuse to enter into a dealership agreement, or offered to sell instruments bearing the Zeiss trademarks on one basis and untrademarked goods on another.

9.After appraising the testimony of two dealers (Rosenberg and Watson) with respect to the significance of Zeiss trademarks in the sale of Zeiss-manufactured instruments, and appraising their demeanor, the Court finds itself unable to extend any weight to their testimony as probative on the issue of alleged antitrust misuse of the Zeiss trademarks. Rosenberg, the operator of a small curiosity shop dealing almost entirely (98%) in used merchandise consisting principally of art, paintings and bric-a-brac, never has been a Zeiss dealer and his testimony with respect to Zeiss trademarks is rejected as weightless and unconvincing. Watson, a dealer in Zeiss-manufactured instruments, testified that he regarded himself as a poor witness with respect to what the Zeiss trademarks meant to others; that while he would not purchase Zeiss instruments without trademarks on them he had never been offered such instruments; and that he would be willing **[**29]** to sell instruments bearing the legend or label "Manufactured by Carl Zeiss Germany" without a Zeiss trademark. At no time did any representative of plaintiffs or Zeiss, N.Y. or ZIV, Inc. ever discuss the Zeiss trademarks with him.

10. Federal government agencies on occasions have made invitations to bid specifying "Zeiss" instruments "or equivalent" and describing the instruments sought. There is no evidence that such specifications could be filled solely by instruments bearing any of the Zeiss trademarks which are the subject of this action.

11. Neither of the plaintiffs was ever a party to any agreement with defendant V.E.B. or anyone else whereby the Zeiss or Zeiss Ikon trademarks in the United States would be licensed as part of any cartel dividing the world market for Zeiss products. Although, as the Court has already found (see Findings Nos. 375-383) the Jena and Heidenheim gentlemen communicated in 1951 with respect to a possible licensing agreement and the Jena gentlemen during 1952 until sometime in 1953 tacitly indicated the possibility of reaching such a license agreement, no such arrangement was ever consummated. (Finding No. 383 and Decision of Nov. 7, 1968, p. **[**30]** 144) In any event, as the Court has already found (see Decision pp. 136-137), § 5(b) of the Trading with the Enemy Act would have rendered any such license ineffective.

12. Plaintiff Carl Zeiss Stiftung owns 100% of the shares of Zeiss, N.Y., a New York corporation. None of the current officers of Zeiss, N.Y. is presently an officer or employee of plaintiff Carl Zeiss Stiftung. Of the five directors of Zeiss, N.Y., one, Dr. Kuehn, Chairman of the Board, is a member of the Board of Management of the plaintiff Carl Zeiss Stiftung and general manager in charge of sales for that enterprise. Another director, Dr. Lehmann, is in charge of sales of scientific instruments for plaintiff Carl Zeiss Stiftung. Another director and the president of Zeiss, N.Y., Mr. Kessler, was employed by plaintiff Carl Zeiss Stiftung from 1953 until 1962 when he came to New York. Dr. Skoludek, a director and executive vice-president of Zeiss, N.Y., was in charge of sales at Carl Zeiss Cologne before assuming his duties in New York in 1965.

13. Zeiss, N.Y. is the sold authorized importer and distributor in the United States of all scientific instruments manufactured and sold for export to the United **[**31]** States by the plaintiff Carl Zeiss Stiftung, except for geodetic instruments and spectacle lenses bearing the Zeiss trademarks which are distributed in the United States by Keuffel & Esser and Transcontinental Corp., respectively, American companies in which neither Zeiss, N.Y. nor plaintiff Carl Zeiss Stiftung has any interest. It purchases goods for its own account from plaintiff Carl Zeiss Stiftung at the same prices at which said plaintiff offers such goods for sale to its other distributors in Germany and elsewhere, including distributors who are not affiliated with said plaintiff, and resells such goods to dealers and other purchasers in the United States.

14. Zeiss, N.Y. distributes goods other than those manufactured by plaintiff Carl Zeiss Stiftung, including spectrophotometers manufactured by RSV, a German firm, bearing the trademark "RSV", and in the past has also sold goods manufactured by other firms bearing trademarks other than the "Zeiss" trademarks.

15. Plaintiff Carl Zeiss Stiftung acquired a majority of the shares of Voigtlaender A.G., a German camera manufacturer, in 1956. Thus both Voigtlaender A.G. and plaintiff Zeiss Ikon A.G. were subsidiaries of plaintiff **[**32]** Carl Zeiss Stiftung in October 1965, when Zeiss Ikon Voigtlaender Vertriebsgesell-schaft, M.b.H., was organized in Germany for the joint marketing of Zeiss Ikon and Voigtlaender photographic equipment, and when Zeiss Ikon Voigtlaender of America, Inc. was organized to engage in such marketing in the United States.

16. ZIV, Inc. is a New York corporation, the stock of which is owned as follows: 80% by Zeiss, N.Y., 10% by plaintiff Zeiss Ikon A. G., and 10% by Voigtlaender A. G. None of the officers or directors of ZIV, Inc. is an officer or director of either of the plaintiffs, except that Dr. Goessler, a member of the board of directors of ZIV, Inc., is an officer of plaintiff Zeiss Ikon, and another member, Mr. Kessler, is the president of Zeiss, N.Y. The president of ZIV, Inc., who is also a director, Mr. Peerschke, was an officer of Zeiss, N.Y. before he became president of ZIV, Inc. Mr. Breford, the vice-president of ZIV, Inc., was likewise a Zeiss, N.Y. officer before he assumed the vice-presidency of ZIV, Inc.

17. ZIV, Inc. purchases cameras and other photographic equipment from Zeiss Ikon Voigtlaender of Germany for its own account and resells such products to its dealers **[**33]** in the United States.

18. Both Zeiss, N.Y. and ZIV, Inc., respectively, themselves:

(a) pay the salaries of all their employees;

(b) keep their own separate books and records at their offices in New York;

(c) prepare their own financial statements and tax returns separate and apart from those of plaintiffs;

(d) pay their own operating expenses;

(e) have their own pension plans and health insurance plans for the benefit of their employees, underwritten by an American insurance company; and

(f) have their own bank accounts with banks in the City of New York and from time to time obtain loans from such banks for the financing of their businesses.

19. Neither Zeiss, N.Y. nor ZIV, Inc.:

(a) has received any loans from either of the plaintiffs; or

(b) has consulted with either of the plaintiffs or with Zeiss Ikon Voigtlaender of Germany prior to appointing dealers, terminating dealers, establishing prices, determining discounts or bidding on public contracts in the United States.

20. Neither of the plaintiffs has any office in the United States.

21. Dr. Kuehn, who is Chairman of the Board of Directors of Zeiss, N.Y. and a member of the Board of Management of plaintiff Carl **[**34]** Zeiss Stiftung, maintains no office in the United States and visits the United States approximately once a year.

22. Dr. Kuehn, as Chairman of the Board of Directors of Zeiss, N.Y. and a representative of its sole shareholder, Carl Zeiss Stiftung, has from time to time set general policies for the management of Zeiss, N.Y., but has not exercised direction or control over its competitive practices, sales prices, or distribution activities.

23. Zeiss, N.Y. has made some reports to plaintiff Carl Zeiss Stiftung with respect to the market conditions in the United States for Zeiss instruments. Each month Zeiss, N.Y. sends financial statements to the Carl Zeiss Stiftung, and Zeiss, N.Y. has made annual reports to plaintiff Carl Zeiss Stiftung which contained information about competitors' instruments and the United States market. Zeiss, N.Y. also sends copies of its price lists to plaintiff Carl Zeiss Stiftung.

24. The president of Zeiss, N.Y. visits Oberkochen approximately twice a year and there discusses with plaintiff Carl Zeiss Stiftung's employees the general market situation in the United States. Other officers and key employees of Zeiss, N.Y. also travel to Germany and representatives **[**35]** of plaintiff Carl Zeiss Stiftung likewise periodically visit Zeiss, N.Y.

25. ZIV, Inc. furnishes statements of its financial condition to Zeiss Ikon A.G. and Voigtlaender A.G. monthly at the plant. These monthly reports contain information about conditions in the United States market, including the competition and the prices of competing goods.

26.There were, during 1965, discussions between representatives of ZIV, Inc. and a Mr. Ellenbogen of Wall Street Camera with respect to the advertisement of Zeiss Ikon cameras by Wall Street Camera at a price below the retail price suggested by ZIV, Inc. No specific reference to the Zeiss trademarks were made during these discussions, but Mr. Ellenbogen was advised that it was thought that his advertising impaired the good will of Zeiss Ikon cameras. Although Wall Street Camera has upon occasion since 1965 advertised Zeiss Ikon cameras at less than the suggested retail prices, it has continued to be supplied with its requirements of Zeiss Ikon cameras by ZIV, Inc. ZIV, Inc. instituted a fair trade policy in New York in May 1965.

27. ZIV, Inc. has reported to Zeiss Ikon A.G. that Zeiss Ikon trademarked cameras have been imported into **[**36]** the United States by unauthorized importers and sold here by dealers at prices below the suggested resale prices published by ZIV, Inc.; and ZIV, Inc. has requested Zeiss Ikon A. G.'s aid in cutting off German distributors who sell to such unauthorized importers.

End of Document

Attorney-General of New York v. Lundy

Supreme Court of New York, Special Term, Albany County

April 3, 1969

No Number in Original

Reporter
59 Misc. 2d 436 *; 299 N.Y.S.2d 30 **; 1969 N.Y. Misc. LEXIS 1661 ***; 1969 Trade Cas. (CCH) P72,905

In the Matter of Attorney-General of the State of New York, Petitioner, v. James A. Lundy et al., Constituting the Public Service Commission of the State of New York, et al., Respondents

Core Terms

carriers, Interstate, motor carrier, transportation, associations, combinations, anti trust law, regulation, antitrust, purposes, tariffs, public interest, instant matter, consolidation, commodities, effectuate, membership, evidences, annulled, effects, exempt

Headnotes/Summary

Headnotes

[*1] Carriers -- motor carriers of property -- Public Service Commission properly approved tariffs of membership corporation composed of motor common carriers of dairy products (Public Service Law, § 63-cc, *subd. 1; General Business Law, § 340*); review petition by Attorney-General dismissed.**

The Public Service Commission, acting within its specialized field of knowledge, properly made an order approving the by-laws and tariffs of the Tank Carriers Conference, Inc., which is a membership corporation composed of motor common carriers of dairy products (Public Service Law, § 63-cc, subd. 1; cf. U. S. Code, tit. 49, § 5b). The commission's determination properly contained qualifications and restrictions in accordance with the purposes of the Donnelly Antitrust Act (*General Business Law, § 340*). The Attorney-General's petition seeking to annul the commission's determination (CPLR, art. 78) is dismissed.

Counsel: *Louis J. Lefkowitz, Attorney-General*, petitioner in person, and *Samuel A. Hirshowitz, First Assistant Attorney-General*, for petitioner.

Kent H. Brown for Public Service Commission, respondent.

Brodsky, Linett & Altman (*David Brodsky* of counsel), for **[***2]** Tank Carriers Conference, Inc.

Judges: De Forest C. Pitt, J.

Opinion by: PITT

Opinion

[*436] [31]** By this article 78 proceeding the Attorney-General of the State of New York is challenging and seeking the annulment of an order and determination of the respondent, Public Service Commission, wherein approval was given to the by-laws of the Tank Carriers Conference, Inc., under subdivision 1 of section 63-cc of the Public Service Law.

Tank Carriers Conference, Inc., is a nonprofit membership corporation whose members are common carriers of property and whose principal purpose is the preparation and publication of tariffs for motor carriers in commodities in bulk of dairy and related products. It is the position of the Attorney-General that the commission's determination in this matter should be annulled for the reason that the same was based upon a showing of public benefit which was wholly insufficient to overcome the policy against restraints of competition and monopoly reflected **[**32]** and defined in the Donnelly Antitrust Act (*General Business Law, § 340*).

[*437] While the proceeding before this court does not, of course, directly attack section 63-cc of the Public Service **[***3]** Law, an examination of the same and of its purpose and effects will be helpful in the assessment of the issues of arbitrariness and illegality, which are raised concerning the subject determination. The trucking industry is regulated both Federally and on our State level for the reason that it is found that the transportation systems of our Nation and State are of vital public interest. Accordingly, the Federal Motor Carrier Act was first enacted subjecting interstate motor carriers of property to regulation by the Interstate Commerce Commission. Under this act, and under such regulation, groups of carriers combined into associations whose main function was to file and maintain tariffs prescribing rates and charges for the transportation of commodities. These tariffs so filed were binding upon the membership of the associations unless a particular member terminated his participation and filed independently. Thus, the Interstate Commerce Commission was relieved of the burden of accommodating separate filings. Lest these combinations be violative of the Sherman ***Antitrust Law*** in that they amounted to combinations in restraint of trade, the Congress in 1948 enacted the Reed-Bullwinkle **[***4]** amendment to the Interstate Commerce Act (U. S. Code, tit. 49, § 5b). This amendment specifically authorizes the Interstate Commerce Commission to approve agreements among carriers providing certain standards were maintained. Notably, any such agreement was to contain the right of independent action on behalf of a carrier.

Paralleling the above, New York State enacted its Motor Carrier Act in 1938 and in 1964 amended the same by the addition of section 63-cc, which amendment and section for all present purposes may be termed a duplicate of the Federal Reed-Bullwinkle Act.

Turning our attention to the instant matter, the Attorney-General maintains that the antitrust laws are not inapplicable to the transportation industry, and notes *McLean Trucking Co.* v. *United States* (321 U.S. 67, 87) wherein the court stated: "The Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy".

This point, **[***5]** however, is not met in argument by the respondent, who emphasizes that section 63-cc does not exempt associations like the subject one from the full impact of the antitrust **[*438]** laws. Indeed, it is noted by **[**33]** the respondent that if such associations are used ofr unlawful purposes they are not protected from the Donnelly Act with respect to such activities. It is then only approved combinations existing for proper purposes that are exempted.

It is additionally noted that the Supreme Court has rejected the contention that the legislative action is determinative of the question of intrusion upon antitrust policy. (*Federal Maritime Comm. v. Svenska Amerika Linien, 390 U.S. 238*.) The effect of this case would appear to be controlled by the respondent's above-noted position.

Directing attention to the instant matter, this court feels that the determination of the respondent was made in keeping with the legislative intent and well within its delegated authority. The qualifying and restrictive language of the respondent's determination not only evidences its awareness of this State's antitrust policy, but clearly also evidences its efforts to effectuate the same.

[*6]** Upon review of the matter the court finds that the determination of the respondent was, therefore, not illegal, being not in violation of law and not arbitrary or capricious, being based upon adequate factual findings. This court will not presume to interfere with the judgment of the respondent in its specialized field of knowledge, thereby upsetting its determination of the existence of the prerequisite public interest. Neither will this court be persuaded to perform an act of "judicial legislation" in its examination and evaluation of the subject statute. Accordingly, and for the reasons above noted, the respondent may submit judgment dismissing the petition.

Water Servs. v. Tesco Chems. Co.

United States Court of Appeals for the Fifth Circuit

April 18, 1969

No. 25578

Reporter

410 F.2d 163 *; 1969 U.S. App. LEXIS 12750 **; 162 U.S.P.Q. (BNA) 321 ***

WATER SERVICES, INC. and Farris Chemical Company, Appellants, v. TESCO CHEMICALS, INC., et al., Appellees

Subsequent History: **[**1]** Rehearing Denied July 7, 1969.

Core Terms

trade secret, covenant, patent, chemicals, competitor, compete, district court, secret, confidential information, automated, hired, duplicate, suppliers, barbecue, cases, competitive advantage, former employer, composition, contracts, customers, Bearings, restrictive covenant, indirectly, novelty, parties, courts, meats, sales

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Traditional common-law restraints fall into two classes: (1) restraints "ancillary" to valid underlying contracts, including employment contracts, and contracts for the sale of a business; (2) restraints not "ancillary" to valid underlying contracts, but typically undertaken to divide territory or markets, limit production, fix prices, or buy out potential competitors. "Non-ancillary" restraints are usually the subject of antitrust action under the Sherman Act while "ancillary" restraints are usually left to state law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN2[] **Types of Contracts, Covenants**

Under Georgia law, covenants not to compete are upheld if they are limited as to time and territory and definite as to the nature, kind, and character of the activities prohibited. Georgia, like most states, has a public policy prohibiting contracts in "general restraint of trade." Ga. Code 1933, § 20-504. But, while public policy forbids any agreement which unreasonably restrains a person from exercising his trade or business, it is equally true that public policy also requires that the freedom of persons to enter into contracts shall not be lightly interfered with.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN3[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

If, considered with reference to the situation, business, and objects of the parties, and in light of all the surrounding circumstances a restraint on competition contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Trade Secrets Law > Protected Information > Customer Lists

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > General Overview

Trade Secrets Law > Protected Information > Business Information

HN4[] **Types of Contracts, Covenants**

In determining whether a restraint is reasonable, two factors are important. First, is the employer trying to protect confidential information relating to the business, such as a trade secret, method of operation, sources of suppliers, and names of customers? Such confidential business information may or may not rise to the level of a trade secret. Second, is the restraint reasonably related to the protection of the confidential information? When these factors are present, Georgia courts approve the covenant not to compete even when the covenant defines the "nature" of the activities only in the broad language of serving a competing employer "in any capacity."

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

See Ga. Code Ann. § 6-1611.

Governments > Courts > Judicial Precedent

HN6[] Courts, Judicial Precedent

Where there is a conflict existing in the decisions of the Supreme Court of Georgia, the correct rule must be determined from the earliest decisions on the subject, and unless overruled, they are controlling.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > Employment Relationships > Employment Contracts > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Contract > Implied Contracts

HN7[] Types of Contracts, Covenants

Although covenants not to compete are proper to protect trade secrets, they may also be valid simply to prevent a former employee's using his expertise against his former employer. Conversely, even without an express restrictive covenant, one of the implied terms of a contract of employment is that the employee will not disclose a trade secret learned during his employment, to a competitor of his former employer.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Confidentiality

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Confidence > Confidential Relationships

Trade Secrets Law > Misappropriation Actions > General Overview

HN8[] Types of Contracts, Covenants

An action for breach of a covenant not to compete and an action for misappropriation of a trade secret by breach of a confidential relationship are independent actions. They are related, however, where an employer has a legitimate interest in protecting a trade secret by means of a restrictive covenant. And the existence of a trade secret bears on the reasonableness of the restraints imposed by the covenant.

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Trade Secrets Law > Protected Information > General Overview

Trade Secrets Law > Protected Information > Customer Lists

Trade Secrets Law > Protected Information > Machines

Trade Secrets Law > Protected Information > Manufacturing Processes

HN9[] **Trade Secret Determination Factors, Continuous Use**

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. A trade secret is a process or device for continuous use in the operation of the business. Generally, it relates to the formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN10[] **Trade Secrets & Unfair Competition, Trade Secrets**

The generally accepted requirements for protection of a trade secret are that the parties view the process or device as a secret and that the secret be revealed in confidence.

Trade Secrets Law > Trade Secret Determination Factors > Novelty

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > Anticipation & Novelty > Elements

Trade Secrets Law > Trade Secret Determination Factors > Prior Art

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Trade Secrets Law > Federal Versus State Law > Patent Law

Trade Secrets Law > Misappropriation Actions > Independent Development

HN11[] **Trade Secret Determination Factors, Novelty**

A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability.

Trade Secrets Law > Protected Information > Combinations & Compilations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Competitive Advantage

Trade Secrets Law > Trade Secret Determination Factors > Ready Availability

HN12[] **Protected Information, Combinations & Compilations**

A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectable secret.

Judges: Wisdom and Ainsworth, Circuit Judges, and Johnson, District Judge.

Opinion by: WISDOM

Opinion

[*322]** **[*164]** WISDOM, Circuit Judge:

Clyde A. Farris developed the first successful, fully automatic system for purifying water for industrial purposes. He sold this system through Water Services, Inc. and Farris Chemical Company under the name "TREAT-A-MATIC". [1]

This diversity case involves the validity of the defendant Philip S. Glad's covenant not to compete against his former employer, Farris Chemical Company. Contrary to the district court's holding, we hold that under Georgia law the covenant was a reasonable restraint. **[**2]** We hold also that the defendants, Glad and his present employer, Tesco Chemicals, Inc., misappropriated Farris's trade secrets: Glad breached his confidential relationship with Farris by disclosing to Tesco the design and composition of the TREAT-A-MATIC system and the identity of the suppliers of the components Farris used in producing the TREAT-A-MATIC. Glad will not be allowed to bite the hand that fed him his expertise.

* * *

Since 1953 Farris has engaged in the business of supplying chemicals and equipment for the treatment of water circulated through boilers and large air conditioning systems such as are found in office buildings. The purpose of the treatment is to maintain this water in as near a pure form as possible to minimize injury to the circulating pipes, storage tanks, and other parts of the heating or cooling system caused by corrosion, scale, and algae, wasting as small an amount of water as possible.

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[1] The suit was originally filed in the name of *Water Services, Inc.* The Farris Chemical Company is the manufacturing subsidiary of *Water Services, Inc.* Clyde A. Farris, Jr. organized and is president of both corporations. By agreement, the subsidiary was added as a party plaintiff at trial. For convenience, in this opinion we regard the two companies as one.

The water purification industry is highly competitive. There are between 100 and 150 companies in the business in the southeastern area of the country, with 20 to 25 in Atlanta alone. In this industry, as in many others, the increase in labor costs has accentuated **[**3]** the demand for automation.

[*165] Farris Chemical has its headquarters in Knoxville, Tennessee, but employs nine or ten field engineers for the southeastern area, one of whom is responsible for sales and services in the State of Georgia. Farris Chemical has had a substantial growth and now has some 25 employees in management, sales, and the mixing or producing of chemicals sold to the trade. The district court found that the company's success is attributable to the ingenuity, industry, and drive of Clyde Farris, president and founder of the company.

The evaporation of water in air conditioning leaves damaging solids in the system. Until 1960, the "bleeding" of these damaging solids, the testing of acidity and alkalinity by pH content, and the mixture of control chemicals had to be done manually with inferior measuring devices. Various companies experimented with automatic devices to perform these functions, but the first models were expensive and required considerable manpower. In 1960, after four years of trial-and-error experimentation with pumps, timers, and electronic devices, and the expenditure of $18,000 for materials, Farris perfected the TREAT-A-MATIC system.

The **[**4]** district court described the system as made of two basic units: "one has a 30-minute timing device at 15 second intervals with a low volume pump for the injection of chemicals direct from shipping containers on the 'rust and scale side'; the other has a 24-hour timer with a skipper wheel up to 12 days and high volume pump for the injection of chemicals direct from shipping containers on the 'algae side'. The system is activated by a conductivity device which measures the pH factor for automatic bleeding. All of the devices, together with the electrical control box (which must be specially wired to turn off when the air conditioning system is not in use) are attractively mounted on a single panel board as the TREAT-A-MATIC system."

Farris did not patent the TREAT-A-MATIC: All of the components of the system were available on the open market. The district court found:

> "Its originality lies in the arrangement of the devices in combination and the knowledge of the supply source of the component parts. The functions performed were being performed **[***323]** by similar devices in the trade prior to TREAT-A-MATIC, but not in combination and not in as easy and incumbersome a manner.
>
> To capture **[**5]** the chemical sales where the highest profit lies, the TREAT-A-MATIC has been a successful tool. Being fully automated, it appeals to the industry. In addition, by furnishing it on a sale, lease-purchase, or contract basis (wherein the system plus chemicals are furnished for a stated time), Farris has been able to obtain the more lucrative chemical business from a wide range of customers. As stated at trial, Farris undoubtedly 'built a better mouse-trap' and beat the competition to the market place with it."

Farris protected the composition of the TREAT-A-MATIC system by concealing the identity of the components and their suppliers. [2] The company maintained rigid internal security, and required each employee to sign a noncompetition covenant as a condition of employment.

Tesco Chemicals is a direct competitor of **[**6]** Farris. At least as early as April of 1962, Tesco Chemicals, Inc. realized the absolute necessity for automated equipment in order to survive. Tesco began in the business of swimming pool treatment. It hired Mr. Frank Parker to establish and develop an Industrial Division. Parker immediately began to work on automating, but in late 1965 he was writing to component suppliers for any **[*166]** information they could give on equipment "packages", despite having had a TREAT-A-MATIC system in the Tesco laboratory for detailed inspection and disassembly in early 1965.

In 1963, Farris hired Philip Glad as a field engineer and sales representative. At the time, Farris stressed the highly competitive nature of the industry and the need for tight secrecy on all information concerning equipment,

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[2] Farris concealed the identity of the components by replacing the label of the original manufacturer with a Farris Chemical label, and by replacing the standard colors with other colors.

chemicals, and prices. Glad signed a contract containing a two-year non-competition provision covering the northern third of Georgia and a few towns on the Tennessee side of the line. Despite Glad's formal education in electrical engineering, the great bulk of his present expertise was obtained from his experience and training with Farris (for 3 months under close supervision, then seminars three **[**7]** or four times a year). Farris gave Glad the names of the component suppliers, the wiring method, the design detail, and other confidential information. Indeed, he became privy to all construction and sales information concerning the TREAT-A-MATIC system.

After two years with Farris, Glad telephoned Parker and arranged to meet with him to discuss the possibility of Tesco's employing him. [3] By that time Parker had experimented with various components in an attempt to create an automated system similar to TREAT-A-MATIC but had met with no success. He had lost several sales for lack of such a system. Parker had seen TREAT-A-MATIC installations at the sites of customers and, as noted earlier, on at least one occasion had disassembled a TREAT-A-MATIC unit. Tesco hired Glad. The district court found that the "hiring of Glad was with the specific intent of acquiring for Tesco the skill and knowledge necessary to create a fully automated system similar to the TREAT-A-MATIC". Glad began immediately to work on reproducing for Tesco the TESCOMATIC system, based on his knowledge of the TREAT-A-MATIC system. The district court commented:

> The similarity between the two systems is striking. **[**8]** Without going into detail, suffice it to say that they are as near identical as possible for Parker and Glad to construct. The components are the same, with the exception of the conductivity device (the source of which apparently was unknown to Glad) and minor changes in the electrical terminal strip and service switch. The grouping and panel mounting are practically the same."

On March 1, 1967, Water Services and Farris brought this suit against Tesco and Glad, asking for injunctive relief and damages. The district court, sitting without a jury, entered judgment in favor of the defendants. We reverse and remand.

I.

Philip Glad, like **[**9]** all other Farris employees, signed the following covenant:

> It is agreed and understood that for a period of two (2) years after the termination of this contract, regardless of the reason of cause of such termination or cancellation, the Employee will not engage, either directly or indirectly, on his own account or as **[***324]** agent, servant or employee of any person, firm or corporation, in any business which could reasonably be considered to be in competition with Water Services, Inc., in any territory in which he has performed services under this contract.

The threshold question is whether this covenant is reasonable and therefore enforcible under Georgia law. The parties agree that Georgia law controls the construction **[*167]** of the covenant. [4] See *The Day Companies v. Patat, 5 Cir. 1968, 403 F.2d 792*; *Budget Rent-A-Car Corp. v. Fein, 5 Cir. 1965, 342 F.2d 509*.

[10]** As the district court observed, "The problem of noncompeting covenants in Georgia is one which has caused great difficulty for the courts and practitioners over a long period of time". ***HN2***[] Under Georgia law, covenants not to compete are upheld if they are limited as to time and territory and definite as to the nature, kind, and character of the activities prohibited. *Bennett v. Georgia Indus. Catering Co., 1966, 222 Ga. 127, 149 S.E.2d*

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[3] Glad suffers from leg "trouble" and other ailments. His work entailed climbing on tanks and other parts of an industrial system. The district court found that partly because of these ailments and partly because of "apparent disenchantment between him and Farris, early in 1966 Glad began to look around for other employment, which would provide him an inside job".

[4] ***HN1***[] Traditional common-law restraints fall into two classes: (1) restraints "ancillary" to valid underlying contracts, including employment contracts, and contracts for the sale of a business; (2) restraints not "ancillary" to valid underlying contracts, but typically undertaken to divide territory or markets, limit production, fix prices, or buy out potential competitors. "Non-ancillary" restraints are usually the subject of antitrust action under the Sherman Act, while "ancillary" restraints are usually left to state law. See *United States v. Addyston Pipe & Steel Co., 6 Cir. 1898, 85 F. 271, 282-283, 46 L.R.A. 122*, aff'd, *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)*; Att'y Gen. Nat'l Comm. Antitrust Rep. 5-12 (1955); Blake, Employee Agreements Not to Compete, 73 Harv.L.Rev. 625, 626-28 (1960); 6A Corbin, Contracts § 1401 (1962).

81; Shirk v. Loftis Bros., 1918, 148 Ga. 500, 97 S.E. 66; Rakestraw v. Lanier, 1898, 104 Ga. 188, 30 S.E. 735. Georgia, like most states, has a public policy prohibiting contracts in "general restraint of trade". See Georgia Code § 20-504. But, "While public policy forbids any agreement which unreasonably restrains a person from exercising his trade or business, it is equally true that public policy also requires that the freedom of persons to enter into contracts shall not be lightly interfered with". Rakestraw v. Lanier, 1898, 104 Ga. 188, 30 S.E. 735.

It is undisputed that Tesco hired Glad within the **[**11]** prohibited two-year period and that Tesco competes with Water Services. The district court held that the covenant here was reasonable as to "time" and "territory" but that it was invalid and unenforceable on the ground that the provision was "unreasonably indefinite" as to "the nature, kind and character of the activities prohibited by the contract". It "contemplates", the court said, "any activity for any competitor whether it relates to the functions and duties of the original employment or not, whether as a truck-driver, bookkeeper, custodian or as an executive or salesman".

Our review of the Georgia law, including consideration of Baxley v. Black, 1968, 224 Ga. 456, 162 S.E.2d 389, decided after the district court rendered its decision in the instant case, compels us to conclude that today Georgia courts would uphold the covenant as a reasonable restraint.

In Rakestraw v. Lanier, 1898, 104 Ga. 188, 30 S.E. 735, still a leading case, the State Supreme Court defined the test for determining the reasonableness of the restraints on activities:

> ***HN3***[] If, considered **[**12]** with reference to the situation, business, and objects of the parties, and in light of all the surrounding circumstances * * * the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid.

The contract in *Rakestraw* involved the sale of a medical partnership. Georgia courts, however, have applied the *Rakestraw* test to determine the reasonableness of contracts ancillary to employment contracts. See Baxley v. Black, 1968, 224 Ga. 456, 162 S.E.2d 389. The Restatement of Contracts applies a similar test to both types of ancillary restraints. Restatement of Contracts § 513-15 (1932); *cf.* Blake, Employee Agreements Not To Compete, 73 Harv. L.Rev. 625, 648-49 (1960).

[*168] ***HN4***[] In determining whether the restraint is reasonable two factors are important. First, is the employer trying to protect confidential information relating to the **[**13]** business, such as a trade secret, method of operation, sources of suppliers, and names of customers? Such confidential business information may or may not rise to the level of a trade secret. Second, is the restraint reasonably related to the protection of the confidential information? See *Restatement of Contracts §§ 515(a)*, 516; Blake, Employee Agreements Not To Compete, 73 Harv.L.Rev. 625 (1960). When these factors have been present, Georgia courts have approved the covenant not to compete even when the covenant defined the "nature" of the activities only in the broad language of serving **[***325]** a competing employer "in any capacity". In Shirk v. Loftis Bros., 1918, 148 Ga. 500, 97 S.E. 66, 67, the Supreme Court of Georgia upheld a covenant restricting an employee from serving "in any relation or capacity whatsoever, in the line of business [of the employer]". In *Shirk*, the employee had become privy to confidential information and methods from the employer concerning repairs of jewelry, watches, and glasses -- information that might be considered as in domain of any person repairing jewelry, watches, and glasses. In Nelson v. Woods, 1949, 205 Ga. 295, 53 S.E.2d 227, **[**14]** the Court upheld a covenant "not to directly or indirectly enter into any competitive 'do-nut' business". The purpose of this covenant was to prevent the employee from divulging the recipe used in baking "Krispy Kreme Do-Nuts". As in the instant case, the originality lay in the combination of readily available components. Similarly in Franco v. Fulton Bakery, Inc., 1940, 190 Ga. 298, 9 S.E.2d 240, the Court approved a covenant of an employee not to "be employed directly or indirectly * * * as an individual, partner, * * * employee, or in any relation or capacity" even though there was no danger or revelation of a secret process of baking. See also Aladdin, Inc. v. Krasnoff, 1958, 214 Ga. 519, 105 S.E.2d 730; Turner v. Robinson, 1959, 214 Ga. 729, 107 S.E.2d 648; Ogle v. Wright, 1939, 187 Ga. 749, 2 S.E.2d 72.

Tesco and Glad rely principally on *Mason, etc. v. Jablin, 1964, 220 Ga. 344, 138 S.E.2d 660*; *Stein Steel & Supply Co. v. Tucker, 1964, 219 Ga. 844, 136 S.E.2d 355*, and *Dixie Bearings, Inc. v. Walker, 1963, 219 Ga. 353, 133 S.E.2d 338*. These cases, however, are distinguishable or **[**15]** not controlling precedent under the Georgia "full-bench rule". This is a codified rule of stare decisis: a unanimous decision of the Supreme Court of Georgia may be overruled only by a unanimous decision. [5] In *Dixie Bearings*, a covenant prohibited the employee from engaging in or becoming associated with any competitive business. The Court held that the agreement was unreasonable because of "the absolute prohibition of the employee's working *in any capacity* for a competitor in positions unrelated to trade secrets or **[*169]** customers" -- for example, as a truck driver or night watchman. Chief Justice Duckworth specially concurred in *Dixie Bearings*, and therefore the decision is not binding under the "full-bench rule". Compare the language of the district court's conclusions in the case. In *Stein Steel*, the facts were similar to those in *Dixie Bearings*. With three justices dissenting, the court held that the covenant was "larger than were necessary for the protection of the promisee". The dissenting justices argued that "the nature of employment is not the controlling factor, since [the employee] might as well make use of sales information, trade secrets, **[**16]** etc., of his former employer in one position as in another". The dissenters noted that *Dixie Bearings* was "not binding", because of the special concurrence in that case. In *Mason*, the court held invalid a covenant forbidding the employee for five years from engaging in the business of manufacturing or selling candy as well as engaging in any fund raising activities similar to the fund raising activities of the employer. The court found that the restraint was unreasonably broad, in part because fund-raising activities were not reasonably related to protecting the former employer's candy business. In *Taylor Freezer Sales Company v. Sweden Freezer Eastern Corp., 1968, 224 Ga. 160, 160 S.E.2d 356*, the plaintiff alleged "no facts * * * to show that the defendant became familiar with any trade secrets or confidential information, other than a general knowledge of the plaintiff's business."

[17]** The Georgia Supreme Court's most recent full-bench decision on the issue of covenants not to compete is *Baxley v. Black, 1968, 224 Ga. 456, 162 S.E.2d 389*. Justice Mobley, author of the opinion, wrote the dissenting opinion in *Stein Steel*. The court rejected the reasoning of *Dixie Bearings* and *Stein Steel*, both **[***326]** cited and discussed in the briefs of the parties. The Court returned to the broad test of reasonableness in *Rakestraw*. The covenant in *Baxley* prohibited the employee, who had been hired as a cook from "directly or indirectly, engag[ing] in the preparation or sale of barbecued meats at any location within a radius of ten (10) miles of any of the locations of the employer". The defendant argued that the covenant should not bar the employee from later employment as a manager, because there is no trade secret involved in the making of a barbecue which is not known to the public generally and the position of manager is totally unrelated to preparing barbecued meats as a cook. The court rejected this argument:

> There is evidence that the appellees employed the appellant as a barbecue cook, that they trained him in their specialized method **[**18]** of cooking, which the appellant admits he had never seen before, that they used special cuts of meat, a secret sauce, special type of operation with indoor pit, etc. The evidence shows further that the appellant has accepted employment as manager of a nearby, newly established, competing barbecue place, where he does some of the cooking, directs how the meats are served, and the operation of the place; and shows further that this new barbecue house was built similar in design to the Old Hickory Houses of the

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[5] Section 6-1611 of the Code of Georgia, which embodies the "full bench rule", provides in part: "* * * ***HN5***[] Unanimous decisions rendered after [January 1, 1897] by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision." Thus, the only decisions which are controlling on the case at bar are the full bench decisions, which, until overruled or modified, have the force and effect of statutory law. *Crown Laundry v. Burch, 205 Ga. 211, 212, 53 S.E.2d 116, 117 (1949)* (full bench).

In *Sowell v. Sowell, 1956, 212 Ga. 351, 353, 92 S.E.2d 524, 526*, the Supreme Court of Georgia said: ***HN6***[] "Where there is a conflict existing in the decisions of this court, the correct rule must be determined from the earliest decisions on the subject, and unless overruled, they are controlling." The Supreme Court of Georgia has taken judicial notice that its Justices now number seven, and the full bench statute is applied as if it required seven concurrences to constitute a full bench decision. Ga.Const.1945, § 2-3701; e.g., *Mote v. Mote, 1958, 214 Ga. 134, 103 S.E.2d 565*.

> appellees, and that in the operation it has duplicated many features of the Old Hickory House, making the operation very similar in practically all particulars. It is obvious that the appellant is violating the covenant in the contract.

A "business which could reasonably be considered to be in competition with Water Services" (the language of the covenant) is clearly a business involving the preparation and sale of a system for supplying and maintaining purified water for industrial purposes. Glad certainly understood it. And by any objective standard, the description was as definite as the language in *Baxley* "preparation and sale of barbecued meats". The covenants **[**19]** in both cases prohibited the employee "either directly or indirectly", on his account or for another, competing with the employee. In both cases the physical features and the methods **[*170]** of operation of the new employer's "system" were substantially similar to those of the former employer. In both cases, the confidential information was developed as a result of the former employer's initiative and investment and was subject to misappropriation regardless of the employee's activities in his new position -- in *Baxley* as cook or manager, in the instant case as salesman or engineer.

In short, Glad possessed confidential information revealed to him by Farris concerning the composition of the TREAT-A-MATIC system. This system was not patented, but was nonetheless the industry's only fully automated, integrated system for controlling and supplying purified industrial water. Even though the system had been marketed for a number of years, competitors had been unable to duplicate it. As a result of this competitive advantage, Farris and Water Services had enjoyed substantial financial success. It was reasonable, therefore, for Farris and Water Services to attempt to preserve their **[**20]** limited competitive advantage by keeping the composition of the TREAT-A-MATIC system secret through rigid internal security and elaborate concealment measures. Employee loyalty was especially important since knowledge of the suppliers of the components was a key to the system. In view of the nature of the interest sought to be protected and the competitive environment of the industry, the covenant not to compete meets the *Rakestraw* test. As stated in Baxley v. Black, the restraint "reasonably necessary to protect [a legitimate] interest of the [appellant] in whose favor it is imposed", was for a just and honest purpose, and would not be specially injurious to the public. *149 S.E.2d at 84*.

In Part I of this opinion we concluded that the covenant is enforceable, under Georgia law, without discussing whether the interest Farris sought to protect rises to the level of a trade secret. In Part II of this opinion we hold that the design and composition of the TREAT-A-MATIC system (including the identity of suppliers of the components) add up to a protectible trade secret. The fact that Farris sought to protect a trade secret provides a compelling case for finding **[**21]** that the restrictive covenant was reasonable.

II.

The district court took pains to point out that the equities were with Farris:

> In connection with this case, the moralities are completely with the plaintiff. Whatever he had, he transmitted to Glad as a trusted employee. Glad subsequently, albeit without any inducement by Tesco, conveyed the information to Tesco regarding the TREAT-A-MATIC. Tesco immediately copied the plaintiff's product through the use of this information. However, **[***327]** the right to free copy is apparently not dependent upon honourable conduct. See *Hampton v. Blair Mfg. Company, 8 Cir. 1967, 374 F.2d 969*. Here, all of this was done in spite of a solemn contract attempting to prevent the same. However, the *sine quanon* of such an action is the existence of the trade secret itself. *McGraw Edison Co. v. Central Transformer Corp., 8 Cir. 1962, 308 F.2d 70*. 12 Milgrim, Business Organizations, § 7.07 (1). And this prerequisite is necessary regardless of the contract, and of any breach of confidence or not. 2 Callman, Unfair Competition and Trade Marks, § 53.3. In this respect, and in this respect only, the plaintiff's claims fail. **[**22]**

No Georgia case goes so far as to say that the existence of a trade secret is the *sine qua non* of an action to enforce a restrictive covenant ancillary to an employment contract. ***HN7***[] Although covenants not to compete are proper to protect trade secrets they may also be valid simply to prevent a former employee's using his expertise against his former employer. For example, see Baxley v. Black; *Franco v. Fulton Bakery, Inc., 1940, 190 Ga. 298, 9 S.E.2d 240*; *Nelson v. Woods, 1949, 205 Ga. 295, 53 S.E.2d 227*; *cf.* *W. Walley, Inc. v. Saks &* ***[*171]*** *Co., 1943,* *266 App.Div. 193, 41 N.Y.S.2d 739*. Conversely, even without an express restrictive covenant, one of the implied terms of a contract of employment is that the employee will not disclose a trade secret learned during his employment, to a competitor of his former employer. But since it may be difficult to determine, as a matter of law, what is a trade secret, the covenant not to compete is a pragmatic solution to the problem of protecting confidential information. See *Irvington Varnish & Insulator Co. v. Van Norde, 1946, 138 N.J.Eq. 99, 46 A.2d 201*; **[**23]** *Kadis v. Britt, 1944, 224 N.C. 154, 29 S.E.2d 543, 152 A.L.R. 405*; 2 Callman, Unfair Competition Trademarks and Monopolies § 64.4(b), at 641 (1968). Technological refinements in industrial espionage increase the employer's need for covenants not to compete.

HN8[] An action for breach of a covenant not to compete and an action for misappropriation of a trade secret by breach of a confidential relationship are independent actions. They are related here, however, because an employer has a legitimate interest in protecting a trade secret by means of a restrictive covenant. And the existence of a trade secret bears on the reasonableness of the restraints imposed by the covenant.

The Restatement of the Law of Torts (1939), § 757, Comment b defines a trade secret as follows:

> ***HN9***[] "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know **[**24]** or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. * * * A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management."

See also 2 Callman, Unfair Competition and Trademarks, § 52.1.

The policy reasons for affording protection to these commercial intangibles are to prevent exploitation by reprehensible business methods and to encourage innovation. *See* Developments in the Law -- Competitive Torts, 77 Harv.L.Rev. 888, 947-948 (1964). If a trade secret is protected, the competitive advantage realized by the owner of the secret will enable him to recoup his development costs, hopefully before his competitors can "reverse-engineer" the product and duplicate **[**25]** it.

The district court attached great weight to two 1964 Supreme Court cases, *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* and *Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669*. These decisions create a more "liberal right to copy" and raise questions as to the scope of protection a state may afford to federally unpatentable devices. Under the *supremacy clause*, a state cannot patent a device that is patentable under the federal patent statutes; federal patent laws have preempted the field. But *Sears* and *Compco* dealt with the right of a competitor to free copy a product on the open market by independent study. They are not applicable to a situation in which an employer hires an employee of a competitor to take advantage of the employee's expertise in reproducing a complicated system first developed by the former employer. *Sears* and *Compco* did not involve trade secrets. Three cases **[***328]** have held them not to have displaced the law of trade secrets. Two of the three cases flatly disregarded *Sears* and *Compco* as inapposite to any issue in a trade secret case. *Servo Corp. v. General Electric Co., 4 Cir. 1964, 337 F.2d 716*, **[**26]** cert. denied, 1966, *383 U.S. 934, 86 S. Ct. 1061, 15 L. Ed. 2d 851*, reh. den. 1966, *384 U.S. 914, 86 S. Ct. 1333, 16 L. Ed. 2d 366*; *Schulenburg v. Signatrol, Inc., 33 Ill.2d 379, 212 N.E.2d 865, 868*, **[*172]** (1965), cert. denied, *383 U.S. 959, 86 S. Ct. 1225, 16 L. Ed. 2d 302 (1966)*. *Hampton v. Blair Mfg. Co., 8 Cir. 1967, 374 F.2d 969*, applied *Sears*, not to deny trade secret status, but to limit the duration of the injunction.

A patent may be distinguished from a trade secret in that a patent is totally exclusionary for the period of time for which it is granted; there are necessarily substantial anticompetitive effects. An ordinary trade secret, however, is not totally exclusionary; it is protected only as long as competitors fail to duplicate it by legitimate, independent research. *See* F. Machlup, An Economic Review of the Patent System 33 (Study No. 15, Senate Subcomm. On Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 85th Cong., 2d Sess., Comm. Print. 1958). The anticompetitive effects are relatively slight since the competitive advantage exists only for what is usually a short **[**27]** period, either because the restrictive covenant, if there be one, is for a small number of years (here, only two years) or because a competitor, by reverse-engineering, may legitimately duplicate the device. This limited protection with its relatively slight anticompetitive effects is helpful to insure growth characteristic of innovative genius. See Doerfer, The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy, 80 Harv.L.Rev. 1432, 1447-56 (1967). We think that substantial policy considerations militate against construing *Sears* and *Compco* as preempting a state's right to protect a trade secret. *See* *Winston Research Corp. v. Minnesota Min. & Mfg. Co., 9 Cir. 1965, 350 F.2d 134*; *Servo Corp. v. General Elec. Co., 4 Cir., 1964, 337 F.2d 716*; *Blazon, Inc. v. DeLuxe Game Corp., S.D.N.Y. 1965, 268 F. Supp. 416*; *Van Products Co. v. General Welding & Fabricating Co., 1965, 419 Pa. 248, 213 A.2d 769*.

Georgia law follows the majority view and the Restatement rationale for protecting trade secrets on the ground of a confidential relationship. *See* *Alexis, Inc. v. Werbell, 1953, 209 Ga. 665, 668, 75 S.E.2d 168, 171*; **[**28]** *Stewart v. Hook, 1903, 118 Ga. 445, 45 S.E. 369, 63 L.R.A. 255*. These decisions seem to establish a broad area of protection of trade secrets and suggest that a Georgia court would follow ***HN10***[] the generally accepted requirements for protection of a trade secret. Basically, these requirements are that the parties view the process or device as a secret and that the secret be revealed in confidence. *See* Developments in the Law -- Competitive Torts, 77 Harv.L.Rev. 888, 949 (1964).

Tesco urges this Court to impose a requirement of novelty as a prerequisite to protection as a trade secret. The *Restatement of Torts, § 759, Comment b* states:

> ***HN11***[] "A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed **[**29]** use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability."

Some courts have adopted a requirement of novelty. [6] We make an Erie guess that a Georgia court would follow **[*173]** the majority view [7] and not require novelty.

[30]** The district court found that the components were not developed by Farris, were available on the open market, and were ascertainable. It is clear that the *theory* of the Treat-A-Matic was not new to the industry. The court also found that the design was apparent from inspection, and that the system had been sold and advertised without **[***329]** restriction. These findings are supported by the evidence. But these findings are not conclusive. The trade secret here was the application of known techniques and the assembly of available components to create the first successful system in the industry. In the trial judge's words, "no components had been brought together into one lightweight automated system until the perfection of the Treat-A-Matic". As the Second Circuit stated in *Imperial Chemicals, Ltd. v. National Distillers & Chemical Corp., 2 Cir. 1965, 342 F.2d 737, 742*, ***HN12***[] "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords **[**31]** a competitive advantage and is a protectible secret". This characterization describes the TREAT-A-MATIC. The composition was unique and conferred a substantial competitive advantage on Farris. Indeed, the company enjoyed unparalleled financial success during the four years that competitors were unsuccessfully trying to duplicate the TREAT-A-MATIC.

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[6] *See, e.g.*, *Sarkes Tarzian, Inc. v. Audio Devices, Inc., S.D.Cal.1958, 166 F. Supp. 250, 265-266*.

[7] *See, e.g.*, *Sun Dial Corp. v. Rideout, 1954, 29 N.J.Super. 361, 102 A.2d 90, 92*, citing ***Restatement of Torts, § 756*** (1939); Developments in the Law -- Competitive Torts, 77 Harv.L.Rev. 888, 949-50.

The parties considered the knowledge of the TREAT-A-MATIC a trade secret revealed in confidence; Farris used elaborate concealment measures to conceal the identity of the components and exacted a covenant not to compete from his employees. That no other competitor had been able to duplicate the TREAT-A-MATIC during the four years it was on the open market is strong evidence that Farris had possession of secrets his competitors could not easily penetrate. The information used in the construction of the TESCOMATIC was not obtained by free copy, or independent analysis, of the TREAT-A-MATIC. The successful reproduction of the system did not take place until Tesco hired Glad for the specific purpose of learning the arrangement and components of the TREAT-A-MATIC. *Cf. Head Ski Co. v. Kam Ski Co., D.Md.1958, 158 F. Supp. 919*. **[**32]**

We hold, therefore, that the covenant not to compete is valid and enforcible and that the TREAT-A-MATIC is a protectible trade secret. Accordingly, we reverse and remand to the district court for proceedings consistent with this opinion.

End of Document

Carl N. Swenson Co. v. E. C. Braun Co.

Court of Appeal of California, Fifth Appellate District, Division Two

April 29, 1969

Civ. No. 25059

Reporter

272 Cal. App. 2d 366 *; 77 Cal. Rptr. 378 **; 1969 Cal. App. LEXIS 2285 ***; 1969 Trade Cas. (CCH) P72,813

CARL N. SWENSON CO., INC., Plaintiff and Appellant, v. E. C. BRAUN CO., Defendant and Respondent

Subsequent History: **[***1]** Appellant's Petition for a Hearing by the Supreme Court was Denied June 25, 1969. Tobriner, J., was of the Opinion that the Petition Should be Granted.

Prior History: APPEAL from a judgment of the Superior Court of Santa Clara County. George H. Barnett, Judge.

Action to confirm an arbitration award.

Disposition: Affirmed. Judgment for defendant denying petition for confirmation and granting defendant's motion to dismiss affirmed.

Core Terms

bid, depository, withdraw, plumbing, subcontractor, arbitration award, general contractor, Contractors, user, awarding authority, closing time, construction project, mechanical work, sheet metal, Cartwright Act, confirmation, withdrawn

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

The California ***antitrust law***, commonly known as the Cartwright Act, *Cal. Bus. & Prof. Code, §§ 16700- 16758*, is patterned upon the federal Sherman Antitrust Act, and federal cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The adoption and enforcement of certain bid depository rules, including one requiring general contractors utilizing the depository to use only bids received through the depository, constitutes an invalid restraint on interstate commerce in violation of the Sherman Act.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Real Property Law > Construction Law > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Practices Governed by Per Se Rule, Boycotts**

Group boycotts are illegal per se, constituting restraints on trade in violation of the Cartwright Act, *Cal. Bus. & Prof. Code, §§ 16700- 16758*. A bid depository cannot be allowed to operate under rules which (1) prevent, preclude or in any manner limit any subcontractor from submitting a bid to a general contractor or awarding authority on any construction project at any time prior to the time set by the awarding authority for the receipt of bids upon any such construction project; (2) limit or restrict, in any way, the amount of a bid submitted by a subcontractor to a general contractor or awarding authority at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project; or (3) limit or in any way prevent a general contractor or awarding authority from receiving or considering any bid which is or may be submitted to him by a subcontractor at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project.

Headnotes/Summary

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Monopolies—Under Cartwright Act.

--The California anti-trust law, commonly known as the Cartwright Act (*Bus. & Prof. Code, §§ 16700-16758*) is patterned upon the federal Sherman Anti-trust Act, and federal cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act.

CA(2)[] **(2)**

Id.—Under Cartwright Act—Agreements and Combinations Prohibited.

--Rules of a locked box bid service operated by a contractors' association relating to time of withdrawal of bid and providing that if separate bids were also submitted in combination, the separate bids could not be withdrawn without withdrawing the combination bid were clearly restrictive of free competition among subcontractors and an arbitration award based upon a violation thereof could therefore not be enforced by the courts; an analysis of the challenged provisions, viewed in the context of other bid depository rules which prohibited depository users from submitting or refusing bids outside the depository, effectively demonstrated that such rules tended to stifle competition between subcontractors and to further an illegal restraint of trade.

Counsel: Littler, Mendelson & Fastiff, Arthur Mendelson, James A. Carter and Robert M. Lieber for Plaintiff and Appellant.

Robert C. Taylor and Ronald H. Klein as Amici Curiae on behalf of Plaintiff and Appellant.

Edmond G. Thiede, Bancroft, Avery & McAlister, William H. Orrick, Jr., and Orrick, Herrington, Rowley & Sutcliffe and Robert J. Gloistein for Defendant and Respondent.

Judges: Shoemaker, P. J. Agee, J., and Taylor, J., concurred.

Opinion by: SHOEMAKER

Opinion

[*367] **[**378]** Plaintiff appeals from a judgment denying its petition for confirmation of an arbitration award and granting defendant's motion to dismiss and entry of judgment in defendant's favor.

The facts are without dispute. Plaintiff is a licensed general building contractor and defendant is a **[***2]** licensed subcontractor engaged in the plumbing and heating business. Defendant is a member of the Greater Bay Area Bid Service, a locked box bid service operated by the Plumbing-Heating-Cooling **[**379]** Contractors Association of the Greater Bay Area, Inc. (hereinafter referred to as "Contractors Association"). The bid service operated pursuant to bid depository rules which bound all members. On December 7, 1965, defendant submitted bids on a construction project at Moffett Field through the bid service and plaintiff as a general contractor received such bids. The bids submitted by defendant were (1) for plumbing alone and (2) a combination bid for plumbing, sheet metal and other mechanical work. On December 7, 1965, plaintiff executed a written acceptance of defendant's plumbing bid of $ 78,735, the low bid received for that work. On the same day, plaintiff was awarded the general contract on the Moffett Field project. However, defendant, prior to the opening of the bids by the government, purported to withdraw its plumbing bid. Plaintiff refused to recognize the right of defendant to withdraw its bid, contending that under the bid service rules it could not do so and the **[***3]** defendant, refusing to honor its bid, was taken by plaintiff before the Contractors Association. The dispute was thereafter submitted to the Fair Trade Committee **[*368]** of the Contractors Association in accordance with the dispute settlement procedure provided for in the bid depository rules. A hearing was held and the committee ruled that defendant had not withdrawn its plumbing bid in accordance with the bid depository rules and directed that it enter into a subcontract with plaintiff for the performance of such work or be subject to the penalties provided for by said rules. Defendant refused to perform and thereupon the Fair Trade Committee ruled that defendant, under the rules, must pay plaintiff liquidated damages in the amount of $ 3,149.40. Defendant was notified of said decision and did not proceed with an appeal under the bid depository rules.

In due time plaintiff filed its petition for an order confirming the award and the entry of judgment against defendant in the amount of the award.

Defendant, opposing the confirmation, moved for vacation of the arbitration award, for dismissal of plaintiff's petition to confirm said award and for the entry of judgment for **[***4]** defendant. One of the grounds urged in support of defendant's motion was that the bid depository rules were illegal as a restraint of trade contrary to both state and federal antitrust legislation.

Prior to the hearing, plaintiff filed documents to the effect that defendant's attempt to withdraw its plumbing bid was not made by telegram, as required under the bid depository rules, and that defendant had also violated another of said rules by insisting upon its right to withdraw *only* its plumbing bid while refusing to withdraw its combination bid covering plumbing, sheet metal and mechanical work.

After hearing, the court found that the bid depository rules in effect on December 7, 1965, constituted an illegal group boycott and that the arbitration award in plaintiff's favor was predicated upon said rules. It concluded as a matter of law that the bid depository rules were in violation of the Cartwright Act and were illegal per se in their entirety; that the arbitration award in plaintiff's favor was likewise illegal and unenforceable; and that defendant was not estopped from raising this defense because neither the action nor inaction of any party to an illegal agreement could **[***5]** validate it nor could the conduct of a party estop it from asserting such invalidity.

Judgment was accordingly entered in favor of defendant.

CA(1)[ ] **(1)** ***HN1***[ ] The California ***antitrust law***, commonly known as the Cartwright Act (*Bus. & Prof. Code, §§ 16700- 16758*) is patterned upon the federal Sherman Antitrust Act, and federal **[*369]** cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act. (*Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]*; *People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 232 [47 Cal.Rptr. 570]*.)

[380]** In reaching its determination relative to the illegality of certain of the bid depository rules adopted by the Contractors Association, the trial court relied upon the California case of *People v. Inland Bid Depository (1965) 233 Cal.App.2d 851 [44 Cal.Rptr. 206]*, and the federal case of *Mechanical Contractors Bid Depository v. Christiansen (10th Cir. 1965) 352 F.2d 817*.

In the *Christiansen* case, the court held that ***HN2***[ ] the adoption and enforcement of certain **[***6]** bid depository rules, including one requiring general contractors utilizing the depository to use *only* bids received through the depository, constituted an invalid restraint on interstate commerce in violation of the Sherman Act.

In the *Inland Bid Depository* case, the court held that ***HN3***[ ] group boycotts were illegal per se, constituting restraints on trade in violation of the Cartwright Act. The court further held that a bid depository could not be allowed to operate under rules which (1) prevent, preclude or in any manner limit any subcontractor from submitting a bid to a general contractor or awarding authority on any construction project at any time prior to the time set by the awarding authority for the receipt of bids upon any such construction project; (2) limit or restrict, in any way, the amount of a bid submitted by a subcontractor to a general contractor or awarding authority at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project; or (3) limit or in any way prevent a general contractor or awarding authority from receiving or considering any bid which is or may be submitted to him by a subcontractor at any time **[***7]** prior to the time set by the awarding authority for the receipt of bids upon a construction project.

CA(2)[ ] **(2)** Plaintiff concedes that certain of the bid depository rules adopted by the Contractors Association were of the type condemned in the *Christiansen* and *Inland Bid Depository* cases, i.e., section 2 of article III of said rules provides for a bid depository closing time of at least four hours before any prime bid closing time of 1 p.m. or thereafter and by certain **[*370]** designated hours of the preceding afternoon if the prime bid closing time is prior to 1 p.m.; section 6, subdivision (a), of article III provides that no subcontractor who is a member of the bid depository may "accept work" on any project being bid through the bid service from any general contractor to whom he did not bid in accordance with the bid depository rules and hence through the depository; section 6, subdivisions (b) and (c) of article III provide that a general contractor must use the low bid received from the depository and may use the bid of an "outside" subcontractor only if said bid is placed in the depository by the general contractor and is the low bid received through the depository.

Plaintiff, **[***8]** however, takes the position that even though the above-mentioned rules are violative of the Cartwright Act, the defense of antitrust illegality may not properly be asserted against the arbitration award in plaintiff's favor because such award was based upon defendant's violation of other depository rules which are themselves valid and lawful and capable of being enforced independently of the invalid rules.

The rules giving rise to the arbitration award in plaintiff's favor consist of the following:

Section 3, subdivision (a) of article III provides that a bid must be revoked or withdrawn before the depository closing time or within two hours thereafter and that the revocation must be confirmed in writing or by telegram. The rule prohibits any bid from being changed in any manner, as opposed to withdrawn, after the depository closing time. A changed bid submitted prior to the depository closing time supersedes an earlier bid.

Section 3, subdivision (c) of article III provides that in the event separate bids are also submitted in combination, the withdrawal of a separate bid requires the withdrawal of any combination bid containing the withdrawn bid.

[381]** Section 1 of article **[***9]** V provides that any user of the bid service who violates the rules may, by majority vote of the Fair Trade Committee, be subject to liquidated damages, suspension from the bid service or any other penalties prescribed by the committee.

Section 2 of article V provides that a noncomplying user shall be required to pay a complying user liquidated damages in the amount of four percent of the bid of the complying user (the terms "complying user" and "noncomplying user" are defined in the rules).

[*371] Sections 2 through 6 of article VI set forth the procedure governing the hearing and determination of disputes by the Fair Trade Committee and provide that the committee's decision shall be final and binding unless appealed in the manner prescribed in section 6.

Plaintiff argues that although the *Inland Bid Depository* case held that it was unlawful for a bid depository to impose rules limiting the time for the *submission* of bids, there is nothing in that opinion which suggests that a bid depository may not lawfully limit the time for the *withdrawal* of bids. Plaintiff reasons that since the arbitration award against defendant was predicated upon its failure to withdraw **[***10]** its bid in accordance with the depository rules and its subsequent refusal to be bound by such bid and to enter into a contract with plaintiff, the arbitration award can properly be enforced without giving effect to any of the rules of the type condemned in the *Christiansen* or *Inland Bid Depository* cases.

Defendant, in response, asserts that section 3, subdivision (a), imposes an illegal restraint on trade, within the meaning of the *Inland Bid Depository* case, because it deprives a subcontractor of the right to withdraw a particular bid and submit an altered bid at any time prior to the general bid opening time and requires him to perform such actions prior to an earlier time limit established by the bid depository rules, and further reasons that the imposition of this earlier time limit stifles competition in and of itself because it precludes a subcontractor from lowering a previously submitted bid during the precise period, immediately preceding the general bid opening time, which, as pointed out in the *Inland Bid Depository* case, "is precisely the time of the most intensive competition by the subcontractors" (p. 861).

Defendant also asserts that section 3, subdivisions **[***11]** (a) and (c), must be read together and that the latter provision imposes a further invalid restraint on trade because it requires that a subcontractor who withdraws a particular separate bid must also withdraw any combination bid containing the withdrawn bid. Defendant points out that plaintiff does not question that it was actually desirous of withdrawing only its plumbing bid without withdrawing its combination bid which included the plumbing, sheet metal and mechanical work, and that had it been permitted under the depository rules to withdraw its separate plumbing bid, its combination bid would have been the low combination bid for the plumbing, sheet metal and mechanical work and would also have been **[*372]** $ 567 lower than the combined total of the separate low bids for the plumbing, sheet metal and mechanical work submitted by the other subcontractors bidding through the depository. Under such circumstances, defendant contends that section 3, subdivisions (a) and (c), are clearly restrictive of free competition among subcontractors and that to enforce an arbitration award based upon defendant's violation of those provisions would be to foster an illegal restraint of trade. **[***12]** We agree.

The cases relied upon by plaintiff in support of its contention that the provisions of the rules that resulted in the arbitration award to plaintiff do not constitute a restraint of trade and hence cannot be used to deprive plaintiff of the judicial enforcement of the award have no application to the problem before us. In our opinion, analysis of section 3, subdivisions (a) and (c), effectively demonstrates that said provisions, when viewed in the context **[**382]** of the other bid depository rules which prohibit depository users from submitting or receiving bids outside the depository, do tend to stifle competition between subcontractors and do further an illegal restraint of trade within the meaning of the *Inland Bid Depository* case. Since section 3, subdivisions (a) and (c) contribute to this unlawful object, the arbitration award based upon defendant's violation thereof cannot be enforced by the courts.

Judgment affirmed.

Simpson v. Union Oil Co.

United States Court of Appeals for the Ninth Circuit

April 30, 1969

No. 22,148

Reporter

411 F.2d 897 *; 1969 U.S. App. LEXIS 12597 **; 1969 Trade Cas. (CCH) P72,788

Richard S. Simpson, Appellant, v. Union Oil Co. of California, Appellee

Disposition: **[**1]** The judgment is affirmed.

Core Terms

trial court, cases, new rule, consignment, retrospective, station, new trial, prospective application, announced, lease, renew, damages, anti trust law, favoring, motion for a new trial, gasoline, market value, Sherman Act, weight of the evidence, factors

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[] **Reviewability of Lower Court Decisions, Preservation for Review**

If no constitutional questions are raised or argued in the court below, they can not be presented and need not be considered on appeal.

Governments > Courts > Judicial Precedent

HN2[] **Courts, Judicial Precedent**

The U.S. Constitution neither prohibits nor requires retrospective effect of a court decision.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Defenses**

The defense to liability under the Sherman Act because of reliance upon prior law can not even be raised unless: (1) there is a clearly declared judicial doctrine, (2) upon which a defendant relies and (3) under which its conduct is lawful, (4) a doctrine which was overruled, (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.

Governments > Courts > Judicial Precedent

Governments > Legislation > Effect & Operation > Prospective Operation

HN4[] **Courts, Judicial Precedent**

Once the premise is accepted that the court is neither required to apply, nor prohibited from applying, a decision retrospectively, the court must weigh the merits and demerits in each case by looking to the prior history of the rule of law in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

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

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

HN5[] **Private Actions, Standing**

The private remedy under the federal antitrust laws was established by the Congress as a matter of public policy, to enlist persons injured by antitrust violations as enforcers by providing an inducement, treble damages plus expenses.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] **Reviewability of Lower Court Decisions, Preservation for Review**

The court does not ordinarily reverse on grounds not properly presented to the trial judge.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN7[] **Standards of Review, Abuse of Discretion**

The grant or denial of a new trial rests within the sound discretion of the trial court and absent a showing of clear abuse of discretion will not be overturned on appeal.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN8[] **Appeals, Standards of Review**

The power of a court of appeal to review the granting or denying of a new trial for excessive or inadequate verdicts or on the ground the verdict is against the weight of the evidence, is not as broad as that of the trial court in granting or denying the motion for a new trial in the first instance.

Tax Law > Federal Income Tax Computation > Valuation > Business Interests

HN9[] **Valuation, Business Interests**

In measuring the value of the good will of a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? These are the factors which would influence a prospective purchaser. The special value which the business might have to its owner, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business.

Judges: Jertberg, Duniway and Carter, Circuit Judges.

Opinion by: CARTER

Opinion

[*898] JAMES M. CARTER, Circuit Judge:

This case has been here before. It is an action for damages under the antitrust laws. On the first occasion the motion of Union Oil Company (hereafter **[*899]** Union) for summary judgment was granted. (1961 TRADE CASES Par. 69,936, p. 77,693). We affirmed. *Simpson v. Union Oil Company of California, 311 F.2d 764 (9th Cir. 1963)*. Certiorari was granted and the Supreme Court reversed 5-3, and remanded for further proceedings. *Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; rehear. den. *377 U.S. 949, 84 S. Ct. 1349, 12 L. Ed. 2d 313*.

The case involved Union's consignment of gasoline to service stations as a method of price maintenance. Since most of the problems resulting from the remand arise from language in the Supreme Court decision, supra, we quote pertinent parts:

> "Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale price maintenance, coercively **[**2]** employed.
>
> The case must be remanded for a hearing on all the other issues of the case, including those raised under the McGuire Act, 66 Stat. 631, *15 U.S.C. 45*, and the damages, if any, suffered. We intimate no views on any other issue; . . . We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device we announce today." *377 U.S. at 24-25*.

After remand and following a pretrial order of June 20, 1966, in the district court, appellant sought in the Supreme Court, a writ of prohibition or alternately a writ of mandamus, to preclude Union from asserting any "equities" which warrant prospective application of the *Simpson* decision, *377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*, supra, in any other court than the Supreme Court.

In the pretrial order above, the district court foreclosed the issues of whether Union had "attempted to monopolize" the wholesaling and retailing of gasoline in violation of Sec. 2 of the Sherman Act, and whether Union had unlawfully tied the **[**3]** sale of petroleum products to its leases in violation of Sec. 1 of the Sherman Act or entered into exclusive dealing contracts with its dealers. Accordingly, appellant also sought a writ in the Supreme Court, compelling the district court to try the aforesaid excluded issues. The applications for both writs were denied. *Simpson v. United States District Court, 385 U.S. 806, 17 L. Ed. 2d 121, 87 S. Ct. 188 (1966)*.

The case went to trial before a jury during January and February 1967 and resulted in a verdict for appellant against Union for $160,000. The trial court had reserved the "equities" issue for court decision. Union filed a motion for judgment N.O.V. and a motion for new trial. Appellant filed a motion to enter judgment upon the verdict. The trial court decided the "equities" issue in favor of Union; denied appellant's motion for judgment on the verdict; denied Union's motion for judgment N.O.V., but granted Union's motion for a new trial.

The trial court made findings of fact and conclusions of law on the "equities" issue, reported in *Simpson v. Union Oil Company of California, 270 F. Supp. 754 (N.D. Cal. 1967)*. By Finding 14 it found **[**4]**

> "On all the facts as they now have been made known by the trial of this case, it would be unfair and inequitable to apply to this damage action, wherein the operative facts all arose in the years 1956-1958, the rule respecting price-fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*."

Its Conclusions 2 and 3 read

> "2. The belief of defendant prior to April 20, 1964 that the Retail Dealer Consignment Agreements between itself and retail gasoline dealers and the actions taken by it pursuant thereto were entirely lawful under the antitrust laws was reasonable and warranted **[*900]** by *United States v. General Electric Company, 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192* and other authorities."
>
> "3. The equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California, 377 U.S. 13, [12 L. Ed. 2d 98, 84 S. Ct. 1051,]* and, particularly, do not warrant application of said rule to this **[**5]** case."

The court then entered its written Orders and Judgment. By the judgment

> "plaintiff's action herein against defendant is dismissed with prejudice." [1] Its order with respect to a new trial was that "defendant's motion to set aside the verdict on said issues [the issues submitted to the jury] and to grant a new trial thereon should a further trial be necessary is hereby Granted."

In substance, the trial court denied appellant a judgment on the verdict because of its findings and conclusions on the "equities" issues; but hedging against possible reversal on this portion of the case, set aside the verdict and granted a new trial.

The Questions Presented

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[1] The motion for judgment N.O.V. was denied because the trial court stated there was "some" proof of damage. This concerned issues submitted to the jury. The dismissal of the action was on the "equities" issue, decided by the court and not submitted to the jury. There is no inconsistency.

1. Should the *Simpson* **[**6]** decision (*377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98*) be applied only prospectively and not to this case?

2. If the dismissal of the action was error, was there also error in granting a new trial?

Other questions have been abandoned. [2]

[7]** I.

SHOULD THE SIMPSON DECISION HAVE ONLY PROSPECTIVE APPLICATION?

(1) *Constitutional Objections*.

We treat at the outset contentions by appellant purportedly raising constitutional questions. Appellant claims that the trial court ruling that the "equities" are in favor of and compel a prospective application of the Supreme Court decision in *Simpson*, runs afoul of constitutional provisions. Appellant argues "courts are without power under the United States Constitution, requiring the separation of powers between legislature and the courts to take away or render nugatory a federally created right to obtain damages for an injury from a defendant's violation of the Sherman Act;" that to deny appellant relief is to deny him due process of law; and that setting aside of the verdict and the granting of judgment to Union denied appellant due process of law.

A short answer is that ***HN1***[] no constitutional questions were raised or argued in the court below and therefore cannot be presented and need not be considered here. *Williamson v. Weyerhaeuser Timber Co., 221 F.2d 5, 14* (9 Cir. 1955). **[**8]**

[*901] It appears appellant is contending that every decision must operate retrospectively. This is based on an old archaic concept, now generally rejected. That concept is that the law has always been fixed and unchangeable and that where a court finds past interpretations are incorrect and proceeds to make a declaration of the law different from the past, the new rule applies to past events.

Judge Cardozo was one of the first to characterize the concept as unrealistic. See the discussion in *United States ex rel. George Angelet v. Fay, 333 F.2d 12, 15-16* (2 Cir. 1964) affirmed sub nom., *Angelet v. Fay, 381 U.S. 654, 14 L. Ed. 2d 623, 85 S. Ct. 1750 (1965)*. The Supreme Court has recently said in *Linkletter v. Walker, 381 U.S. 618, 629, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)* "the ***HN2***[] Constitution neither prohibits nor requires retrospective effect." *Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145 (1932)* was an early case where a lower court refused to make its decision retrospective **[**9]** and Justice Cardozo, writing for the Supreme Court, rejected constitutional contentions. (p. 364).

As to the contention that appellant had been deprived of a jury trial, the short answer is the record below. This constitutional claim was not raised below and cannot be considered here, *Williamson v. Weyerhaeuser, supra*; *Cox v. City of Freeman, 321 F.2d 887, 891* (8 Cir. 1963).

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[2] At the trial Union withdrew the McGuire Act defense referred to in the Supreme Court order of remand.

As to the precluded issues, "attempt to monopolize" and "tie in sales to leases," they are not discussed in the briefs, although referred to in appellant's "Statement of the Case" and "Specifications of Error." They are "deemed abandoned and need not be considered herein," *Peck v. Shell Oil Co., 142 F.2d 141, 143* (9 Cir. 1944).

Moreover if the trial court was wrong in its decision as to the "equities" but was correct in granting a new trial no harm has been done appellant.

Appellant attempted to inject these issues in the case in 1966, 8 years after the case started and after Simpson had filed a Pretrial statement in 1965 which had *not* contained them. The trial court properly excluded them as untimely and as injected "solely because of plaintiff's dissatisfaction with the court's ruling" on the "equities" issue, and thereby protracting the trial. The trial judge acted properly.

Likewise a court may set aside a verdict without constitutional encroachment. Neither the granting of the new trial nor the judgment as non-retroactive impinged on the constitutional provisions relied on by appellant.

(2) *The Trial Court Properly Considered and Ruled on the Equities Issue*.

The issue of the "equities" was properly before the trial court on remand. The Supreme Court said, " . . . when all the facts are known, there may be any equities that would warrant only prospective application . . . of the rule . . . we announce today." Obviously, the court was speaking of the *facts of this case*. There is no indication or reason to believe they were speaking *only of facts of other damage suits as they might arise in the future*. The 5th Circuit in *Guidry v. Continental Oil Company, 350 F.2d 342, 344 (1965)* **[**10]** stated that the reservation in *Simpson* "seemingly refers to the inequity to subjecting the Union Oil Company to a triple damage action for conduct that was apparently legal until the narrowing of *United States v. General Elec. Co., 1926, 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362*."

It is traditionally the function of the trial court to find the facts. The Supreme Court is ill equipped to carry out the fact finding process [3] and it would be absurd to read the Supreme Court's language to mean that the Supreme Court would take evidence and find the facts as to whether "equities" existed.

The trial court properly took evidence, and made findings of facts and conclusions of law as to whether there existed "equities that would warrant only prospective application . . ." of the rule the Court announced **[**11]** in *Simpson*. We think this was what the Court intended.

This fact finding was clearly to be performed by the trial judge and not by the jury. Moreover this duty was urged on the trial court by appellant and no objection as required by *Rule 51, F.R. Civ. P.*, was made, when the court instructed the jury that the issue was taken from the jury and that the court would decide it.

[*902] (3) *The Test to Determine if the Simpson Case Should Be Retrospective or Prospective in Application*.

Hanover Shoe, Inc. v. United Shoe Machinery Inc., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968) held that *American Tobacco Company v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* (in approving Judge Learned Hand's Alcoa analysis of "monopolization" as a violation of Section 2 of the Sherman Act in *United States v. Aluminum Company of America, 148 F.2d 416* (2 Cir. 1945)), had not altered the law of monopolization and that the problem of the retrospective or prospective application of a new rule of law was not involved in the case.

Appellant summarized language in *Hanover* (and Union agrees), as follows:

> "In **[**12]** its analysis of the issue the Supreme Court stated that ***HN3***[] the defense to liability under the Sherman Act because of reliance upon prior law could not even be raised unless (1) there was a clearly declared judicial doctrine, (2) upon which a defendant relied and (3) under which its conduct was lawful, (4) a doctrine which was overruled, (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful."

Generally as to the problem of prospective application of a new rule of law, " . . . the Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker, supra*; and *Great Northern R. Co. v. Sunburst Oil & Refining Co., supra.* Three alternatives were available in the instant case. The Court could have said, but did not, (1) that the rule applied to *Simpson* and all other cases prospectively; or (2) not to *Simpson* but to all other cases prospectively or (3) retrospectively to *Simpson* and all other cases.

[3] In actions by one State against another State, of which the Supreme Court has original jurisdiction, masters are appointed by the Supreme Court to initially find the facts and report to the court.

There can be no doubt the Court intended "when all the facts are **[**13]** known" to determine if the rule announced in *Simpson* should apply to that case. What the Court does, when this case again reaches it, will determine whether the *Simpson* rule is retrospective or prospective and whether it should be applied to the *Simpson* case.

In *Linkletter v. Walker, supra*, the Court said, "Once ***HN4***[] the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (p. 629).

Although the Court also said " . . . no distinction was drawn between civil and criminal litigation," (p. 627) the Court meant that in either a civil or criminal case, the new decision might be retrospective or prospective depending on the determination of the factors set forth above.

We think that under the reasoning of *Linkletter, supra*, in applying the test set forth, there are various distinctions **[**14]** between civil and criminal cases bearing on the question as to whether the rule should be applied to the case at bar.

In the criminal case, whether the question arises on direct or collateral attack, the defendant has been convicted of a crime and the decision to be made is, the validity or invalidity of the conviction. That decision must be made in the particular case then on appeal or review. The court may also provide in the same case for its retrospectivity *Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968)*; or do so in a subsequent case *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)* -- retrospective by *Doughty v. Maxwell, 376 U.S. 202, 11 L. Ed. 2d 650, 84 S. Ct. 702 (1964)*; or provide for prospective application only by a subsequent case, *Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)*, -- prospective for judgments after 6/19/61. *Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)*.

[*903] In three cases where the new rule was applied retrospectively, *Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956)*; **[**15]** *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)*; and *Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964)*, "the principle . . . applied went to the fairness of the trial -- the very integrity of the fact-finding process." *Linkletter v. Walker, supra, (381 U.S. at 639*).

Other considerations are "the necessity for an effective deterrent to illegal police action," and on the other hand "the wholesale release of the guilty victims." Linkletter v. Walker (*381 U.S. at 636-37*). The reliance on the old rule in criminal cases is not by the litigant, the defendant. The reliance is on the part of the law enforcement officers. *Johnson v. New Jersey, 384 U.S. 719, 731, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966)*.

These considerations are not present in a civil case. The problem in the civil case is different, and the last paragraph of *Simpson* and the five way test from *Hanover v. United Shoe Co., supra*, point the way.

The major consideration is -- did a party to the present litigation rely on a rule of law which has now been changed, so that it would be inequitable **[**16]** to apply the new rule to such party. There is another consideration which could conceivably come within the meaning of "any equities" referred to in *Simpson*. We note it briefly.

A substantial number of cases in which a plaintiff seeking damages has succeeded in persuading an appellate court to establish a new rule favorable to him, have applied the rule to him, but only prospectively as to all other possible plaintiffs. The reasons seem to be two: (1) that it is unfair to the party who has fought the case, sometimes through several courts, to tell him that he is right, but that he is to receive nothing for his efforts or his expenses, which may have been quite heavy, and (2) that there will be no incentive to a plaintiff to seek to have a new rule established, that is, to improve the law, if he is to get nothing for his pains if he succeeds.

Some, but not all of the cases seem to make a distinction between an individual plaintiff or small business entity, who for want of a better name we shall call the "one-time litigant" and the party which is a public body, a public utility, an insurance company or a major business corporation, to whom we shall apply the term "an institutional **[**17]** litigant."

The first reason above operates in favor of the "one-time litigant" who undertakes to have a new rule established when he sues an "institutional litigant" that has a continuing and recurring interest in the problem, such as an insurance company defending damage claims, a public utility defending similar claims, a manufacturer defending products liability cases, or a major company defending an antitrust case. By and large, the injured plaintiff in such cases is an individual or small business entity, who or which may have such a case only once in a lifetime. He gets no reward out of establishing a new rule in favor of others; if his damages are not recovered in the suit he brings, he will never get any. On the other hand, the "institutional litigant" that secures the establishment of a new rule, has the prospect of continuing future benefits from the rule, even if he does not get the benefit of the rule in the particular case. This may well be sufficient inducement for it to seek a new rule.

We cite in the margin [4] the cases in which an "institutional litigant" having **[*904]** a continuing interest in the problem secured a new rule, favorable to it, in a particular **[**18]** case, but did not get the benefit of the rule in that case. Nevertheless, it stood to benefit by the rule in future cases.

[19]** When we turn to the "one-time litigant" who gets a new rule established, a number of the cases give him the benefit of his success in the case in which the new rule is established. [5] **[**20]** Other cases deny the "one-time litigant" the benefits of his victory. [6]

The second reason, i.e. the "incentive idea," would seem to be applicable to private antitrust plaintiffs. The Supreme Court, this court, and many other courts, have repeatedly emphasized that ***HN5***[] the private remedy

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[4] State ex rel. Wash. *State Finance Committee v. Martin, 62 Wash. 2d 645, 663-73, 384 P. 2d 833 (1963)* (the state v. the state treasurer); *Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963)* (a tax case); *Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 824, 177 S.W. 2d 588, 153 A.L.R. 422 (1943)*; *American-First Title & Trust Company v. Ewing, 403 P. 2d 488* (Okla., 1965). As to such cases, see Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1, 17, 19 (1960). But the Arizona court in two other tax cases, has applied the new rule to the parties to the case, although declaring the rule to be prospective in other cases. *Duhame v. State Tax Comm'n, 65 Ariz. 268, 179 P. 2d 252, 171 A.L.R. 684 (1947)*; *Arizona State Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P. 2d 392 (1953)*.

[5] *Arizona State Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P. 2d 392 (1953)* [tax]; *Duhame v. State Tax Comm'n, 65 Ariz. 268, 179 P. 2d 252 (1953)* [tax]; *City of Fairbanks v. Schaible, 375 P. 2d 201 (Alaska 1962)* [sovereign immunity]; *Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965)*, cert. denied ***383 U.S. 946, 16 L. Ed. 2d 209, 86 S. Ct. 1204 (1966)*** [charitable immunity]; *Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E. 2d 89, 86 A.L.R. 469 (1959)*; *Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W. 2d 1 (1960)* [charitable immunity]; *Sherbutte v. Marine City, 374 Mich. 48, 130 N.W. 2d 920 (1964)* [sovereign immunity of a municipal corporation]; *Barker v. St. Louis County, 340 Mo. 986, 104 S.W. 2d 371 (1937)* [overruling prior cases which had upheld a 20-day statute of limitations for claims as to property taken for public use]; *Rampone v. Wanskuck Bldgs. Inc., 102 R.I. 30, 227 A. 2d 586, 589 (1967)* [overruling prior rule that tenant could not sue landlord in tort for breach of covenant to repair. New rule applied to plaintiff, but otherwise only prospective as of 60 days after filing of opinion, "so as to afford all interested parties a reasonable opportunity to become aware of this decision and to be guided accordingly"]; *Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W. 2d 249 (1963)* [charitable immunity]; *Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962)* [sovereign immunity]; ***Kojis v. Doctors Hospital, 12 Wis. 2d 367, 107 N.W. 2d 292 (1961)***; *Goller v. White, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963)* [intrafamily immunity].

See also *Culpepper v. Culpepper, 147 Fla. 632, 3 So. 2d 330 (1941)* where the court refused to apply to a pending case a rule *which had been applied* in the overruling case itself. Accord, ***Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251 (1944)***; *Ellsworth v. Brown, 387 P. 2d 634 (Okla. 1963)*.

[6] ***Continental Supply Co. v. Abell, 95 Mont. 148, 24 P. 2d 133 (1933)***, where the court was badly split on the issue; *Hare v. General Contract Purchase Co., 220 Ark. 601, 249 S.W.2d 973 (1952)*; *Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W. 2d 795 (1962)*; *Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961)*, where again the court was badly split. But see *England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964)*, a case in which the court declined to apply the new rule *against* the plaintiffs in that case.

was established by the Congress as a matter of public policy, to enlist persons injured by antitrust violations as enforcers by providing an inducement, **[**21]** treble damages plus expenses. [7]

[22]** The trial court did not consider this possible aspect of the equities. **[*905]** There was good reason for its not doing so. First, the usual result in an action for damages is that if the plaintiff wins he gets a judgment for his damages. It is against this background that we must read the Supreme Court's comment, which refers to "equities that would warrant only prospective application . . . of the rule . . . we announce today." *377 U.S. at 24-25*. We think that this means primarily that the appellant should recover unless there were equities favoring appellee that "would warrant" a denial of recovery to appellant, although it does not exclude the possibility of considering equities favorable to appellant, once equities favoring appellee have been shown. Thus, the trial court properly directed its attention to equities favoring appellee.

Second, if there are equities that favor appellant, other than the fact that he won the appeal, they ought to be brought to the court's attention. But appellant did not claim before the trial court that there were such equities favoring him. He merely argued (a) that he should be entitled to recover because he won the appeal **[**23]** regardless of the equities favoring appellee, and (b) that there were no equities favoring appellee. The nearest appellant came to arguing the point was in an objection to the court's finding 14, where he said "that this finding conflicts with the Congressional purpose and proper judicial enforcement of the antitrust laws." There was no discussion, no assertion that there were special equities favoring appellant. In a memorandum in support of his motion for entry of judgment in his favor, under the heading "The law encourages appeals and operates retrospectively to remedy a wrong," appellant cited several cases, only two of which are ordinary civil cases. These were *Mosser v. Darrow, 341 U.S. 267, 95 L. Ed. 927, 71 S. Ct. 680 (1951)* and *Molitor v. Kaneland Community Unit School Dist., 18 Ill. 2d 11, 163 N.E. 2d 89 (1959)*. Again, there was no discussion, no claim that there were special equities favoring appellant. Reliance was solely on the bare fact that he was the successful appellant.

This was the fact that the trial court necessarily weighed against the equities that it found to be favorable to appellee. ***HN6***[] **[**24]** We do not ordinarily reverse on grounds not properly presented to the trial judge. *United States v. Hudspeth, 384 F.2d 683, 689* (9 Cir. 1967); *Stephens v. Arrow Lumber Co., 354 F.2d 732, 734* (9 Cir. 1966).

The problem is fraught with difficulties, and we only hold that the trial court proceeded in a proper manner to consider the "equities" which should save Union from liability to appellant.

(4) *A New Rule was Announced by the Supreme Court in the Simpson case*.

We find it is clear that the Supreme Court announced a new rule in *Simpson*. The court's language concerning " . . . the rule governing price fixing by the 'consignment' device which we announce today," leaves no doubt. We do not intend to labor the point, except to cite the authorities relied on by the parties.

Union cites the line of supporting cases prior and subsequent to *United States v. General Electric Co., 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)*. [8] In that **[*906]** case it was definitely settled that consignment was not

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[7] *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*; *Lawlor v. National Screen Service Corp., 349 U.S. 322, 329, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)*; *United States v. Borden Co., 347 U.S. 514, 518, 98 L. Ed. 903, 74 S. Ct. 703 (1954)*; *Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 828* (9 Cir. 1963); *Flintkote Co. v. Lysfjord, 246 F.2d 368, 398* (9 Cir. 1957); *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358* (9 Cir. 1955); *Byram Concretetanks Inc. v. Warren Concrete Products Co., 374 F.2d 649, 651* (3 Cir. 1967); *Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817, 821* (10 Cir. 1965); *Osborn v. Sinclair Ref. Co., 324 F.2d 566, 572* (4 Cir. 1963); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893* (5 Cir. 1954). Where is the incentive if, after winning, the plaintiff gets nothing? See Note, 71 Yale L.J. 907, 945 (1962).

[8] The cases, in addition to General Electric, are *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 296, 298, 310, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*; *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 411, 55 L. Ed. 502, 31 S. Ct. 376 (1911)* Holmes, J. dissenting; *Boston Medical Supply Co. v. Lea & Febiger, 195 F.2d 853, 856* (1 Cir. 1952); *Texas Co. v.*

illegal under the antitrust laws, as a price fixing arrangement; that there was **[**25]** a distinction between an agency and a sale; and that the antitrust laws did not prohibit one from determining the price at which he sells his own property.

[26]** Thus, under the five-way test in *Hanover* there was a clearly defined judicial doctrine, under which Union's conduct was lawful, a doctrine which was overruled, in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. There remains only the question of Union's reliance on the old rule, a subject we discuss in the next section.

(5) *Reliance by Union and the Equities*

Had the trial court allowed the verdict to stand and entered judgment thereon, it would have been for $160,000 trebled, i.e. $480,000 plus attorney's fees.

Union had owned the leasehold on a service station in 1956. Relying on *United States v. General Electric, 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)* it marketed its gas by consignment. Appellant, a former employee, helped put the consignment plan into effect. At his request he was given a lease for 1 year on Union's station which was later renewed for one year. For refusing to comply with his consignment agreement, the lease was not renewed.

Although some cases hold that reliance on existing law is presumed, *State v. O'Neil, 147 Iowa 513, 126 N.W. 454, 457*, **[**27]** (Sup. Ct. of Iowa 1910), *Continental Supply Co. v. Abell, 95 Montana 148, 24 P. 2d 133, 140* (Sup. Ct. of Mont. 1933), Union offered proof of its reliance and the trial court **[*907]** made findings of fact and conclusions of law. They show that: Union's General Counsel was consulted about the consignment device and he advised Union that there were "no legal objections" and the device was "lawful both under the antitrust laws and all other laws." General Counsel studied, among others, the *General Electric* case and was "entirely satisfied" that "consignment and the proposed method of merchandising were lawful in every respect and would not violate the ***antitrust law***;" that the consignment agreement was "modeled upon" and was "substantially the same" as the agreement and arrangement in *General Electric*, and was true and bona fide; that acting in reliance on its General

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Higgins, 118 F.2d 636 (2 Cir. 1941); *United States v. General Electric Co., 115 F. Supp. 835 (D.N.J. 1953)*; *United States v. Richfield Oil Corp., 99 F. Supp. 280, 289 (S.D. Cal. 1951)*; affirmed per curiam ***343 U.S. 922, 72 S. Ct. 665, 96 L. Ed. 1334 (1952)***; ***United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949)***; United States v. Standard Oil Co. of Cal., CCH TRADE CASES P 69,399 (1959); United States v. Standard Oil Co. of Cal., CCH TRADE CASES P 69,212 (1958); *Shasta Douglas Oil Co. v. Work, 212 Cal. App. 2d 618, 28 Cal. Rptr. 190 (1963)*; *Gonzalez v. Derrington, 188 Cal. App. 2d 819, 10 Cal. Rptr. 700, 717 (1961)*, modified on other grounds *56 Cal. 2d 130, 363 P. 2d 1, 14 Cal. Rptr. 1 (1961)*; *Westinghouse Electric Corp. v. Lyons, 125 N.Y.S. 2d 420 (Sup. Ct. N.Y. County 1953)*, affirmed ***1 App. Div. 2d 770, 149 N.Y.S. 2d 212 (Sup. Ct. App. Div. 1956)***; *Avon Prod. v. Berson, 206 Misc. 900, 135 N.Y.S. 2d 867, 874 (Sup. Ct. N.Y. County 1954)*.

Union also cites cases and comments concerning the General Electric Rule, all stating that *Simpson* was a new rule in ***antitrust law***; *Sun Oil Co. v. F.T.C., 350 F.2d 624, 635* (7 Cir. 1965), cert. denied ***382 U.S. 982, 15 L. Ed. 2d 473, 86 S. Ct. 559 (1966)***; *C.B.S. Business Equip. Corp. v. Underwood Corp., 240 F. Supp. 413, 424 (S.D.N.Y. 1964)*; *Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526, 535-7 (S.D.N.Y. 1964)*; Brodley, Oligopoly Power Under the Sherman and Clayton Acts -- From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285, 320 (1967); Day, Developments in Antitrust During the Past Year, 25 A.B.A. Antitrust Section 3, 32 (1964); Handler, Recent Antitrust Developments -- 1964, 63 Mich. L. Rev. 59, 60, 62-64 (1964); Rahl, The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case, 29 A.B.A. Antitrust Section 216 (1965); Rahl, Control of an Agent's Prices: The Simpson Case -- A Study in Antitrust Analysis, 61 Nw. U.L. Rev. 1 (1966); 2 Tulsa L.J. 55 (1965); Note, Antitrust -- Consignment Agreements To Fix Retail Prices, 18 Vand. L. Rev. 222, 228 (1964); 10 Vill. L. Rev. 366, 368-69 (1965).

Appellant relies on: *F.T.C. v. Texaco, Inc., 381 U.S. 739, 14 L. Ed. 2d 714, 85 S. Ct. 1798 (1965)*; *Atlantic Ref. Co. v. F.T.C., 381 U.S. 357, 14 L. Ed. 2d 443, 85 S. Ct. 1498 (1965)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*; *United States v. Masonite Corp., 316 U.S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070 (1942)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922)*; *United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951)*, affirmed per curiam, ***343 U.S. 922, 72 S. Ct. 665, 96 L. Ed. 1334 (1952)***; *Stanton v. Texaco, Inc., 289 F. Supp. 884, 888-89 (D.R.I. 1968)*.

Counsel's opinion, Union put the plan in operation; that in 1954 and at all times until the *Simpson* decision on April 20, 1964 it was the "general and uniform view" that *General Electric* was the law and "that the rule of the case applied to all kinds of merchandise, and was not confined to **[**28]** patented articles;" that Union "acted reasonably and justifiably;" that until the *Simpson* decision Union "reasonably believed" that consignment agreements were wholly lawful and did not violate the antitrust laws and that Union was fully justified in that belief.

These findings were fully supported by the evidence and are binding on us. Appellant makes two attacks, one that the General Counsel did not give consideration to certain decisions. We have cited appellant's cases heretofore for reference and have held that the Supreme Court in *Simpson* knew it was announcing a new rule and so stated.

The second attack on the findings is that the General Counsel left enforcement of the agreements to a "marketing" department. If the consignment agreements were then legal it would follow that Union would have a right to enforce them. One method of enforcement was refusal to deal with a consignee who breached his agreement. Thus Union refused to renew appellant's lease.

The court made a finding that this was the only "coercion" [9] used against appellant. It was supported by the evidence and by a stipulation entered between counsel at the trial. No agreement provided appellant **[**29]** must take any or all of his gasoline needs from Union. See *Simpson v. Union Oil Co., 311 F.2d 764, 766*.

We think the court's finding on coercion was supported by the record, and that since the consignment agreement was lawful under *General Electric* it was also lawful to enforce it by refusal to deal and refusal to renew the one year lease.

The findings of the trial court on the equities and reliance were fully supported by the record.

II.

THE ORDER GRANTING A NEW TRIAL

The trial court refused to enter a judgment on the verdict but instead dismissed the case with prejudice, because of Union's reliance on prior **[**30]** laws and because the "equities" warranted only prospective application of the new rule in *Simpson* and did not warrant application to the case at bar.

The trial court also granted Union's motion for a new trial "should a further trial be necessary."

HN7[] The grant or denial of a new trial rests within the sound discretion of the trial court and absent a showing of clear abuse of discretion will not be overturned on appeal. *Oswald v. Cruz, 289 F.2d 488* (9 Cir. 1961); *Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 256* **[*908]** (9 Cir. 1957), cert. denied *356 U.S. 968, 2 L. Ed. 2d 1074, 78 S. Ct. 1008*, where the court said:

> "But having permitted the jury to come to its conclusion on the facts, *the trial judge then had the right, and indeed the duty, to weigh the evidence, as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence*, where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in **[**31]** the sound discretion of the trial judge, a miscarriage of justice."

Appellant's contention that the verdict was "well within the range of lost values to Mr. Simpson for the destruction of his business" does not rest on correct principles of law. Appellant also confuses the rule for granting a judgment N.O.V. with the rules for granting a new trial. A judgment N.O.V. is improperly granted if there is sufficient evidence

[9] See comments concerning the term "coercion" used in the *Simpson* opinion. Handler, supra note 8, at 64-5; Rahl, supra note 8, 29 A.B.A. Antitrust Section at 221-22; Rahl, supra note 8, 61 Nw. U.L. Rev. at 3, 8-9; 17 Stan. L. Rev. 519, 521-23 (1965); 2 Tulsa L.J. 55, 56-7 (1965); 37 U. Colo. L. Rev. 293, 294 (1965).

to support the verdict, *Williams v. Nichols, 266 F.2d 389, 393* (4 Cir. 1959) where the case was remanded for an "analysis and appraisal by the trial court of the weight of all the evidence."

See Moore's Federal Practice, Sec. 5908(5) and particularly page 3817, where motions for a directed verdict or for judgment N.O.V. both raising the legal sufficiency of the evidence are "sharply distinguished" from a motion for a new trial which is "addressed to the sound discretion of the trial court." *Liquid Veneer Corp. v. Smuckler, 90 F.2d 196* (9 Cir. 1937) and *Peterman v. Indian Motorcycle Co., 216 F.2d 289, 292* (1 Cir. 1954) were cases where a motion for a new trial was denied. If they stand for the proposition appellant **[**32]** contends for, -- that a verdict should not be set aside on a motion for new trial if "it can be sustained from any viewpoint of approach" (*Liquid Veneer*, page 205) they do not represent the present law of this circuit. *Moist Cold Refrigerator Co. v. Lou Johnson, supra.*

HN8[] The power of a court of appeal to review the granting or denying of a new trial for excessive or inadequate verdicts or on the ground the verdict is against the weight of the evidence, is not as broad as that of the trial court in granting or denying the motion for a new trial in the first instance. *Southern Pacific Co. v. Guthrie, 186 F.2d 926, 932-3* (9 Cir. 1951), cert. den. *341 U.S. 904, 95 L. Ed. 1343, 71 S. Ct. 614*; *Siebrand v. Gossnell, 234 F.2d 81, 94* (9 Cir. 1956).

No detailed listing of the evidence supporting appellant's theory of damages is necessary. The trial court stated that after the verdict was returned he was "shocked" with it. He granted the new trial on the grounds "that the verdict is against the weight of the evidence, shocks the conscience, **[**33]** is grossly and monstrously excessive, is the result either of passion or prejudice or of consideration by the jury of factors irrelevant to the litigation, is speculative, conjectural and a miscarriage of justice."

Appellant's theory of damage was that his business had been destroyed and he purported to offer proof on the value of his business as a service station operator. In *Standard Oil Company of California v. Moore, 251 F.2d 188* (9 Cir. 1957), cert. denied *356 U.S. 975, 2 L. Ed. 2d 1148, 78 S. Ct. 1139*, this court had before it the question of valuing a retail gasoline business. It laid down the rule as follows:

> "It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and retained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value.
>
> "As one means of proving going concern **[**34]** or good will value, Moore produced **[*909]** the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.
>
> "We agree. ***HN9***[] In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States, 338 U.S. 1, 16-17, 69 S. Ct. 1434, 93 L. Ed. 1765*. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential **[**35]** of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business. n44"
> "n44 Moore retains his life expectancy and business acumen. Assuming that he is entitled to, and so receives, the market value of the destroyed good will of his business, he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location."

Appellant proceeded however as if his case was one involving personal injuries. He premised his proof on the theory that he could operate the station for his life expectancy, 24 years, and on a calculation of net profits for the period; and on the further assumption that, having lost the business, he would never have any other earnings for the rest of his life, just as if he had been personally permanently disabled.

Appellant's damage, if any, resulted from (1) lost profits, if any, during his operation of the station because of the illegal restraints imposed on him **[**36]** by Union, and (2) the refusal of Union to renew his second one year lease and such further renewals as might be reasonably anticipated. [10] There was evidence of Union's policy to continually renew leases. A buyer, in valuing appellant's business, could reasonably take into account Union's renewal policy. But any damage suffered was, in general terms, damage to a going business and not personal injury or damage which would thereafter deprive appellant of all earning power from his services. The proper measure of damage was the market value of the business, i.e. the value of the goodwill of an operating business, and not the loss of earning power by appellant for his life time.

There was evidence that appellant remained in possession after his lease expired in May 1958 until June 5, 1958. He then operated a Mobil station for 2 years. After leaving the Mobil station he never again engaged in any branch of the oil or gasoline **[**37]** business, and the record shows he had no desire to.

The proof also showed from his profit and loss statement that his "take home" from the Union station averaged $473.43 per month and from the Mobil station $476.95 per month. He worked 17 hours per day, 7 days a week during his first year at the Union station and during the second year 12 hours per day 7 days a week. But the "take home" was not net profits from a business, since no allowance was made for the value of his labor.

The earnings from the station were only material in so far as they had a bearing on the market value of the business. Except in this respect, appellant's earnings were totally irrelevant. The issues should have been, what was the value of the business, what money did appellant have invested in it, what was **[*910]** its net income *after* deducting a fair return on capital and fair compensation to appellant for his work, what were the prospects of continual renewals of the lease and finally, if illegal restraints were removed, what were the prospects of additional profits from the business as it became better established. These are the factors that a willing buyer would consider in determining fair **[**38]** market value of the business.

Appellant's expert accountant played with figures, computed sums of money appellant *might* have earned at the service station and multiplied it by 24 years, his life expectancy. The $160,000 represented the present discounted value of about $10,500 per year over the 24 years period.

Clearly this type of evidence and computations does not comply with the method to value the loss of a business. No allowance was made for the value of appellant's labor, *Standard Oil Company v. Moore, supra*; and there was no diminution by reason of appellant's continued earning capacity.

Contention is made by appellant that affidavits taken from jurors and before the court caused or played a part in, the trial judge's decision to grant the motion for a new trial. Without discussing the appropriateness of such affidavits in this case, it is sufficient to state that the trial court expressly stated, in ruling on the motions for new trial that he did not rely on the jurors' affidavits.

We agree with the trial court that a $160,000 verdict for refusal to renew a one year lease is "monstrous" and against the weight of the evidence. The trial court did **[**39]** not abuse its discretion in granting a new trial. [11]

The judgment is affirmed.

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[10] There were also minor items of damage such as loss on sale of equipment, etc.

[11] Union properly requested instructions based on *Standard Oil Co. of Cal. v. Moore, 251 F.2d 188* (9 Cir. 1957), cert. denied ***356 U.S. 975, 2 L. Ed. 2d 1148, 78 S. Ct. 1139 (1958)***. They were rejected and exception taken. Union also requested an instruction that the jury should consider appellant's earning power in other occupations. It was also refused and exception taken. Thus the case went to jury much like a personal injury case in which the plaintiff was fully incapacitated and had lost his entire earning power.

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TNT Communications, Inc. v. Management Television Systems, Inc.

Supreme Court of New York, Appellate Division, First Department

May 1, 1969

No Number in Original

Reporter

32 A.D.2d 55 *; 299 N.Y.S.2d 692 **; 1969 N.Y. App. Div. LEXIS 4072 ***; 1969 Trade Cas. (CCH) P72,785

TNT Communications Inc., Appellant, v. Management Television Systems, Inc., et al., Respondents

Prior History: **[***1]** Appeal from an order of the Supreme Court at Special Term (Abraham N. Geller, J.), entered January 6, 1969 in New York County, insofar as it denied plaintiff's motion to dismiss the second separate and distinct affirmative defense and granted defendants' cross motion to dismiss the second cause of action.

Disposition: Order entered January 6, 1969, so far as appealed from, unanimously modified, on the law, to the extent of dismissing the second separate and distinct affirmative defense, and, as so modified, affirmed, with $ 50 costs and disbursements to plaintiff-appellant.

Core Terms

defendants', allegations, anti trust law, counterclaim, violations, trade secret, disclosure, sustaining, wrongdoing, practices, closed circuit television, general allegation, cause of action, subject matter, unrelated, modified, network, screen, alleged wrongful conduct, unfair competition act, business practice, direct relation, no purpose, plaintiff-appellant, disbursements, appropriated, monopolistic, transactions, multi-media, proceedings

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Price Discrimination, Defenses**

Where the effect of sustaining a defense would be to "lower the dam" for the admission upon the trial of "a second main stream of evidence, with its own bundle of facts and law," thereby impeding or diverting the rightful progress of this action for the enforcement of an alleged lawful and valuable right, the defense should be avoided.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN2[] **Price Discrimination, Defenses**

Allegations of collateral wrongdoing in the form of general monopolistic business practices should not be acceptable as a defense to an action brought for the protection of legal and proper interests; nor should the defense be sustained on the basis of ***antitrust law*** violations unrelated to plaintiff's cause of action.

Headnotes/Summary

Headnotes

Trade-marks, trade names and unfair competition -- trade secrets -- in action against plaintiff, former employees and associates and corporations to restrain disclosure and use of trade secrets relating to plaintiff's business, defense that plaintiff has engaged in acts of unfair competition and in conduct in violation of antitrust laws failed to show connection between plaintiff's alleged illegal practices and defendants' alleged wrongful conduct -- defense dismissed -- defense not sustainable under unclean hands doctrine -- defense not validated by allegations that plaintiff motivated by malice.

1. Plaintiff, **[***2]** which alleged that it is engaged in the business of offering networks of closed circuit television and related media for use by private and public organizations, brought this action against former employees and their associates and corporations to restrain disclosure and use of trade secrets relating to its business and to recover damages resulting from the alleged wrongful conduct in such disclosure and use. A defense interposed by defendants alleges that plaintiff, for the purpose of achieving a dominant position in its business, has engaged in numerous acts of unfair competition and predatory practices, and in conduct in violation of the antitrust laws of the United States and of the State of New York. Defendants fail to show any connection between plaintiff's alleged illegal practices and defendants' alleged wrongful conduct. The defense lacks a proper showing that the plaintiff's alleged illegal acts have caused or will result in any injury to the lawful rights of defendants. Defendants' allegations merely tend to show unrelated wrongdoing. The defense should be dismissed.

2. The defense is not sustainable as an "unclean hands" defense. Such a defense is available only **[***3]** when the illegal conduct of a plaintiff is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct.

3. The defense is not validated by the general allegations that the plaintiff's actions are motivated by malice and that this action is brought with intent to harass and destroy the defendants' corporation which is engaged in business as a competitor of plaintiff.

Counsel: *Marshall C. Berger* of counsel (*Edward C. Wallace* and *Martin D. Ginsburg* with him on the brief; *Weil, Gotshal & Manges*, attorneys), for appellant.

Joseph H. Einstein of counsel (*Jay H. Topkis* with him on the brief; *Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison*, attorneys), for respondents.

Judges: Eager, J. P. Tilzer, McGivern, Nunez and McNally, JJ., concur.

Opinion by: EAGER

Opinion

[*56] **[**693]** The plaintiff, according to the allegations of its complaint, is engaged "in the business of offering networks of closed circuit television and related media" for use by private and public organizations, "with emphasis on large screen displays to groups rather than individual viewing." It has brought this action against former **[***4]** employees and their associates and corporations to restrain disclosure and use of trade secrets relating to its multi-media network business and to recover damages resulting from the alleged wrongful conduct in such disclosure and use.

[*57] **[**694]** The defendants' second defense and counterclaim, interposed in the action, alleges that plaintiff, for the purpose of achieving a "dominant position" in its business, "has engaged in numerous acts of unfair competition and predatory practices", with some specification of such acts; and there is included the general allegation that plaintiff "has achieved and seeks to maintain a dominant position in the large screen closed circuit television business by conduct in violation of the antitrust laws of the United States [and] * * * of the State of New York". The plaintiff moved to strike the defense and counterclaim and Special Term granted the motion to the extent of striking the same as a counterclaim while sustaining defendants' allegations as a defense. Plaintiff appeals, contending that defendants' pleading statement is not available as a defense. We conclude that the defense is not sustainable.

The defendants' allegations **[***5]** fail to show any connection between plaintiff's alleged illegal practices and the defendants' alleged wrongful conduct in appropriating the trade secrets appertaining solely to the multi-media network branch of the plaintiff's business. Defendants' alleged thievery and plagiarism were and are independent acts unrelated to plaintiff's improper business methods set forth in the defense. Furthermore, the stated defense lacks a proper showing that the plaintiff's alleged "acts of unfair competition and predatory practices", including alleged antitrust violations, have caused or will result in any injury to the lawful rights of defendants.

Under the circumstances, defendants' allegations of monopolistic practices and ***antitrust law*** violations by plaintiff in the conduct of its general large screen closed circuit television business can furnish no justification for the alleged stealing and wrongful use by defendants of the trade secrets. The defendants' allegations merely tend to show unrelated wrongdoing. But collateral wrongdoing is not generally the basis for a defense in any case. Although such wrongdoing may, on a proper showing of injury, furnish the basis for a counterclaim, **[***6]** here, the defendants' counterclaim was properly dismissed and they did not appeal.

The fact is that proof of the acts alleged in the particular defense can serve no purpose other than to import into this case a multiplicity of complex transactions having no bearing upon the subject matter of the action. The sustaining of the defense would permit its use as a vehicle to enable the defendants to conduct pretrial disclosure proceedings relative to plaintiff's general business transactions over many years and long antedating **[*58]** the wrongful conduct charged against the defendants. Such disclosure proceedings would appear to serve no purpose other than to allow defendants to probe generally into the business practices and secrets of the plaintiff. In reality, ***HN1***[] the effect of sustaining the defense would be to "lower the dam" for the admission upon the trial of "a second main stream of evidence, with its own bundle of facts and **[**695]** law," thereby impeding or diverting the rightful progress of this action for the enforcement of an alleged lawful and valuable right. This should be avoided. (See *Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 A D 2d 170, 173*.) **[***7]**

We conclude that ***HN2***[] allegations of collateral wrongdoing in the form of general monopolistic business practices should not be acceptable as a defense to an action brought for the protection of legal and proper interests; nor should the defense be sustained on the basis of ***antitrust law*** violations unrelated to plaintiff's cause of action. The defense should not be allowed where, in effect, it serves merely as an indirect method of enforcing compliance with the antitrust laws. (Cf. *Kelly v. Kosuga, 358 U.S. 516*.)

The decision of *Remington Rand, Inc. v. International Business Mach. Corp. (167 Misc. 108*), cited at Special Term and relied upon by defendants is not in point. There, the defense based upon alleged ***antitrust law*** violations was sustained because the violations were held to invalidate the contract which formed the basis of the cause of action defended against. Thus, there was a direct relationship between the subject matter of the cause of action and the defense that is not present here.

We readily reject defendants' urging that their allegations are sustainable as an "unclean hands" defense. It is settled that such a defense is available only when the illegal **[***8]** conduct of a plaintiff is "directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct". (*National Distillers Corp. v. Seyopp Corp., 17 N Y 2d 12, 15-16*.) Here, as aforenoted, the elements of direct relationship and special injury are absent.

Finally, the defense is not validated by the general allegation that the plaintiff's actions are motivated by malice and by the general allegation that this action is brought with intent to harass and destroy the defendants' corporation which is engaged in business as a competitor of plaintiff. The ulterior motives and purposes of plaintiff, if any, in bringing the suit are immaterial if, as alleged by it, defendants have wrongfully appropriated its valuable trade secrets. The question here is solely whether plaintiff's interests are entitled to the protection **[*59]** of the court. If so, the right to such protection may not be defeated by proof of the existence of ill will toward defendants. (See *Ramsey v. Gould, 57 Barb. 398, 402*; 1 C. J. S., Actions, § 24.)

The order, entered January 6, 1969, sustaining the second defense as such, should be modified, **[***9]** on the law, to provide that such defense be dismissed, and the order should otherwise be affirmed, with costs and disbursements to plaintiff-appellant.

[696]** Order entered January 6, 1969, so far as appealed from, unanimously modified, on the law, to the extent of dismissing the second separate and distinct affirmative defense, and, as so modified, affirmed, with $ 50 costs and disbursements to plaintiff-appellant.

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United States v. Uniroyal, Inc.

United States District Court for the Southern District of New York

May 5, 1969

No. 64 Civ. 1949

Reporter

300 F. Supp. 84 *; 1969 U.S. Dist. LEXIS 10949 **; 1969 Trade Cas. (CCH) P72,786

United States, Plaintiff, v. Uniroyal, Inc., formerly known as United States Rubber Co., Defendant

Core Terms

retailers, practices, salesmen, prices, sales manager, Sherman Act, violations, injunctive relief, manufacturer, resale price, discount, suggested retail price, retail price, episodes, footwear, discontinuance, advertising, conspiracy, selling, personnel, cases, abandoned, canvas, proven, sales, price-cutting, price-fixing, merchandise, injunction, resumption

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

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

HN1[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A combination or conspiracy between a manufacturer-supplier and its retailer-customers which interferes with the setting of retail prices by free market forces is unlawful per se. Nor may a manufacturer-supplier lawfully restrict its retailer-customers' dispositions of the goods it sells them. The authorities have always distinguished between situations, on the one hand, in which a manufacturer-supplier simply announces its suggested retail prices and refuses to sell to distributors and dealers which do not maintain the suggested price and those situations, on the other hand, in which the manufacturer-supplier takes further steps to effectuate compliance with its suggestion. In the former category, the manufacturer is merely exercising its lawful right to select its customers where other and equivalent brands are readily available on the market.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

HN2[] **Antitrust & Trade Law, Sherman Act**

Although a unilateral refusal to deal which does not eventuate in an agreement does not itself violate *§ 1* of the Sherman Act, no matter what the reason, any express resale price-fixing agreement is per se unlawful. The combination or conspiracy required by *§ 1* of the Sherman Act, however, need not be express; concerted action may be inferred from a course of conduct by the alleged participants. Moreover, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. Thus, a comprehensive and firmly enforced retail price policy, resulting in some cases in unwilling compliance by retailers, constitutes a violation. A supplier may not use coercion on its retail outlets to achieve resale price maintenance. It matters not what the coercive device is.

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

HN3[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Where the customers' acquiescence in the suggested prices of the manufacturer is not a matter of individual free choice prompted alone by the desirability of the product, an agreement or combination in violation of the antitrust laws may be found. The manufacturer may not induce the acquiescence of some retailers by promising the adherence of others or institute a program of making threats or a system for detection and reporting.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN4[] **Antitrust & Trade Law, Sherman Act**

Mere complaints by a manufacturer's customers that retailers are engaging in price-cutting or discounting do not in themselves constitute a combination and violation of *§ 1* of the Sherman Act. However, if a manufacturer reacts to such complaints by cutting off the offending retailers, a conspiracy or combination may be found to exist. And if the manufacturer goes still further and induces the retailers to discontinue their discounting practices, the requisite agreement is apparent.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Once the previous affirmative efforts of a manufacturer to secure compliance with its suggested retail prices have been shown sufficiently to establish the existence of an unlawful conspiracy or combination, then a refusal to deal, undertaken in pursuance of the conspiracy or combination, transgresses the antitrust laws.

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

HN6[] Duties & Liabilities, Unlawful Acts of Agents

Liability may be imposed upon a corporation for the acts of its agents, contrary to their orders and without authority, express or implied, merely because they were committed in the course of the corporation's business and within the scope of the agents' employment.

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

HN7[] Duties & Liabilities, Unlawful Acts of Agents

A corporation has a responsibility to eliminate unlawful practices by its salesmen and branch managers in the course of their routine labors - the selling of the corporation's products - even if the extent of its business precludes the personal supervision of high level officers who, as a result, rely upon written and oral instructions to their subordinates to insure that their policies will be carried out.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

HN8[] US Department of Justice Actions, Civil Actions

When a corporation is shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN9[] US Department of Justice Actions, Civil Actions

A Court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. Postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN10[] US Department of Justice Actions, Civil Actions

The determination necessary to the granting of injunctive relief in an antitrust case, that there exists some cognizable danger of recurrent violation, is a determination that there exists a risk which is something more than the mere possibility which serves to keep the case alive.

Civil Procedure > ... > Justiciability > Mootness > Public Interest Exception

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > ... > Justiciability > Mootness > Voluntary Cessation Exception

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN11[] Mootness, Public Interest Exception

When a corporation accused of illegal conduct under *§ 1* of the Sherman Act is free to return to its old ways, its voluntary cessation of illegal conduct does not make the case moot, even though there is no likelihood of resumption of unlawful conduct. The Court retains power to hear and determine the case because a controversy may remain which the public has an interest in having settled. The test for mootness is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN12[] US Department of Justice Actions, Civil Actions

There has been some confusion over what, if anything, is the difference between (i), the absence of any "cognizable danger of recurrent violation" which leads to the denial of injunctive relief in an action under *§ 1* of the Sherman Act and (ii), the absence of a "mere possibility" that the wrong will be repeated that deprives a Court of the power to hear and determine a case altogether. The answer seems to have traditionally been found in the reasons behind the corporate defendant's discontinuance of unlawful practices. Such a discontinuance does not relieve a Court of the duty to pass on the question of legality where by the mere volition of the parties the combination could come into existence at any moment. Where, however, the discontinuance was impelled by extrinsic circumstances beyond the defendant's control, a Court lacks power to decide the academic question left behind.

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

Civil Procedure > ... > Justiciability > Mootness > General Overview

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

HN13[] **Sherman Act, Remedies**

Where there has been no showing on the record that the reason for a corporate defendant's voluntary cessation of its unlawful pricing practices was fear of suit brought about by the Government investigation in a case, the question is whether the abandonment of unlawful price-maintenance practices due to a decision that such practices are economically unsound is "action by the defendant" or a result of a force beyond its control. If it is the latter, the case is moot and the complaint should be dismissed. If it is the former, the defendant should be adjudged to have violated *§ 1* of the Sherman Act and the Court should retain jurisdiction for the granting of further relief, upon application of the Government, in the event of future violations. The United States Supreme Court has twice indicated a preference for the latter course in cases where business considerations have prompted a defendant's reversal in policy.

Judges: [1]** Pollack, D.J.

Opinion by: POLLACK

Opinion

[*86] POLLACK, D.J.:

The complaint in this action was filed on June 24, 1964 under Section 4 of the Sherman Act to prevent and restrain defendant from alleged continuing violations of *Section 1* of the Act, *15 U.S.C. § 1*, in interstate trade and commerce in rubber-soled canvas footwear, produced and sold by defendant under the names of "Keds" and "Kedettes". [*] The first paragraph of the multi-paragraph prayer for relief contains the customary request that this Court "adjudge and decree" that the defendant violated the Sherman Act. The remaining paragraphs specify the various injunctive remedies sought against the defendant to restrain its future conduct.

[2]** The defendant filed its answer on July 15, 1964 denying all of the substantive **[*87]** allegations of the complaint. On June 21, 1967, an order was filed amending the caption of the action to show defendant's change of name from United States Rubber Company to Uniroyal, Inc.

Both sides engaged in extensive discovery, by deposition and otherwise, which was completed shortly before the commencement of the trial. This included approximately 75 depositions, five sets of interrogatories, the exchange of a vast quantity of documents both by agreement of counsel and by formal process and requests to admit pursuant to *Rule 36 of the Federal Rules of Civil Procedure*. The parties stipulated to a number of matters and these are reflected in the findings of fact contained herein.

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[*] In 1967, defendant changed the designation of its "Kedettes" footwear to its registered trademark "Grasshoppers", a name formerly used to designate a style of "Keds". In 1968, defendant broadened the "Grasshoppers" line to include leather sandals previously called "Royal Continentals" which are not included in this action. Throughout this opinion and the findings herein, the term "Kedettes", whether or not so expressly stated, shall include the footwear now called "Grasshoppers" as well, except for that portion of the line formerly called "Royal Continentals".

The Government claims that the defendant has combined and conspired to eliminate price competition among retail dealers and to curtail or eliminate the participation of discount retailers in the distribution of "Keds". As a result, the Government asserts, consumers were forced to pay high, arbitrary and non-competitive prices for "Keds" and "Kedettes".

The Government sought to establish that the defendant made **[**3]** known to its retailers "suggested" or "anticipated" resale prices and secured their promise, in advance of sales, to resell "Keds" and "Kedettes" only at those prices. The Government further claimed that, on the basis of complaints made by competing retailers, the defendant sought to convince price-cutting retailers to maintain prices in the future and that in most cases such retailers agreed. It also claimed that in a number of instances the defendant refused to sell "Keds" and "Kedettes" to retailers who did not adhere to the suggested or anticipated prices and renewed such sales only after receiving an assurance of future adherence. Further, it was claimed that to prevent price-cutters from obtaining the canvas footwear from other sources, the defendant secured agreements from retailers that they would not resell to other retailers; and that, to assure the elimination of retail price competition, the defendant obtained the agreement of price-cutting retailers to cease sales at particular locations.

Defendant denied the charge of conspiracy. It presented a defense consisting, in part, of its refutation and explanation of the circumstances of a substantial number of episodes **[**4]** of alleged unlawful activity. Defendant asserted that any unlawful practices on the part of its sales personnel were ancient, sporadic, isolated occurrences which had no anti-competitive effects at the time and have none now. Moreover, defendant contended that substantial direct and positive testimony and other evidence conclusively showed that these practices were unauthorized.

The evidence adduced at trial established the existence of thirty-eight episodes in which some of defendant's salesmen and occasionally, sales managers, took action intended to curb price-cutting. Although such episodes were too few in number to have had any significant impact on competition, they were nonetheless violative of the Sherman Act and should have been eradicated by a more alert and stern policing system than defendant had in effect at the time.

During the past six to eight years, there has been a substantial rise and spread of chain and discount operations and other price-cutting retailers. These have come to be accepted as a way of retail life. There has also been an increase in the number of lines of rubber-soled canvas footwear, including imported ones, competitive with "Keds" and "Kedettes". **[**5]** Concurrently with these developments, ***antitrust law*** has gradually reached a more restrictive definition of permissible conduct on the part of a manufacturer-supplier aimed at maintaining resale prices on its goods.

Defendant has abandoned the practices violative of the Sherman Act; it has instructed its sales staff that any attempt to maintain resale prices is unlawful; and it has changed personnel and assignments within its sales organization to **[*88]** insure proper business conduct on their part.

Looking backwards, it is plain that all parts of the sales organization did not fall into legal step at once. But the evidence is clear and convincing that the activity of the kind complained of by the Government has ceased; and the defendant's intent, expressed on the record, to comply with the law in the future is accepted as bona fide. Accordingly, on the entire record presented to this Court, no substantial basis has been established by credible evidence that there is any danger of recurrent violation. Hence, there is no warrant for injunctive relief.

The considerations in detail that have led the Court to these findings and conclusions are as follows.

Defendant is a New **[**6]** Jersey corporation. It has its principal place of business at 1230 Avenue of the Americas, New York, New York in this district. It engages in interstate commerce by manufacturing, advertising and selling rubber-soled canvas footwear (often called "canvas footwear") and other products.

Defendant is the largest manufacturer and distributor of rubber-soled canvas footwear in the United States. It markets certain of its men's, women's and children's footwear under its registered trademarks, "Keds" and

"Kedettes". Defendant advertises such footwear nationally and locally by way of television, radio and periodicals, and distributes most of its "Keds" and "Kedettes" to retailers throughout the United States for resale to consumers.

Defendant does its domestic manufacturing and selling through separate operating divisions. It formerly manufactured and sold "Keds" and "Kedettes" through its footwear and general products division. That division was dissolved on April 17, 1962, and from that date defendant has continued to manufacture and sell "Keds" and "Kedettes" through its consumer and industrial products division. Both divisions have had their main headquarters in New York City **[**7]** and ancillary headquarters in Naugatuck, Connecticut.

The wholesale price levels of the different styles of the "Keds" and "Kedettes" that are offered by the defendant differ substantially from one another. The cheaper lines of "Keds" have included at different times such styles as the "Rover", the "Duo-Life Bal", the "Olympia" and the "Gladiator".

Defendant from prior to 1958 to the present has communicated "suggested" or "anticipated" retail prices to many of its retailers throughout the United States through published lists or oral communications to such retailers by defendant's employees and agents.

Such prices have been distributed locally by defendant's district sales managers or salesmen and not on a nationwide basis by defendant's central offices. In some districts some salesmen have distributed such lists, and others have not. Some of the salesmen have given such lists only to those who have asked for them. The suggested retail prices given in the lists distributed by the district sales managers or salesmen have not necessarily coincided with those contained in the lists distributed by defendant's central offices.

The relevant legal rules are clear. ***HN1***[] A combination **[**8]** or conspiracy between a manufacturer-supplier and its retailer-customers which interferes with the setting of retail prices by free market forces is unlawful *per se*. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*; *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*. Nor may a manufacturer-supplier lawfully restrict its retailer-customers' dispositions of the goods it sells them. *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*.

The authorities have always distinguished between situations, on the one hand, in which a manufacturer-supplier simply announces its suggested retail prices and refuses to sell to distributors **[*89]** and dealers which do not maintain the suggested price and those situations, on the other hand, in which the manufacturer-supplier takes further steps to effectuate compliance with its suggestion. In the former category, the manufacturer is merely exercising its lawful right to select its customers where other and equivalent brands are readily available on the market. *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 **[**9]** S. Ct. 465 (1919)*, cited and explained in *United States v. Arnold, Schwinn & Co., 388 U.S. at 376 87 S. Ct. 1856*; *United States v. Parke, Davis & Co., 362 U.S. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1959)*; *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)*; *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452-453, 66 L. Ed. 307, 42 S. Ct. 150 (1922)*; *Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964)*, cert. dismissed, *381 U.S. 125, 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965)*; *Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 1969 TRADE CASES P72,694* (S.D.N.Y. 1969, Herlands, J.).

HN2[] Although a unilateral refusal to deal which does not eventuate in an agreement does not itself violate *Section 1* of the Sherman Act, no matter what the reason, see Turner, The Definition of Agreement under the Sherman Act, Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 690 (1962), any express resale price-fixing agreement is *per se* unlawful. *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *United States v. Bausch & Lomb Optical Co., **[**10]** 321 U.S. 707, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)*; *United States v. Univis Lens Co., 316 U.S. 241, 86 L. Ed. 1408, 62 S. Ct. 1088 (1942)*; *United States v. A. Schrader's Son, Inc., 252 U.S. 85, 64 L. Ed. 471, 40 S. Ct. 251 (1920)*; *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. The combination or conspiracy required by *Section 1*, however, need not be express; concerted action may be inferred from a course of conduct by the alleged participants. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939); Girardi v. Gates Rubber Co. Sales Div. Inc., 325 F.2d 196 (9th Cir. 1963). Moreover,

> an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. United States v. Parke, Davis & Co., 362 U.S. at 43.

Thus, a comprehensive and firmly enforced retail price policy, resulting in some cases in unwilling compliance by retailers, constitutes **[**11]** a violation. Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). "[A] supplier may not use coercion on its retail outlets to achieve resale price maintenance. . . . [It] matters not what the coercive device is." Simpson v. Union Oil Co., 377 U.S. at 17.

HN3[] Where the customers' acquiescence in the suggested prices of the manufacturer is not "a matter of individual free choice prompted alone by the desirability of the product ", an agreement or combination in violation of the antitrust laws may be found. United States v. Parke, Davis & Co., 362 U.S. at 47. The manufacturer may not induce the acquiescence of some retailers by promising the adherence of others or institute a program of making threats or a system for detection and reporting. United States v. Parke, Davis & Co., supra; Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 84 L. Ed. 852, 60 S. Ct. 618 (1940); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922).

HN4[] Mere complaints by a manufacturer's customers that retailers are engaging in price-cutting or discounting do not in themselves constitute a combination and violation of Section 1. Interphoto Corp. v. Minolta **[**12]** Corp., 1969 TRADE CASES **[*90]** at 86,478, n. 3; Carbon Steel Products Corp. v. Alan Wood Steel Co., 289 F. Supp. 584 (S.D.N.Y. 1968); and cf. Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963). However, if a manufacturer reacts to such complaints by cutting off the offending retailers, a conspiracy or combination may be found to exist. And if the manufacturer goes still further and induces the retailers to discontinue their discounting practices, the requisite agreement is apparent. United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1959); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922).

HN5[] Once the previous affirmative efforts of the manufacturer to secure compliance with its suggested retail prices have been shown sufficiently to establish the existence of an unlawful conspiracy or combination, then a refusal to deal, undertaken in pursuance of the conspiracy or combination, transgresses the antitrust laws. United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 84 L. Ed. 852, 60 S. Ct. 618 (1940); Interphoto **[**13]** Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1969).

Turning now to the case at bar, the relevant products include numerous items. [1] Although defendant's "Keds" and "Kedettes" have sustained a loss in their share of the market, defendant has sold these products to between 25,000 and 30,000 retailers at any given time during the period of the alleged conspiracy, [2] **[**14]** through over 200 salesmen across the country. [3]

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[1] Both the "Keds" and "Kedettes" lines of canvas footwear comprise many different styles and types, each of which has its own name and code number. In 1963, for example, defendant offered for sale over 100 different "Keds" styles and over 50 different "Kedettes" styles. Many of these styles included a number of different colors as well as a full range of sizes and widths.

[2] During the past three years, defendant has sold "Keds" and "Kedettes" (or both) to retailers whose number has totaled:

1966

28,801

1967

27,435

[15]** **[*91]** It is against this background that we must view the thirty-eight incidents of violations of the Sherman Act by resale price maintenance acts or interference with disposition of merchandise sold to a retailer which the proof established. These occurred in sixteen [4] of defendant's **[*92]** twenty-five then existent branches. [5] The

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1968

24,461

(first six months).

Although precise data is not available, a reliable, conservative estimate by the defendant places the total number of retailers to whom it has sold "Keds", "Kedettes", or both at over 25,000 for each year since 1958.

[3] These salesmen, sometimes called sales representatives, have numbered between 200 and 225 in recent years, each being assigned to a geographical area called a territory. These sales representatives work under the supervision of district sales managers. Defendant has assigned each district sales manager to a geographical area called a district, sometimes referred to as a "red-line" district. Each such manager has his headquarters within his district at a local office called a branch. Branches have been located in various cities throughout the country. Each district sales manager has a number of salesmen reporting to him and he assigns to each of them a territory within his district. The district sales managers report to regional sales managers, each of whom is located within the region and supervises a number of district sales managers. Regional managers report to the manager of branch sales, who is stationed at defendant's principal office in New York City. Until April 17, 1962, the manager of branch sales reported to the general sales manager of the footwear and general products division. The latter reported to the general manager of that division, then a corporate vice president. Since April 18, 1962, the manager of branch sales reports to a divisional vice president of the consumer and industrial products division. The latter reports to the president of that division, who reports to the president of the corporation, Uniroyal's chief executive officer.

Defendant compensates all of its sales employees in a manner calculated to encourage them to increase the volume of "Keds" and "Kedettes" sales. The manager of branch sales, each regional sales manager, each district sales manager and each sales representative receive a fixed salary plus an annual bonus. The bonus represents a substantial fraction of the employee's income and is directly proportional to the volume of sales produced by him, or, in the case of a manager, by his subordinates. Defendant also uses other means to encourage its sales employees to increase sales volume and to expand distribution by opening new accounts.

[4] The incidents proven, classified by branch, are as follows:

Date

Specific Location

Los Angeles, Cal. Branch

1958

San Diego, Cal.

1960

Santa Monica, Cal.

Denver, Colo. Branch

1963

Lamar, Colo.

1964

Boulder, Colo.

Miami, Fla. Branch

defendant's conspiratorial conduct actually proven over a period exceeding a decade involved slightly over fifteen

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1959-65

Pompano Beach, Fla.

Atlanta, Ga. Branch

1962

Cordele, Ga.

Kansas City, Kan. Branch

1960-64

C. R. Anthony (see below)

1961

Topeka, Kan.

1961

Topeka, Kan.

New Orleans, La. Branch

1958

New Orleans, La.

Baltimore, Md. Branch

1960

Roanoke, Va.

Boston, Mass. Branch

1958

Waltham, Mass.

1958

Hartford, Conn.

1958-61

Conn. and Mass.

1961

Conn. and Mass.

1961

Torrington, Conn.

1962

Gloucester, Mass.

1962

Winchester, Mass.

1962

Fall River, Mass.

1962

Boston, Mass.

one-hundredths of one percent (0.15%) of the total number of customers on defendant's books at any given point in

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St. Louis, Mo. Branch

1960

Berland (see below)

1960-62

Berland (see below)

Buffalo, N.Y. Branch

1958-64

Buffalo, N.Y.

1958-67

Hamburg, East Aurora, N.Y.

1962

Berland Cheektowaga, N.Y.

(see below)

New York, N.Y. Branch

1961

Berland, Levittown, N.Y.

(see below)

Cincinnati, O. Branch

1958

Elwood, Inc.

1961

Kenwood, O.

1961

Dayton, O.

1961

Cincinnati, O.

1962

Newark, O.

Pittsburgh, Pa. Branch

1958

Charleston, W. Va.

1962

Charleston, W. Va.

Dallas, Tex. Branch

1958

Marfa, Tex.

Houston, Tex. Branch

that period. [6] Of the thirty-eight episodes proven, nine arose in or prior to 1962 in the Boston Branch area while

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1963

Austin, Tex.

Seattle, Wash. Branch

1954

Bellevue, Wash.

1962

Seattle, Wash.

1963

Renton, Wash.

Kenneth M. Kaligian was Assistant District Sales Manager or District Sales Manager. Thus, one of defendant's then

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C. R. Anthony is a chain of department stores in 21 or 22 states west of the Mississippi River comprised of 310 stores and with its headquarters in Oklahoma City, Okla. Berland Shoes, Inc., a subsidiary of Genesco, is another multi-outlet chain which operates leased shoe departments in stores across the country. Both are known discount operations. However, the violations in connection therewith centered not only around prices but also around transshipment by these customers of "Keds" and "Kedettes" to other of their outlets outside of the territory of the Uniroyal branch that had initially sold them the shoes. Defendant has since accommodated its distribution operation to the needs of chains such as these.

[5] **[**17]** Defendant's footwear branches from 1958 to date, listed in alphabetical order by state, are:

Los Angeles, Cal.

San Francisco, Cal.

Denver, Colo.

Miami, Fla.

Atlanta, Ga.

Chicago, Ill.

Kansas City, Kan.

New Orleans, La.

Baltimore, Md.

Boston, Mass.

Detroit, Mich.

Minneapolis, Minn.

Milwaukee, Wis. (opened 1961, closed Dec. 31, 1966)

St. Louis, Mo.

Omaha, Neb. (closed May 31, 1967)

Newark, N.J.

Buffalo, N.Y.

New York, N.Y.

Cincinnati, O.

Cleveland, O. (closed July 1, 1967)

Philadelphia, Pa.

Pittsburgh, Pa.

twenty-five branches contributed almost one-fourth of the incidents proven by the Government. Five other episodes occurred in or prior to 1962 in the Cincinnati Branch area, in which John R. Eble was the District Sales Manager. Cincinnati, then, contributed almost one-eighth of the incidents proven. Together, these two branches account for almost thirty-seven percent of the violations of **[**16]** the Sherman Act charged to defendant.

[18]** Nineteen alleged episodes, in thirteen branches, adduced by the Government as evidence of unlawful resale price interference, coercion or agreements are resolved on the facts and issues of credibility against the Government and in **[*93]** favor of the defendant. [7] **[**19]** Of these, two episodes occurred in the Newark, New

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Dallas, Tex.

Houston, Tex.

Seattle, Wash.

[6] This percentage was calculated using 25,000 as the number of retail customers. Initially the Government filed 68 proposed findings of which 58 represented alleged factual episodes of efforts by defendant to suppress price-cutting practices or to restrict resale or reshipment of its products or both. Some of these incidents were not proved by credible evidence and some were withdrawn. Had the Government proven every one of these incidents and withdrawn none, it would have shown an adverse effect on less than two-tenths of one per cent (.2%) of defendant's customers.

[7] The Government failed to establish with credible proof that violations occurred in the following episodes charged:

Date

Specific Location

Los Angeles, Cal. Branch

1958

Norwalk, Cal.

1960, 1962

Norwalk, Cal.

San Francisco, Cal. Branch

1961

Oakland, Cal.

Miami, Fla. Branch

1961

St. Petersburg, Fla.

Kansas City, Kan. Branch

1966

Kansas City, Mo.

New Orleans, La. Branch

1960

New Orleans, La.

1963

Hattiesburg, Miss.

Baltimore, Md. Branch

1961-66

Jersey branch in which no other proof of violations was offered by the Government. Additionally, defendant has

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Pulaski, Va.

Boston, Mass. Branch

1959

Waltham, Mass.

Newark, N.J. Branch

1963

Teaneck, N.J.

1963

Englewood, N.J.

Buffalo, N.Y. Branch

1962

Binghamton, Utica, N.Y.

Cincinnati, Ohio Branch

1961

Wilmington, Ohio

1961

Cincinnati, Ohio

Pittsburgh, Pa. Branch

1958 to date

Keystone Stores Chain

Dallas, Tex. Branch

1960

Kermit, Tex.

Seattle, Wash. Branch

1954

Bellevue, Wash.

1960

Helena, Mont.

1963

Chehalis, Wash.

conclusively shown that in regions as to which the Government has adduced no credible proof, retail resale pricing has been free of interference by defendant for at least the past five to six years; these were chiefly the major metropolitan regions. [8]

The present case, involving *de minimis* economic consequences of isolated pricing practices adopted by a few salesmen contrary to their employer's unequivocal instructions, is to be sharply distinguished from the broad restrictive impact on competition resulting from a pervasive price-fixing scheme designed to impose market-wide controls over the prices at which the manufacturer's goods are sold. *E.g.*, *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1959)*; and *Dr. Miles Medical Co.* ***[**20]*** *v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*.

In this case, the violations were not indicative of any national price-fixing scheme. There were no express, written resale price-fixing agreements. There was no attempt at the higher levels of the defendant's organization to enforce or cause to be enforced a price structure upon the retail tradesmen.

In addition, there is other evidence which suggests the absence of any plan or intention to enforce suggested retail **[*94]** prices. For example, defendant has never signed or had in effect any agreement fixing retail prices of "Keds" or "Kedettes" under any fair trade law. Nor has defendant ever attempted to enter into any such agreement. The inference suggested above to be drawn from this is demonstrated by *United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 331-2 (N.D. Ill. 1965)*, rev'd on other grounds, *388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*.

Defendant has not "preticketed" "Keds" or "Kedettes" or otherwise marked any such product, its container or display material with a retail price, coded or uncoded. See *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S.* ***[**21]*** *Ct. 150 (1922)*; *Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963)*; and *United States v. Serta Associates, Inc., 296 F. Supp. 1121 (N.D. Ill. 1968)*.

Defendant has engaged in national advertising and promotion of "Keds" and "Kedettes" without referring to retail prices. Defendant has provided television stations with visual and audio material intended for broadcasting on

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[8] The Government has conceded that it has no direct evidence of violations of the antitrust laws in the Cleveland, Detroit and Chicago branches. Defendant's evidence clearly established the existence of a competitive atmosphere and freedom from restraint or interference with retail pricing in the Chicago branch as well as in New Jersey and Pennsylvania. Defendant also showed the absence in New York City, Missouri, Massachusetts and California of restraint on or interference with retail pricing.

fashion and similar programs. These releases have referred to retail prices, but in almost every case, the reference has properly been in terms of an approximation. United States v. Serta Associates, Inc., supra.

Defendant has made available to all retail merchants to whom it sells "Keds" or "Kedettes" advertising mats showing the price for the advertised product as "$0.00". This has allowed the retailer to insert whatever price he wished when arranging to have the advertisement printed.

Defendant has also made available to retailers price tags for use in window and other displays. These tags bear the name "Keds", but leave a blank space in which the retailer may insert the price upon which he decides. See, Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), cert. dismissed, 381 U.S. 125, **[**22]** 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965).

Finally, the defendant has sold to retailers quantities of discontinued styles which have competed with current styles. Defendant has not suggested retail prices for such discontinued merchandise. Some of the defendant's district sales managers have encouraged the salesmen to seek out and sell "Keds" and "Kedettes" to discount houses or to other retailers who habitually sell at reduced prices for the purposes of increasing volume of sales.

Other courts, faced with factual situations not dissimilar to the one existing in the case at bar, have failed to find a violation of law.

In *Schwinn*, at 237 F. Supp. pp. 331-332, Judge Perry wrote:

> The plaintiff has failed to prove the vital part of the price-fixing conspiracy upon which plaintiff has through counsel most diligently and fervently persisted. But dedication, sincerity and hard work cannot supply evidence. When a few witnesses come in and tell orally of fixed prices and threats, and then the records of actual sales come in literally from scores of retailers, the court has no alternative but to find there was no price-fixing scheme through a conspiracy between the defendants **[**23]** or otherwise. This court is convinced and the record of the evidence shows that the defendant Schwinn devoutly hoped that its retail franchises would hew close to the suggested price list, but it also shows that, whatever some officer or representative may have said or written, when retailers met competition in interbrand or even intrabrand bicycles, no action was taken by Schwinn or any of the distributors or agents of either.

In United States v. Hudnut, 8 F.2d 1010 (S.D.N.Y. 1925), Judge Augustus N. Hand commented:

> It is hardly useful to review in detail the 73 cases of retailers to whom the defendant sold its goods, and who were cut off for price-cutting, and reinstated. These are but a small fraction **[*95]** of 40,000 customers, who purchased its perfumes and toilet articles. . . .
>
> On the whole, there were among the 73 cases very few instances indeed where Hudnut's salesmen, even with the inevitable enthusiasm of such persons, did anything like make an agreement to fix a resale price. . . .
>
> The government has been treated with unusual frankness and given full access to the defendant's files. If some salesmen have occasionally done things which may merit **[**24]** criticism . . . there is no body of transactions which merit condemnation for violation of the Sherman Act.

Also worthy of note here is the view taken by Chief Judge Kirkpatrick in United States v. Kohler Co., 1953 TRADE CASES P67,453, at p. 68,289 (E.D. Pa. 1953):

> [In] a business, as extensive as the present defendant's, sporadic instances of attempted restraint of competition on the part of a few sales representatives is insufficient to fix responsibility for any violation of the law upon the principal.

See also Judge Nordbye's exhaustive examination of the amount and quality of the oral and documentary evidence adduced by the Government in United States v. J.I. Case Co., 101 F. Supp. 856, 865 (D. Minn. 1951).

Here, the Government's evidence of isolated instances of improper pricing practices, though very weak, is barely sufficient, quantitatively and qualitatively, to establish an infraction of the Sherman Act.

Nor is the defendant relieved of responsibility for the unlawful occurrences by reason of the fact that they were episodes of unauthorized conduct on the part of sales personnel.

There is evidence on the record of awareness of and even participation in **[**25]** these events by regional and national personnel.

Moreover, defendant's arguments that the nature of its business necessitates the granting of a large amount of autonomy to the district sales managers offers some proof that those managers who participated in the wrongful acts proven here acted well within the authority given them.

HN6[] Liability may be imposed upon a corporation for the acts of its agents, contrary to their orders and without authority, express or implied, merely because they were committed in the course of the corporation's business and within the scope of the agents' employment. *United States v. Kemble, 198 F.2d 889, 893* (3d Cir.) cert. denied *344 U.S. 893, 97 L. Ed. 690, 73 S. Ct. 211 (1952)*.

This is not an instance of *respondeat superior*; it is one of the non-performance of a non-delegable duty. ***HN7***[] A corporation has a responsibility to eliminate unlawful practices by its salesmen and branch managers in the course of their routine labors - the selling of the corporation's products - even if the extent of its business precludes the personal supervision of high level officers who, as a result, rely upon written and oral instructions to their subordinates to insure **[**26]** that their policies will be carried out. The corporation must, in such circumstances, of defendant's then twenty-five branches. select to act for it, even where the latter have gone to considerable lengths to furnish the salesmen and branch managers with guidelines of the applicable legal requirements. *United States v. Armour & Co., 168 F.2d 342, 343-344 (3d Cir. 1948)*.

The salient fact is that there has been at least one incident of unlawful resale price maintenance or conduct in aid thereof in sixteen of defendant's then twenty-five branches. These incidents either directly involved branch office personnel or occurred with the knowledge and acquiescence of such personnel, or under circumstances in which it was the business duty of such personnel to have such knowledge. Cf. *United States v. Armour & Co., supra, at 343*.

> The purpose of the Act is a deterrent one; and to deny the possibility of **[*96]** corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion. *United States v. George F. Fish, Inc., 154 F.2d 798, 801* (2d Cir., Judge Clark), cert. denied, *328 U.S. 869, 90 L. Ed. 1639,* ***[**27]*** *66 S. Ct. 1377 (1946)*.

Even if the incidents proven are *de minimis* when compared to the vast number of retail outlets that defendant sells its products to, the episodes were sufficient in number to have warranted sterner policing by the defendant of the conduct of its employees during the years in question.

However, as this defect in defendant's sales and distribution system has been corrected, the question arises as to what, if any, type of relief is now appropriate.

The Government contends that the burden is on defendant to show by clear and convincing evidence that there has been a complete abandonment of its unlawful practices and that there is no reasonable probability or expectation of their resumption. For this proposition, the Government relies chiefly on *United States v. W.T. Grant Co., 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)* and *United States v. Oregon State Medical Soc., 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690 (1942)*. In the latter case, Mr. Justice Jackson wrote, at p. 333:

> ***HN8***[] When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has **[**28]** been abandoned without clear proof. Local *167 International Brotherhood of Teamsters v. United States, 291 U.S. 293, 298, 54 S. Ct. 396, 78 L. Ed. 804*.

> It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption. Cf. *United States v. United States Steel Corp., 251 U.S. 417, 445, 64 L. Ed. 343, 40 S. Ct. 293*.

The Supreme Court, however, affirmed the denial of an injunction in that case because defendants had demonstrated "an overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent because wise and advantageous . . ." *343 U.S. at 334*.

In *Grant* the Court said:

> ***HN9***[] [The] Court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, **[**29]** something more than the mere possibility which serves to keep the case alive . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. *345 U.S. at 633*.

The Supreme Court affirmed the denial of an injunction in *Grant* despite the fact that five years of administrative attempts to convince defendant of the illegality of its practices had preceded the bringing of the suit. "Postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's." *345 U.S. at 634*.

The problem with the Government's prayer for injunctive relief is that the Court is not satisfied that such relief is needed.

Of the thirty-eight incidents proven by the Government, only five occurred in 1964, the year of the filing of the complaint herein, or later. [9] Four additional **[*97]** incidents occurred in 1963. [10] **[**31]** All of the remaining twenty-nine episodes terminated at least a year and a half before the filing of the complaint, in June, 1964. Eight [11] of these terminated before 1960 and, therefore, can be considered ancient history in relation to **[**30]** the question of whether to grant injunctive relief. This leaves the bulk of the incidents proven as occurring in the period 1960-1962 inclusive. The persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales responsibilities.

In fourteen of the sixteen branches in which violations were established, defendant's evidence has convincingly shown that the price maintenance and restrictive distribution practices have been discontinued in the area and that vigorous price competition is now prevalent. [12] **[**32]** In each of the two remaining **[*98]** branches, only a solitary, isolated incident was shown to have occurred. [13]

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[9] One incident occurred in Boulder, Colo. in 1964. The other four of these incidents were continuations of older practices into the year 1964; one in Hamburg and East Aurora, N.Y. (Buffalo branch) began in 1958 and extended into 1967; another Buffalo incident began in 1958 but the witness was unable to fix dates later than that year for any conversations evidencing the alleged agreements and the Court has therefore fixed 1964, when the employment of the salesman involved was terminated, as the date ending the incident; an incident in Pompano Beach, Fla. (Miami branch) occurred during the period 1959 to 1965; finally, an incident involving C.R. Anthony (Kansas City branch) began in 1960 and ended in 1964.

[10] One was in Lamar, Colo. (Denver branch); another involved Berland (St. Louis branch); a third was in Austin, Tex. (Houston branch); and the fourth was in Renton, Wash. (Seattle branch).

[11] These are: Los Angeles branch, 1958 (San Diego, Cal.); New Orleans, La., 1958; Boston branch, 1958 (two incidents, in Waltham, Mass. and Hartford, Conn.); Cincinnati branch, 1958 (Elwood, Ind.); Pittsburgh branch, 1958 (Charleston, W. Va.); Dallas branch, 1958 (Marfa, Tex.); Seattle branch, 1954 (Bellevue, Wash.).

[12] In each of these fourteen branches the current situation is clear: there is, and has been for years, a general prevalence of price-cutting and an absence of any resale price maintenance or interference with retail pricing.

The Government relies almost exclusively on its proof of these pre-suit violations to support its prayer for injunctive relief.

Defendant, on the other hand, submitted evidence on its current resale pricing practices and contemporary conditions in the marketplace. The upshot of this evidence, which has not been controverted by the Government with any substantial proof, is that defendant is neither presently violating *Section 1* of the Sherman Act nor is likely to do so in the future.

Defendant has placed in evidence discount price advertisements which appeared publicly on occasions in eighteen states in the years 1962 through 1968. [14] But it is the other evidence submitted by defendant which explains **[**33]** and amplifies the force and effect of these advertisements.

There is substantial evidence that the two episodes proven in the Los Angeles branch area were isolated instances and not part of a general pattern. Extensive proof of price competition and advertising since 1960 has been presented for this area.

There is substantial evidence for the Denver branch area that no resale price maintenance has occurred and that price cutting has been unimpeded since April 30, 1967, the date on which T. S. Newton was replaced as District Sales Manager, which position he had held during the two incidents proven there.

There were a number of instances proven for the Miami branch area of discount price advertising.

In the Kansas City branch area, there has been proof of discount price advertising and, in addition, retailers have been affirmatively advised since 1965 that they are free to charge whatever prices they desire. Since March, 1964 C. R. Anthony has been entirely free of restrictions on pricing and transshipment. There has been no agreement similar to the one which existed prior to that date.

Vigorous competition in the Baltimore branch area was demonstrated by the 1968 advertising and testimony of David Allen and by other applicable evidence.

On August 21, 1962, Kenneth M. Kaligian, the District Sales Manager of the Boston branch, was replaced. The evidence is clear that since his removal the local retailers have been free of retail price interference from the defendant. In addition, Kenneth B. Miller, a Boston branch sales representative and author of several Government exhibits, left defendant's employ on December 31, 1966. The latter events in this branch are set out more fully above.

As to the Missouri and New York City branches, defendant has proven that Berland resumed buying the products that defendant had withheld from it around the middle of 1963. Since that time there has been no interference with Berland's pricing or transhipment. Widespread price-cutting among retailers has been proved in New York City (Manhattan, Queens, Brooklyn, Bronx).

In August, 1968, Stanley H. Kieon took over the Buffalo branch and merchandise has since been sold in that area without any resale price restrictions. His predecessor, R. F. Kurrasch, had created difficulties.

On November 1, 1967, John R. Eble, the District Sales Manager of the Cincinnati branch, was removed and placed in a position that has no responsibility for sales of "Keds" or "Kedettes".

The evidence shows that since 1964 there has been no interference with retail pricing in West Virginia (Pittsburgh branch), two incidents having been proven in that area prior to that date.

On September 30, 1967, J. C. Beavers was replaced as the District Sales Manager of the Dallas branch. A series of letters and invoices demonstrated that the Houston branch, among others, does not interfere with transshipments of "Keds" and "Kedettes" even where the retailer involved (as revealed by his advertisements) is a price-cutter. Indeed, Houston aids such shipments. The only concern of the District Sales Manager there is with sales credits and commissions.

As to the Seattle branch, defendant has established that since 1965 it has not even suggested prices. Competitive advertising and the absence of any interference with retail pricing have been demonstrated in that area.

[13] Neither the 1962 incident in the Atlanta branch nor the 1958 incident in the New Orleans branch was shown to be a typical occurrence in those areas. Certainly the latter incident is remote indeed when considered as part of a request for injunctive relief. Neither incident provides the basis for an inference of the existence of an ongoing practice for which this remedy would be appropriate.

[14] The states involved, listed in alphabetical order with the dates of the advertisements proven, are:

Defendant's business has changed considerably in recent years. Imports and other brands have been introduced into the market which have drastically reduced Uniroyal's share of the market in this country. Brands that are considerably lower priced have become important factors in the business. The market requirements involve a greater variety of styles, colors, widths and shapes and it becomes a much more difficult selling job to sell in this market.

Furthermore, in recent **[**34]** years mass merchandising and the big chain operation and discounters have become a very important part of the marketplace. Retail customers are prone to go to shopping centers in the suburbs and shopping plazas and to chain operations and to the large discount operations to buy their canvas footwear.

Defendant's extensive evidence on the current situation in the Boston branch is indicative of the general contemporary **[*99]** state of affairs and bears detailed review here.

With the removal of the branch sales manager of the Boston district in 1962 a radical change in the conduct of defendant's business in that area took place. The new sales manager made an investigation of the marketing conditions. He determined that the area was subject to a trend toward the mass merchant and the discount and chain-type of operation. He organized the territories of the salesmen, held meetings individually and on a group basis with the latter to outline what was expected of them, replaced some of them and proceeded to sell a large number of so-called marginal accounts. The men were told that such selling was part of their responsibility to increase the total volume and the line was offered **[**35]** to and business was obtained from several chain and discount price-cutting operators.

The subject of suggested retail prices came up during training sessions specifically and the salesmen were pointedly advised that the prices were suggested and that they were not to be enforced. Complaints received in the Boston area after 1962 from retailers complaining of their competitors were responded to with the statement that the goods were not fair-traded and that the defendant had no way or desire to enforce the suggested retail price. Sometimes the complaint would just be ignored and left to die a natural death by letting it go unanswered. Other forms of responses were utilized but in sum they indicated that resale price maintenance was a thing of the past in

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Arkansas (1968)

California (1963, 1966-68)

Colorado (1967, 1968)

Florida (1965, 1967, 1968)

Hawaii (1968)

Kansas (1966)

Louisiana (1965)

Maryland (1968)

Massachusetts (1962, 1968)

New Jersey (1968, 1969)

New York (1965, 1968)

North Carolina (1966-68)

Ohio (1966, 1968)

Pennsylvania (1962-63, 1965-66)

Texas (1966)

Utah (1968)

Washington (1966)

Wisconsin (1966)

this area. The Boston branch numbered among its accounts some 1,800 to 1,900 retailers. The evidence persuasively indicated that the new district sales manager for this branch eliminated from 1962 on any price coercion or restrictions on the purchasers of the merchandise with respect to their sale or transfer of that merchandise.

The emphasis of defendant's top executive sales personnel is on selling and producing sales and not **[**36]** on handling the complaints of retailers with respect to their competitors. The current philosophy is that enforcement or policing of retail prices is a complete waste of a salesman's or manager's time since it is nonproductive. The defendant now would rather have the business at any price rather than to lose the business to its competitors as a result of attempts to control resale prices. The corporation's policy and plan for non-enforcement of suggested retail prices has been confirmed through authorization of its top management in the form of a promise placed on the record.

The policy of defendant since at least 1962 has been to instruct and train its sales managers or salesmen not to interfere with retail prices or the freedom of a retailer to sell at whatever price he chooses. Defendant's national sales executives have conducted meetings and training programs for the sales managers and salesmen at which the latter were informed and instructed that it was the policy of the defendant not to interfere with resale prices or the transfer of merchandise from one to another district by a purchaser thereof. While defendant has never promulgated an oral or written policy or directive **[**37]** of any kind directing or encouraging enforcement of suggested retail prices, it has not until very recently issued any written statement of its policy of discouraging such enforcement. Defendant's recent practice has been to require its district sales managers to issue written directives to the local salesmen, explaining defendant's policy of non-interference with retail prices. Each district sales manager must report back his compliance with this requirement by filing with the main office a copy of the directive thus issued.

In recent years defendant's salesmen have generally conducted themselves in a manner indicative of absence of any attempt at enforcement of suggested retail prices. They have offered popular items in the "Keds" line to retailers, including discount houses, who have consistently advertised and sold them below defendant's suggested retail prices. Complaints by other retailers have reached the defendant **[*100]** in respect thereof and defendant has not interfered with such advertising or selling.

The change in the competitive climate of the market as a result of the introduction of imports and other brands of canvas footwear, the absence of economic feasibility **[**38]** of resale price maintenance, the turnover of defendant's sales personnel and the curtailment of the activities of those who remain, the constantly greater reliance on discount houses and other unorthodox merchandisers, and the fact that defendant's strength in the marketplace and influence over retailers have waned considerably, are all persuasive of the contention that there is no likelihood that there will be violations in the future. *United States v. San Diego Grocers Association, 1963 TRADE CASES P70,777 (S.D. Cal. 1963)*.

Under these circumstances, the Court is persuaded that there is no cognizable danger of recurrent violation sufficient to warrant the issuance of an injunction in this case.

Accordingly, that branch of the Government's prayer which seeks injunctive relief is denied.

However, the Government also asks, in its complaint, that the Court adjudge and decree that defendant has violated the Sherman Act. The issues here are somewhat different from those determined in denying injunctive relief to the Government.

HN10[] The determination necessary to the granting of injunctive relief, that there exists some cognizable danger of recurrent violation, is a determination that **[**39]** there exists a risk which is "something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co., 345 U.S. at 633*.

HN11[] When the defendant is free to return to its old ways, as it is here, its voluntary cessation of illegal conduct does not make the case moot, even though there is no likelihood of resumption of unlawful conduct. The Court retains power to hear and determine the case because a controversy may remain which the public has an interest in having settled. Ibid. at 632. See also *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*, where the Supreme Court recently held that the controversy was not technically moot but that the trial judge had discretion on remand to determine whether an injunction should issue:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[the] defendant . . . free to return to his old ways." *United States v. W. T. Grant Co., 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)*; see, *e.g.*, **[**40]** *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes. *United States v. W. T. Grant Co., 345 U.S., at 633*. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. *Id., at 633-636*. This is a matter for the trial judge.

HN12[] There has understandably been some confusion over what, if anything, is the difference between (i), the absence of any "cognizable danger of recurrent violation" which leads to the denial of injunctive relief and (ii), the absence of a "mere possibility" that the wrong will be repeated that deprives a Court of the power to hear and determine a case altogether. **[*101]** Cf. *United States **[**41]** v. Ins. Bd., 144 F. Supp. 684 (N.D. Ohio 1956)* and cases cited therein. The answer seems to have traditionally been found in the reasons behind the defendant's discontinuance of unlawful practices.

Such a discontinuance does not relieve a Court of the duty to pass on the question of legality where "by the mere volition of the parties the combination could come into existence at any moment." *United States v. Hamburg-Amerikanische Co., 239 U.S. 466, 477, 60 L. Ed. 387, 36 S. Ct. 212 (1916)*, citing *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*. Where, however, the discontinuance was impelled by extrinsic circumstances beyond the defendant's control, a Court lacks power to decide the academic question left behind.

> Here, on the contrary, the business in which the parties to the combination were engaged has, by force of events beyond their control, ceased, and by the same power and a continued relation concerning it between them has become unlawful and impossible. The difference between this and the Trans-Missouri case was clearly laid down in *Mills v. Green, 159 U.S. 651, 40 L. Ed. 293, 16 S. Ct. 132*, where, after announcing **[**42]** the general rule as to the absence of authority to consider a mere moot question, and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared: "But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."
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> *239 U.S. at 477*.

There has been no showing on the record that the reason for defendant's voluntary cessation of its unlawful pricing practices was fear of suit brought about by the Government investigation in this case. Cf. *United States v. Parke, Davis & Co., 362 U.S. 29, 48, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1959)*. The record suggests, as one reason for the change, decline of defendant's share of the relevant market in an increasingly competitive situation. The question before the Court, then, ***HN13***[] is whether the abandonment of unlawful price-maintenance practices due to a decision that such practices are economically unsound is "action by the defendant" or a result of a force beyond its control. If it is the latter, the case is moot and the complaint should be dismissed. **[**43]** If it is the former, the defendant should be adjudged to have violated *Section 1* of the Sherman Act and the Court should retain jurisdiction for the granting of further relief, upon application of the Government, in the event of future violations. Cf. United States v. Parke, Davis & Co., 365 U.S. 125, 126, 5 L. Ed. 2d 457, 81 S. Ct. 433 (1961).

The United States Supreme Court has twice indicated a preference for the latter course in cases where business considerations have prompted the defendant's reversal in policy. In United States v. United States Steel Corp., 251 U.S. 417, 64 L. Ed. 343, 40 S. Ct. 293 (1920), the Court affirmed the dismissal of the bill in a dissolution suit. The corporation there involved had failed to achieve the monopoly position it desired because it had underestimated the opposing market forces. The antitrust violations were instances scattered over ten years and had all been abandoned nine months before suit was brought.

> There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" **[**44]** of their resumption. . . . And we may say in passing that the government cannot fear their resumption, for it did not avail itself of the offer of the District Court to retain jurisdiction of the cause in order that, if illegal acts should be attempted, they could be restrained.
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> 251 U.S. at 445.

[*102] Any doubt that existed as to whether the discontinuance of past price-maintenance practices for business reasons should be the subject of an adjudication of violation was erased by the history of the *Parke, Davis* case subsequent to the first remand by the Supreme Court. Pursuant to instructions to the District Court to issue an injunction unless the defendant submitted evidence to refute the Government's right to injunctive relief, the defendant submitted evidence which showed the futility of the continuation of the price-fixing practices. The defendant showed that it was now necessary to meet new competition and that the prior sales practices had been abandoned because they were ineffective. United States v. Parke, Davis & Co., 1960 TRADE CASES P 69,776 (D.C. 1960).

No appeal was taken from the denial by the District Court of injunctive relief but the Government **[**45]** did appeal from the omission from the order of any provision adjudging that defendant therein had violated the Sherman Act. 365 U.S. at 126. The Government argued that there was need for such an adjudication which would serve as the basis for treble damage suits under Section 4 of the Clayton Act and as an aid to facilitate the Government's own proceedings in the future. (See Brief for United States, p. 5-7). The Supreme Court said:

> We . . . hold that . . . the Government is entitled to a judgment on the merits, as prayed in paragraph 1 of the section of the Complaint captioned "Prayer." We also hold that the District Court should retain the case on the docket for future action in the event the Government applies for further relief from an alleged resumption by Parke Davis of illegal activity.
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> 365 U.S. at 126.

United States v. W. T. Grant Co., 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953) is not apposite although a contrary result would seem, at first glance, to have been reached when the order of this Court was affirmed by the Supreme Court. In entering judgment for the defendants therein because there was not the slightest threat that their terminated, unlawful **[**46]** conduct would be resumed, Judge Conger had written:

> The suit is not continued a controversy merely because a decree of past violation is sought.
>
> United States v. W. T. Grant Co., 112 F. Supp. 336, 338 (S.D.N.Y. 1952), aff'd, 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953).

Grant, however, involved interlocking directorates, a violation of Section 8 of the Clayton Act. In such a case there is not the residual public interest in having a violation adjudicated that there was in *Parke, Davis*. The practical difficulties in bringing a treble damage suit for such a Section 8 violation are so great as to render such suits a mere theoretical possibility.

Accordingly, the decree to be entered herein will adjudge that the defendant has violated *Section 1* of the Sherman Act and this Court will retain the case on the docket for future action in the event that the Government applies for further relief from an alleged resumption by Uniroyal of illegal activity and, except as so granted, the prayers of the Government will be denied.

The foregoing together with footnotes shall constitute the findings of fact and conclusions of law required by *Rule 52(a), Fed. R.* ***[**47]*** *Civ. P.*

Submit decree within fifteen days hereof, on notice.

So ordered.

Zenith Radio Corp. v. Hazeltine Research

Supreme Court of the United States

January 22, 1969, Argued ; May 19, 1969, Decided

No. 49

Reporter

395 U.S. 100 *; 89 S. Ct. 1562 **; 23 L. Ed. 2d 129 ***; 1969 U.S. LEXIS 3305 ****; 161 U.S.P.Q. (BNA) 577; 1969 Trade Cas. (CCH) P72,800

ZENITH RADIO CORP. v. HAZELTINE RESEARCH, INC., ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: *388 F.2d 25*, affirmed in part, reversed in part, and remanded.

Core Terms

patent, pool, license, royalty, licensee, patentee, Radio, district court, injunction, products, manufacture, Automatic, patent misuse, monopoly, infringement, merchandise, parties, damages, anti trust law, injunctive relief, trial court, conditioning, invention, percentage-of-sales, distributors, conspiracy, royalty payment, importation, provisions, insisted

LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

HN1[] **Entry of Judgments, Nonparties Affected by Judgment**

One is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

Civil Procedure > Remedies > Injunctions > Contempt

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

Civil Procedure > Remedies > Injunctions > General Overview

HN2[] **Injunctions, Contempt**

Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, *Fed. R. Civ. P. 65(d)*, a nonparty with notice cannot be held in contempt until shown to be in concert or participation.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Evidence > Burdens of Proof > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Clayton Act > General Overview

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

HN3[] **Remedies, Damages**

It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

Governments > Courts > Authority to Adjudicate

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN4[] **Province of Court & Jury, Factual Issues**

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under *Fed. R. Civ. P. 52 (a)* is not whether it would have made the findings the trial court did, but whether on the entire evidence it is left with the definite and firm conviction that a mistake has been committed.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > Remedies > Damages > General Overview

HN5[] **Private Actions, Remedies**

Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN6[] **Private Actions, Remedies**

In the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

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

Patent Law > Remedies > Damages > General Overview

HN7[] **Private Actions, Remedies**

Although the factfinder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof.

Patent Law > Remedies > Equitable Relief > Injunctions

HN8[] **Equitable Relief, Injunctions**

See *15 U. S. C. S. § 26*.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

Patent Law > Remedies > Equitable Relief > Injunctions

HN9[] **Clayton Act, Remedies**

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. Section 16 of the Clayton Act, *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 which Congress has sought to protect.

Labor & Employment Law > Wrongful Termination > Remedies > Reinstatement

Patent Law > Remedies > Equitable Relief > Injunctions

HN10[] **Remedies, Reinstatement**

In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

Patent Law > Remedies > Equitable Relief > Injunctions

HN11[] **Equitable Relief, Injunctions**

When one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN12[] **Conveyances, Assignments**

A patentee has the exclusive right to manufacture, use, and sell his invention. The heart of his legal monopoly is the right to invoke the state's power to prevent others from utilizing his discovery without his consent. The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

International Trade Law > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

Patent Law > Remedies > Equitable Relief > Injunctions

HN13[] **Conveyances, Licenses**

There are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. His right to set the price for a license does not extend so far, whatever privilege he has to exact royalties as high as he can negotiate. And just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN14[] **Inequitable Conduct, Anticompetitive Conduct**

It is not per se a misuse of patents to measure the consideration by a percentage of the licensee's sales.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN15[] Defenses, Misuse

If convenience of the parties rather than patent power dictates the total-sales royalty provision, there is no misuse of the patents and no forbidden conditions attached to the license.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Ownership > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN16[] Conveyances, Licenses

Patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but also for producing products which do not employ his discoveries at all.

Lawyers' Edition Display

Summary

In a patent infringement suit by a research company in the United States District Court for the Northern District of Illinois, the defendant, a radio and television set manufacturer, counterclaimed for treble damages and injunctive relief, alleging antitrust violations consisting of both misuse of the research company's patents and a conspiracy in restraint of trade by the research company, its parent corporation, and Canadian, English, and Australian patent pools. Holding that the research company had misused its patents, the District Court awarded the manufacturer treble damages and injunctive relief against the research company; and further holding that the research company and its parent corporation had conspired in restraint of trade, the District Court, relying upon a pretrial stipulation that the research company and its parent corporation were to be considered as an entity for purposes of the litigation, awarded the manufacturer treble damages and injunctive relief against both the research company and its parent corporation (*239 F Supp 51*). On appeal, the Court of Appeals for the Seventh Circuit, affirming the treble damage award for patent misuse, but otherwise reversing the judgment of the District Court, (1) held that the District Court lacked jurisdiction over the research company's parent corporation, and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against the parent corporation, (2) modified in certain respects the District Court's injunction against patent misuse, (3) held that the manufacturer had failed to prove that it had sustained damage as a result of the conspiracy in restraint of trade, and (4) struck the injunction against the research company's participation in conspiracies restricting the manufacturer's trade in foreign markets (*388 F2d 25*).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case to the Court of Appeals. In an opinion by White, J., it was held, expressing the view of seven members of the court, that the question of injunctive relief against misuse of the research company's patents should be remanded for further

proceedings, and it was held, expressing the unanimous view of the court, that (1) the District Court lacked jurisdiction over the research company's parent corporation, (2) the manufacturer had failed to prove that it sustained damage as a result of the conspiracy affecting the English and Australian markets, but had proved that it sustained damage as a result of the conspiracy affecting the Canadian market, and (3) the District Court had properly granted injunctive relief against the research company's participation in conspiracies restricting the manufacturer's trade in foreign markets.

Harlan, J., although concurring in the other parts of the court's opinion, dissented from the court's holding, with respect to the issue of injunctive relief against misuse of patents, that a patent license provision which measures royalties by a percentage of the licensee's total sales is lawful if included for the convenience of both parties but unlawful if insisted upon by the patentee.

Headnotes

JUDGMENT §244 > affiliated corporations -- > Headnote:
LEdHN[1][] [1]

Despite a pretrial stipulation by the parties that one of the parties and its parent corporation would be considered as an entity for purposes of the litigation, a judgment for damages and injunctive relief cannot properly be entered against the parent corporation where it did not execute the stipulation, was not named as a party, was never served, and did not formally appear at the trial; and the fact that the subsidiary may have executed the stipulation to avoid litigating the alter ego issue cannot foreclose the parent corporation, which never had its day in court on the question whether it and its subsidiary should be considered the same entity for purposes of the litigation.

JUDGMENT §208 > nonparties -- > Headnote:
LEdHN[2][] [2]

A person is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

COURTS §26 > jurisdiction -- > Headnote:
LEdHN[3][] [3]

A court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

JUDGMENT §244 > affiliated corporations -- > Headnote:
LEdHN[4][] [4]

If it is shown that a parent corporation, through its officers, in fact controlled litigation on behalf of a subsidiary, and if the claim is made that a judgment against the subsidiary is res judicata against the parent because of this control, such claim can be finally adjudicated against the parent only in a court with jurisdiction over the parent.

ESTOPPEL AND WAIVER §55 > failure to repudiate stipulation -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

Even if some attorneys of a parent corporation were present during part of the trial of antitrust claims against a subsidiary, and failed to repudiate a pretrial stipulation made by the subsidiary to the effect that the subsidiary and the parent would be treated as an entity for purposes of the litigation, the parent corporation is not estopped to deny that it is bound by such stipulation.

INJUNCTION §139 > persons bound -- > Headnote:
LEdHN[6][] [6]

Although injunctions issued by federal courts bind not only the parties- defendant in a suit, but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, a nonparty with notice cannot be held in contempt until shown to be in concert or participation, and it is error to enter an injunction against the parent corporation of a company which is a party without making such determination in a proceeding to which the parent corporation itself is a party.

APPEARANCE §7 > effect of special appearance -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

The fact that a parent corporation enters a special appearance to contest jurisdiction, in an antitrust case involving a patent pool conspiracy in restraint of trade, does not indicate that it was found to be in active concert and participation with its subsidiary, which was a party, nor does the entry of such a special appearance indicate that the parent corporation has consented to be bound by such a finding.

RESTRAINTS OF TRADE AND MONOPOLIES §61 > conspiracy -- patent pool -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

The provision of the Sherman Antitrust Act proscribing conspiracies in restraint of trade (*15 USC 1*) is violated where a research company and its parent corporation conspire with a Canadian patent pool to deny patent licenses to companies seeking to export American-made goods to Canada.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > treble damages -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

Although patent rights are involved, once a manufacturer demonstrates that its exports from the United States have been restrained by the activities of a Canadian patent pool, an American research company participating in the patent pool conspiracy is subject to treble damage liability.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > treble damages -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

With respect to a claim for treble damages for conspiracy in restraint of trade, the claimant's burden of proving the fact of damage is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount, and not the fact of damage; it is enough that the illegality is shown to be a material cause of the injury; and a claimant need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:
LEdHN[11][] [11]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is sufficient to sustain the inference that a manufacturer of radio and television sets has in fact been injured to some extent by a Canadian patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) the pool's efforts to prevent importation of radio and television sets from the United States were highly organized and effective, agents, investigators, and manufacturer and distributor trade associations having systematically policed the market, warning notices and advertisements having advised distributors, dealers, and even consumers against selling or using unlicensed equipment, and infringement suits or threats thereof having been regularly and effectively employed to dissuade dealers from handling American-made sets; (2) the pool's past conduct interfered with and made more difficult the distribution of the manufacturer's products during subsequent years for which damages were sought, and the manufacturer suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed; (3) the pool continued after the beginning of the damage period, and the manufacturer was deprived of a license on pool patents permitting it to sell American-made merchandise in Canada; (4) a formal request by the manufacturer for a pool license would have been futile; (5) the manufacturer continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws, and such deprivation in itself had an impact on the manufacturer and constituted an injury to its business; (6) although the manufacturer was able to obtain independent distributors in certain parts of Canada, it was unable to do so in other parts of Canada, and its poorer performance in Canada than in the United States was attributed to the discouraging and repressive effects of the Canadian patent pool; (7) without a pool license, the manufacturer encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States and which its demonstrated business proficiency dictated that it should have obtained in Canada; and (8) the pool was an established organization with a long history of successfully excluding imported merchandise, and in view of its continued existence during the damage period, the injury alleged by the manufacturer was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause.

EVIDENCE §209 > presumption -- continuance of conspiracy -- > Headnote:
LEdHN[12][] [12]

A court is entitled to assume the continuance of a conspiracy in restraint of trade, in the absence of clear evidence of its termination.

APPEAL AND ERROR §1464 > review -- findings of fact -- > Headnote:
LEdHN[13][] [13]

In applying the standard of *Rule 52(a) of the Federal Rules of Civil Procedure*, which provides that the findings of fact of a Federal District Court sitting without a jury shall not be set aside unless clearly erroneous, appellate courts must constantly have in mind that their function is not to decide factual issues de novo; the authority of an appellate court, when reviewing the findings of a judge, as well as those of jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence; and the question for the appellate court under *Rule 52(a)* is not whether it would have made the findings the trial court did, but whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.

EVIDENCE §343.5 > burden of proof -- damages for antitrust violation -- > Headnote:
LEdHN[14][] [14]

Trial and appellate courts alike must observe the practical limits of the burden of proof which may be demanded of a plaintiff, in an antitrust action for treble damages, who seeks recovery for injuries from partial or total exclusion from a market, damage issues in such cases being rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:
LEdHN[15][] [15]

In the absence of more precise proof in an antitrust action for treble damages, a finder of fact may conclude as a matter of just and reasonable inference from the proof of a defendant's wrongful acts and their tendency to injure the plaintiff's business, and from the evidence of the decline in prices, profits, or values, not shown to be attributable to other causes, that the defendant's wrongful acts had caused damage to the plaintiff, and although not entitled to base a judgment on speculation or guesswork, the finder of fact may make a just and reasonable estimate of the damage based on relevant data, acting upon probable and inferential, as well as direct and positive, proof.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:
LEdHN[16][] [16]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is not sufficient to sustain the inference that a manufacturer of radio and television sets has sustained any damage as a result of an English patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) obstacles for which the patent pool was not responsible discouraged the manufacturer's entry into the English market, (2) the manufacturer was waiting for a change in the type of scanning signals used for English television and did not intend to promote the sale of its television sets in England until such a signal change occurred, and if such a change had occurred, neither the absence of a patent pool license nor patent pool threats against it or its customers would have deterred it from a major effort to penetrate the English market, and (3) the manufacturer's own business calculus, rather than restraints by the patent pool, led it to await more favorable conditions before attempting to enter the English market.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:
LEdHN[17][] [17]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is not sufficient to sustain the inference that a manufacturer of radio and television sets has sustained any damage as a result of an Australian patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) the manufacturer had exported no products to Australia and had not requested a patent pool license, (2) a government embargo had foreclosed importation into Australia of the manufacturer's American-made merchandise, and high tariffs and shipping costs, as well as the prospect of vigorous competition, were additional barriers, and (3) the manufacturer neither intended nor was prepared to enter the Australian market during the period for which damages were sought.

RESTRAINTS OF TRADE AND MONOPOLIES §61 > conspiracy -- patent pool -- > Headnote:
LEdHN[18][] [18]

If a conspiracy by a research company and its parent corporation with an Australian patent pool had effectively kept an American manufacturer of radio and television sets from the Australian market, a compensable violation of the antitrust laws would have occurred.

RESTRAINTS OF TRADE AND MONOPOLIES §68 > injunctive relief -- > Headnote:
LEdHN[19][] [19]

The remedy of injunctive relief, available under 16 of the Clayton Act (*15 USC 26*) upon demonstration of threatened loss or damage by a violation of the antitrust laws, is available even though the plaintiff has not yet suffered actual injuries; 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.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > RESTRAINTS OF TRADE AND MONOPOLIES §68 > remedies for antitrust violation -- injunctive relief -- > Headnote:
LEdHN[20][] [20]

The purpose of giving private parties treble damage and injunctive remedies for violations of the antitrust laws is not merely to provide private relief, but is to serve as well the high purpose of enforcing the antitrust laws; 16 of the Clayton Act (*15 USC 26*), authorizing injunctive relief against threatened loss or damage by a violation of the antitrust laws, 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, and its availability should be conditioned by the necessities of the public interest which Congress has sought to protect.

RESTRAINTS OF TRADE AND MONOPOLIES §77 > injunctive relief -- patent pool -- > Headnote:
LEdHN[21A][] [21A]***LEdHN[21B]***[] [21B]

Injunctive relief against a conspiracy in restraint of trade is proper where (1) the defendant research company and its parent corporation conspired with a Canadian patent pool to exclude the plaintiff, a manufacturer of radio and television sets, and others from the Canadian market, (2) there is nothing indicating that the conspiracy has terminated or that the threat to the plaintiff inherent in the conduct will cease in the foreseeable future, (3) neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct will cease with the judgment negates the threat to the plaintiff's foreign trade, and (4) the parent corporation's abandonment of its participation in the Canadian patent pool has occurred after, and apparently in response to, the court's judgment and decree.

APPEAL AND ERROR §1672 > RESTRAINTS OF TRADE AND MONOPOLIES §81 > modification of injunction -- > Headnote:
LEdHN[22A][] [22A]***LEdHN[22B]***[] [22B]

Although a defendant who has been enjoined from conspiring with a Canadian patent pool in violation of the antitrust laws is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, the United States Supreme Court will not, on direct review of the decree granting injunctive relief, undertake a reappraisal of the injunction in light of posttrial developments.

RESTRAINTS OF TRADE AND MONOPOLIES §77 > injunctive relief -- patent pools -- > Headnote:
LEdHN[23A][] [23A]***LEdHN[23B]***[] [23B]

A radio and television set manufacturer which is interested in expanding its foreign commerce and which has suffered restraints of trade at the hands of a research company and its coconspirators in a Canadian patent pool is entitled to injunctive relief broadly barring the research company from conspiring with others to restrict or prevent the manufacturer from entering any other foreign market, and findings that the research company and its parent corporation were conspiring with English and Australian patent pools which refused to license imports, and that the manufacturer intended to expand its export business, are sufficient foundation for the conclusion that continued participation by the research company and its parent corporation in the English and Australian pools poses a significant threat of loss or damage to the manufacturer's business, even if such business has not previously been damaged as a result of the activities of the English and Australian pools.

INJUNCTION §138 > extent of relief -- > Headnote:
LEdHN[24][] [24]

In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

RESTRAINTS OF TRADE AND MONOPOLIES §75 > injunction -- extent of relief -- > Headnote:
LEdHN[25][] [25]

The federal courts, in exercising the traditional equitable powers extended to them by 16 of the Clayton Act (*15 USC 26*), authorizing injunctive relief against threatened loss or damage by a violation of the antitrust laws, should respond to the salutary principle that when one has been found to have committed acts in violation of a law, he may be restrained from committing other related unlawful acts.

RESTRAINTS OF TRADE AND MONOPOLIES §75 > injunction -- extent of relief -- > Headnote:
LEdHN[26][] [26]

Although a Federal District Court may not enjoin all future illegal conduct of a defendant, or even all future violations of the antitrust laws, however unrelated to the antitrust violation found by the court, when the defendant's purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed, and this is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that they effectively pry open to competition a market which has been closed by the defendant's illegal restraints.

PATENTS §232 > misuse -- royalties -- > Headnote:
LEdHN[27][] [27]

Conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse.

PATENTS §5 > rights of patentee -- > Headnote:
LEdHN[28][] [28]

A patentee has the exclusive right to manufacture, use, and sell his invention; the heart of his legal monopoly is the right to invoke the state's power to prevent others from utilizing his discovery without his consent; and the law recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention.

PATENTS §225 > PATENTS §232 > licenses -- conditions -- royalties -- > Headnote:
LEdHN[29][] [29]

There are established limits which a patentee must not exceed in employing the leverage of his patent to control or limit the operations of a licensee; among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of the patent monopoly, and his right to set the price for a license does not extend so far, whatever privilege he has to exact royalties as high as he can negotiate; and just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products, since, in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

PATENTS §5 > rights of patentee -- > Headnote:
LEdHN[30][] [30]

A patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the government.

PATENTS §232 > misuse -- royalties -- > Headnote:
LEdHN[31][] [31]

If the provision of a license agreement basing royalty payments on the licensee's total sales is dictated by the convenience of the parties rather than by the patent power of the patentee, such a royalty arrangement involves neither misuse of the patents nor forbidden conditions attached to the license.

PATENTS §232 > royalties -- > Headnote:
LEdHN[32][] [32]

If a licensee negotiates for the privilege to use any or all of the patents and developments as he desires to use them, he cannot complain that he must pay royalties if he chooses to use none of them, and he cannot then charge that the patentee has refused to license except on the basis of a total-sales royalty.

PATENTS §232 > royalties -- > Headnote:
LEdHN[33][] [33]

A patentee is not authorized to use the power of his patent to insist on a total-sales royalty from a licensee and to override protestations of the licensee that some of his products are unsuited to the patent or that for some lines of his merchandise he has no need or desire to purchase the privileges of the patent, since, in such event, not only would royalties be collected on unpatented merchandise, but the obligation to pay for nonuse would have its source in the leverage of the patent.

PATENTS §232 > misuse -- royalties -- > Headnote:
LEdHN[34][] [34]

Patent misuse inheres in a patentee's insistence on a licensee's payment of a percentage-of-sales royalty, regardless of use, where the patentee rejects the licensee's proposals to pay only for actual use; a licensee must pay if he uses a patent, but he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all; and there is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use, but also for producing products which do not employ his discoveries at all.

PATENTS §232 > royalties -- > Headnote:
LEdHN[35][] [35]

A licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's expenses in dealing with him; he cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent; if the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license--enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all; but there is no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

RESTRAINTS OF TRADE AND MONOPOLIES §58 > RESTRAINTS OF TRADE AND MONOPOLIES §77 > misuse of patent -- license -- conditions -- > Headnote:
LEdHN[36][] [36]

If there is a patent misuse consisting of a patentee's conditioning the grant of patent licenses upon the payment of royalties on unpatented products, it does not necessarily follow that such misuse embodies the ingredients of an ***antitrust law*** violation under either 1 or 2 of the Sherman Act (*15 USC 1*, *2*), or that the licensee has been threatened by an ***antitrust law*** violation so as to entitle it to an injunction under 16 of the Clayton Act (*15 USC 26*).

APPEAL AND ERROR §1692.1 > remand -- > Headnote:
LEdHN[37][] [37]

The United States Supreme Court will remand an antitrust case to a Federal Court of Appeals for a determination in the first instance whether findings and evidence of a Federal District Court, sitting without a jury, are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify an injunction issued by the District Court, where such matter has not been considered by the Court of Appeals.

Syllabus

[579] Upon the expiration in 1959 of petitioner, Zenith's, license agreement with Hazeltine Research, Inc. (HRI), which permitted Zenith to use all of HRI's domestic radio and television patents under HRI's so-called standard package license, Zenith refused to renew, asserting that it no longer required a license. HRI brought a patent infringement suit in November 1959. Zenith's answer alleged invalidity of the patent, noninfringement, patent misuse by HRI, and HRI's unclean hands through conspiracy with foreign patent pools. In May 1963 Zenith counterclaimed against HRI for treble damages and injunctive relief, alleging Sherman Act violations by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, its parent Hazeltine Corp. (Hazeltine), and patent pools in Canada, England, and Australia. Zenith contended that the patent pools refused to license the foreign patents, including Hazeltine's, **[****2]** placed within their exclusive licensing authority, to Zenith and others seeking to export American-made radios and television sets into those foreign markets. HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation. Hazeltine was not served with the counterclaim or named as a party, and made no appearance until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." The District Court, sitting without a jury, ruled for Zenith on the infringement action, and on the counterclaim held that (1) HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license and by insisting on extracting royalties from unpatented products, and (2) HRI and Hazeltine conspired with foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. With respect to patent misuse, judgment was entered for Zenith for treble the actual damages of approximately $ 50,000, and injunctive relief given against further misuse. Treble damages for almost $ 35,000,000 were awarded Zenith on the conspiracy claim, together **[****3]** with injunctive relief against further participation **[*101]** in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market. Relying on the "one entity" stipulation, the court entered the judgments for treble damages and injunctive relief against Hazeltine as well as HRI. The Court of Appeals set aside the judgments against Hazeltine, ruling that the lower court lacked jurisdiction over that company and that the stipulation was an insufficient basis for entering judgment against Hazeltine. On the patent misuse claim, the treble-damage award against HRI was affirmed, but the injunction against further misuse was modified. The conspiracy treble-damage award was reversed, the Court of Appeals holding that Zenith had failed to prove it had in fact been injured during the relevant four-year period preceding the filing of its counter-claim. That court also struck down the injunction against HRI's participation in conspiracies restricting Zenith's foreign trade. *Held*:

1. One is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. **[****4]** Pp. 108-112.

(a) The judgments against Hazeltine were properly vacated as Hazeltine was not named as a party or served, and did not formally appear at the trial; and the stipulation executed by HRI was not an adequate substitute for the normal means of obtaining jurisdiction over Hazeltine. P. 110.

(b) It was error to enter an injunction against Hazeltine without determining that it was "in active concert or participation" with HRI in a proceeding in which Hazeltine was a party. P. 112.

2. The Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Pp. 114-125.

(a) The evidence was sufficient to sustain a finding that the Canadian patent pool refused to license imported goods, thus excluding foreign manufacturers like Zenith from the Canadian market for radio and television products. P. 118.

(b) The evidence clearly warrants the inference that the Canadian patent pool's past conduct interfered with and made more difficult the distribution of Zenith products in the relevant 1959-1963 period; and it could rationally be found that Zenith suffered damage during the pertinent period from having a smaller share of the **[****5]** market than it would have had if the pool had never existed. Pp. 118-119.

[*102] (c) The evidence is sufficient to support a finding of damage resulting from events occurring after the damage period began. Pp. 119-123.

(d) In applying the clearly erroneous standard of *Fed. Rule Civ. Proc. 52 (a)* to the findings of a district court sitting without a jury, the appellate court must determine whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed," and not whether it would have made the same findings the trial court did. P. 123.

(e) Where a treble-damage plaintiff seeks recovery for injuries from a total or partial market exclusion, a court may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264*. Pp. 123-124.

(f) The trial court was entitled to infer from the **[****6]** circumstantial evidence that the necessary causal relation between the Canadian patent pool's conduct and the claimed damage existed. Pp. 124-125.

3. The Court of Appeals properly set aside the District Court's judgment with respect to injury to Zenith by the English patent pool, as the only permissible inference from the record is that Zenith did not enter the English television market because it was awaiting a change in the English line-scanning signal and not because of the activities of the patent pool. Pp. 125-128.

4. The Court of Appeals correctly reversed the lower court's damages award with respect to the Australian market as nothing in the record permits the inference that Zenith either intended or was prepared to enter the Australian market during the relevant period. Pp. 128-129.

5. Injunctive relief under § 16 of the Clayton Act is available even though the plaintiff has not suffered actual injury as long as he demonstrates a significant threat of injury from an impending antitrust violation or from a contemporary violation likely to continue or recur. Pp. 129-133.

(a) Injunctive relief against HRI with respect to the Canadian market was wholly proper, as the trial **[****7]** court found that HRI and the Canadian patent pool were conspiring to exclude Zenith **[*103]** and others from the Canadian market, and there was nothing to indicate that this clear violation of the antitrust laws had terminated or that the threat to Zenith would cease in the foreseeable future. Pp. 131-132.

(b) The injunction which barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign markets is also reinstated, in light of HRI's antitrust violation by its conspiring with the Canadian pool, its participation in similar pools in England and Australia, and Zenith's interest in expanding its foreign markets. Pp. 132-133.

6. Conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse. Pp. 133-140.

(a) If convenience of the parties rather than patent power dictates a percentage-of-total-sales royalty provision there is no misuse of the patents. *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827*. Pp. 137-138.

(b) A licensee, who obtains the privilege of using the patent and insurance against infringement suits, **[****8]** must anticipate some minimum charge for the license, enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all, but the patentee's statutory monopoly cannot be used to coerce an agreement to pay a percentage royalty on goods not using the patent. Pp. 139-140.

7. The matter is remanded to the Court of Appeals for it to consider whether the trial court correctly determined that HRI conditioned the grant of licenses upon the payment of royalties on unpatented products, and, if so, whether such misuse embodies the ingredients of a violation of either *§ 1* or *§ 2* of the Sherman Act, or whether Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. Pp. 140-141.

Counsel: Thomas C. McConnell argued the cause for petitioner. With him on the briefs were Philip J. Curtis and Francis J. McConnell.

John T. Chadwell and Victor P. Kayser argued the cause for respondents. With them on the briefs for respondent Hazeltine Research, Inc., were C. Lee Cook, Jr., **[*104]** Joseph V. Giffin, M. Hudson Rathburn, and Laurence B. Dodds. With Messrs. Chadwell and Kayser on **[****9]** the brief for Hazeltine Corp. were Messrs. Cook and Giffin.

Solicitor General Griswold, Assistant Attorney General Zimmerman, and Harris Weinstein filed a brief for the United States as amicus curiae.

Judges: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall

Opinion by: WHITE

Opinion

[*137]** **[**1566]** MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner Zenith Radio Corporation (Zenith) is a Delaware Corporation which for many years has been successfully engaged in the business of manufacturing radio and television sets for sale in the United States and foreign countries. A necessary incident of Zenith's operations has been the acquisition of licenses to use patented devices in the radios and televisions it manufactures, and its transactions have included licensing agreements with respondent Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television fields. HRI is the wholly owned subsidiary of respondent Hazeltine Corporation (Hazeltine), a substantially larger and more diversified company that has among its assets numerous foreign patents -- including the foreign counterparts **[****10]** of HRI's domestic patents -- which it licenses for use in foreign countries.

Until 1959, Zenith had obtained the right to use all HRI domestic patents under HRI's so-called standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license from HRI. Negotiations proceeded to a stalemate, and in November 1959, HRI brought suit in the Northern District of Illinois, claiming that **[**1567]** Zenith television sets infringed HRI's patents on a particular automatic control system. Zenith's answer alleged invalidity of the patent asserted and noninfringement, **[*105]** and further alleged that HRI's claim was unenforceable because of patent misuse as well as unclean hands through conspiracy with foreign patent pools. On May 22, 1963, more than three years after its answer had been filed, Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, Hazeltine, and patent pools in Canada, England, and Australia. Zenith **[****11]** contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets.

[*138]** The District Court, sitting without a jury, ruled for Zenith in the infringement action, *239 F.Supp. 51, 68-69*, and its judgment in that respect, which was affirmed by the *Court of Appeals, 388 F.2d 25, 30-33*, is not in issue here. On the counterclaim, the District Court ruled, first, that HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products. *239 F.Supp., at 69-72, 76-77*. Judgment was entered in Zenith's favor for treble the amount of its actual damages of approximately $ 50,000, and injunctive relief against further patent misuse was awarded. Second, HRI and Hazeltine were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. Hazeltine had granted the pools the exclusive right **[****12]** to license Hazeltine patents in their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired **[*106]** with the pools to restrain the trade or commerce of the United States, in violation of *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 1*, and was liable for injury caused Zenith's foreign business by the operation of the pools.

239 F.Supp., at 77-78. Total damages with respect to the three markets, when trebled, amounted to nearly $ 35,000,000. [1] **[**1568]** Judgment in this **[*107]** **[580]** amount was awarded Zenith, along with injunctive relief

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[1] In its initial findings, handed down on January 25, 1965, 239 F.Supp., at 76, the District Court concluded that Zenith had suffered actual damages of $ 16,238,872 as a result of the restraints imposed by the three pools upon Zenith's export business during the four-year damage period:

Canada:

Television

$ 5,826,896

Radio

470,495

England:

Television

8,079,859

Radio

1,169,067

Australia:

Television

625,786

Radio

66,769

Total

16,238,872

On April 5, 1965, the District Court entered partial judgment, awarding Zenith treble damages for patent misuse and treble damages with respect to Canada, but reserving jurisdiction for further hearings on damages in the English and Australian markets. The further proceedings were held in October and November 1965, after which the District Court amended its findings on damages for England and Australia:

England:

Television

$ 4,312,924

Radio

against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market.

[**13]** Relying **[***139]** upon its finding that HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation, see *239 F.Supp., at 69*, the court entered judgments for treble damages and injunctive relief, both with respect to patent misuse and conspiracy, against Hazeltine as well as against the named counter-defendant, HRI.

On appeal by HRI and Hazeltine, the Court of Appeals set aside entirely the judgments for damages and injunctive relief entered against Hazeltine, ruling that the District Court lacked jurisdiction over that company and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against Hazeltine. 388 F.2d, at 28-30. With respect to Zenith's patent misuse claim, the Court of Appeals affirmed the treble-damage award against HRI, but modified in certain respects the District Court's injunction against further misuse. *388 F.2d, at 33-35, 39*.

The Court of Appeals also reversed the treble-damage award for conspiracy to restrain Zenith's export trade. Without reaching any of the other issues presented by the appeal **[****14]** on this phase of the case, the court held that Zenith had failed to sustain its burden under § 4 of the **[*108]** Clayton Act, 38 Stat. 731, *15 U. S. C. § 15*, to prove the fact of damage -- injury to its business -- within the relevant four-year period preceding May 22, 1963, the date Zenith's counterclaim was filed. [2] Finally, the Court of Appeals struck the injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets.

745,102

Australia:

Television

223,508

Radio

24,952

Total

5,306,486

These revisions reflect the proof submitted at the further proceedings, showing that government embargoes in England and Australia, in effect until 1959 and 1960 respectively, precluded entry by Zenith into the English and Australian markets. The District Court found, with respect to England, that because of the embargoes, Zenith's damages were zero for the first year of the damage period, 50% of the figure initially accepted by the court for the second year, 75% for the third, and 100% for the fourth. With respect to Australia, the District Court adopted a similar 0-50-75-100% revision of the original figures used by the court in computing the damage findings of January 25, 1965.

[2] The record discloses that Zenith, HRI, and the courts below all considered the damage period to be the four years prior to the date on which Zenith filed its counterclaim. No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959. Cf. *Bull v. United States, 295 U.S. 247, 262 and n. 10 (1935)*; *Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 (C. A. 6th Cir. 1960)*, cert. denied, ***366 U.S. 911 (1961)***. Cf. *Fed. Rule Civ. Proc. 15 (c)* (amended pleading relates back to date of original pleading if the "claim or defense

[**15]** We granted certiorari, *391 U.S. 933*, to consider among other things the question whether the Court of Appeals properly discharged its appellate function under *Rule 52 (a) of the Federal Rules of Civil Procedure*, which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless "clearly erroneous."

I. THE JUDGMENTS AGAINST HAZELTINE.

The named plaintiff in the patent infringement complaint which began this litigation was HRI, not its parent, Hazeltine; Zenith's counterclaim named only HRI as the "counter-defendant," identifying HRI and Hazeltine as "counter-defendant and its parent." After Zenith had filed its answer and had delivered a draft of its counter-claim to HRI's attorneys -- both the answer and **[581]** the counterclaim alleging that HRI had unlawfully **[**1569]** conspired with Hazeltine and foreign patent pools -- HRI and Zenith **[*109]** stipulated that "for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company."

[*140]** On May 22, 1963, two weeks after the stipulation had been signed, Zenith filed its counterclaim, seeking money **[****16]** damages from HRI and an injunction against HRI and those "in privity" with it. Hazeltine was not served with the counterclaim and was not named as a party, although it was alleged to be a coconspirator with HRI and the foreign patent pools. Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." Insofar as the record reveals, Hazeltine did not formally participate in the proceedings until after the District Court had entered its initial findings of fact and conclusions of law. On April 5, 1965, after Hazeltine's special appearance, the trial judge entered judgment against Hazeltine as well as HRI, thereby rejecting Hazeltine's objection that the court was without jurisdiction over it. Apparently, the trial court based its decision on the pretrial stipulation [3] and its earlier finding that:

"The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, **[*110]** Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics **[****17]** industry in the United States and in foreign countries." *239 F.Supp., at 69*.

[**18]** ***LEdHN[1]***[] [1] ***LEdHN[2]***[] [2] ***LEdHN[3]***[] [3]The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that ***HN1***[] one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee, 311 U.S. 32, 40-41 (1940)*. The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E. g., Pennoyer v. Neff, 95 U.S. 714 (1878)*; *Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957)*.

Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over **[****19]** a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent,

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asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").

[3] During the proceedings before the District Court on April 2, 1965, the trial judge noted: "Well, of course, Hazeltine Corporation wasn't a party to the lawsuit." The court's reliance upon the stipulation as a basis for its decision to enter judgment against Hazeltine as well as HRI is reflected by the interchanges between the court and counsel for Hazeltine during those proceedings. An example is the following:

"Mr. Kayser [counsel for Hazeltine]: . . . Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody liable on a judgment when he didn't even name them? He relied on some pretrial stipulation.

"The Court: You mean that pretrial stipulations are worthless?"

but it was signed only by HRI, through its attorney, Dodds. Hazeltine did not execute the stipulation, and Dodds, **[***141]** although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation **[**1570]** on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them.

[*111] Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter ego*s; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest **[****20]** jurisdiction would warrant entry of judgment against it. But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue, [4] **[582]** but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

LEdHN[4][] [4] ***LEdHN[5A]***[] [5A] **[****21]** Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be *res judicata* against Hazeltine because of this control, that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company. [5] See *G. & C. Merriam Co. **[*112]** v. Saalfield, 241 U.S. 22 (1916)*; *Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260 (1961)*.

LEdHN[5B][] [5B]

[**22]** ***LEdHN[6]***[] [6] ***LEdHN[7A]***[] [7A]Neither the judgment for damages nor the injunction against Hazeltine was proper. ***HN2***[] Although injunctions issued by federal courts bind not only the parties defendant **[***142]** in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," *Fed. Rule Civ. Proc. 65 (d)*, a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party. [6]

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[4] There is some indication that the genesis of the stipulation was a pretrial conference, when a question was raised as to whether or not a subpoena served upon HRI could reach certain records of Hazeltine relating to the latter's foreign patents. Hazeltine, of course, argues that the stipulation's only purpose and effect were to facilitate discovery and trial by obviating the necessity of litigating whether or not Zenith could "pierce the corporate veil" between HRI and its parent.

[5] In its brief in this Court, Zenith seems to argue that Hazeltine is estopped to deny that it is bound by the stipulation. Not only was HRI's counsel, Dodds, an officer of Hazeltine, but also Ruestow and Westermann, Hazeltine's general patent counsel and general counsel, were present during trial and failed to "repudiate" the construction allegedly given the stipulation by the parties at trial to the effect that it bound Hazeltine to any adjudication on the counterclaim. We find this theory untenable on the record of this case, for the references during trial to the stipulation are equally consistent with the interpretation advanced by Hazeltine that the stipulation merely eliminated the necessity for Zenith to perform the time-consuming task of piercing the corporate veil in proving its counterclaim against HRI. Also, Ruestow and Westermann were called as witnesses during trial, and assuming they were present throughout the trial -- a fact which is neither proved nor disproved by the record -- their failure to repudiate Zenith's proposed construction of the stipulation is entirely consistent with the proposition that they were present only as witnesses, and not as authorized representatives for a person who might be bound by the litigation.

[6] Just as the *alter ego* issue was not litigated after Hazeltine had made its special appearance and while it had an opportunity to be heard, see *supra, at 111*, so the District Court evidently did not rely upon anything more than the stipulation as a basis for entering the injunction against Hazeltine as well as HRI. The record does not support the contention, implicit in Zenith's brief, that when Hazeltine appeared to contest jurisdiction it was found by the District Court to be "in active concert or participation"

LEdHN[7B][] [7B]

[**23]** **[*113]** II. **[**1571]** THE FOREIGN PATENT POOLS.

A. *The Treble-Damage Award*.

LEdHN[8A][] [8A] *LEdHN[9A]*[] [9A]HRI's major points in the Court of Appeals were that no injury to Zenith's business during the damage period had been proved; that if Zenith had suffered injury, it resulted wholly or partly from conduct prior to May 22, 1959, and to this extent was barred by the statute of limitations and by Zenith's 1957 settlement of certain antitrust litigation against RCA, General Electric, and Western Electric, which had the effect of releasing HRI from all liability for pre-settlement acts of the foreign patent pools; [7] that the Hazeltine companies had not illegally conspired with foreign pools; and that the damage award was excessive. Passing the other issues pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period which resulted from pool activities either before or after the beginning of the damage period, and that the District Court's **[****24]** finding to the contrary was clearly erroneous. [8]

LEdHN[8B][] [8B] *LEdHN[9B]*[] [9B]

[583] **[****25]**

[*114] *LEdHN[10A]*[] [10A]We **[***143]** have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent [9] by the Canadian pool's **[**1572]** restraints upon imports of radio and television sets. On the other hand, we agree with the Court of Appeals that the District Court erred as to the English and Australian markets.

LEdHN[10B][] [10B]

[**26]** 1. *The Canadian Pool*.

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with HRI and that, by entering its special appearance, Hazeltine consented to be bound by such a finding. See generally Dobbs, The Validation of Void Judgments: The Bootstrap Principle (pts. 1 and 2), 53 Va. L. Rev. 1003, 1241 (1967).

[7] Although HRI and Hazeltine were not parties to this prior litigation and did not enter the settlement agreement, HRI urged that all joint tortfeasors, including HRI and Hazeltine, were released from liability for injuries flowing from the pre-settlement acts of the pools. The 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade; the embargoes in England and Australia were thought by the District Court to preclude any injury from acts of the English and Australian pools, and the embargoes were not lifted until well after the settlement was executed.

[8] The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. See, *e. g.,* *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951)*; *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962)*. Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra.* Cf. *American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 443 (C. A. 2d Cir. 1945)*. Although patent rights are here involved, the same conclusions follow. See, for example, *United States v. Line Material Co., 333 U.S. 287, 305-315 (1948)*; *United States v. Singer Mfg. Co., 374 U.S. 174, 196-197 (1963)*.

[9] Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. *HN3*[] It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra, at 702 (1962)*; *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 143-144 (1968)* (concurring opinion).

LEdHN[11][] [11]The findings of the District Court with respect to the operations of the Canadian pool may be briefly summarized. The Canadian patent pool, Canadian Radio Patents, Ltd. (CRPL), was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Company, and **[*115]** by Westinghouse through its Canadian subsidiary. The pool was made up largely of Canadian manufacturers, most of which were subsidiaries of American companies. The pool for many years had the exclusive right to sublicense the patents of its member companies and also those of Hazeltine and a number of other foreign concerns. About 5,000 patents were available to the pool for licensing, and only package licenses were granted, covering all patents in the pool and strictly limited to manufacture in Canada. No license to importers was available. The chief purpose of the pool was to protect the manufacturing members and licensees from competition by American and other foreign companies seeking to export their products into Canada.

CRPL's efforts to prevent **[****27]** importation of radio and television sets from the United States were highly organized and effective. Agents, investigators, and manufacturer and distributor trade associations systematically policed the market; warning notices and advertisements advised distributors, dealers, and even consumers against selling or using unlicensed equipment. Infringement suits or threats thereof were regularly and effectively employed to dissuade dealers from handling American-made sets.

For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful. Zenith then brought an antitrust suit against RCA, General Electric, and Western Electric. [10] This litigation was favorably settled, Zenith receiving, among other things, worldwide **[***144]** licenses on patents owned by the named defendants. **[*116]** Armed with these and other licenses, Zenith in 1958 began exporting radio and television products to Canada. It was promptly informed by CRPL that to continue business in Canada, Zenith would be required to sign CRPL's standard license, which did not permit importation, **[****28]** and that to sell in Canada it must manufacture there. Zenith was notified at the time that it was infringing at least one of Hazeltine's patents which had been placed with CRPL for licensing in Canada. Soon after this demand by CRPL, HRI began its infringement suit against Zenith.

Some of the trial court's findings describing the operations of the Canadian pool and its "drastic" impact upon Zenith's foreign commerce did not date the events or state whether they had occurred before or after May 22, 1959. The damage award was confined to injuries sustained during the statutory period, **[584]** but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period. Damages **[**1573]** were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television **[****29]** market on May 22, 1959, and throughout the damage period rather than its actual 3% share. [11] Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages **[*117]** awarded, therefore, necessarily resulted from pre-damage period conduct. [12]

[**30]** The Court of Appeals reversed the District Court because it considered the evidence insufficient to prove the fact of any damage to Zenith after May 22, 1959. Having put aside HRI's statute of limitations defense, belatedly raised in the District Court and pressed in the Court of Appeals, [13] the import of the court's **[***145]**

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[10] Zenith's antitrust claim was asserted as a counterclaim in a patent infringement suit brought by RCA against Zenith and its subsidiary, the Rauland Corporation.

[11] The computation of damages, prepared by Zenith's experts and accepted by the District Court, see *239 F.Supp., at 76*, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales.

[12] On November 22, 1965, during the further proceedings held to consider damages for England and Australia, Zenith's executive vice-president and treasurer, Kaplan, testified:

"In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date."

decision **[*118]** was that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date. The Court of Appeals' overriding judgment -- as it had to be if its no-injury rationale were to meet claims of damage period injury from pre-damage period conduct -- was that Zenith would have done no more business in Canada after May 22, 1959, had the patent pool never operated in that country.

[**31]** The Court of Appeals was clearly in error. The evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their **[**1574]** clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its codefendants. And even in 1958, when Zenith undertook in earnest to establish its distribution system in Canada and to market its merchandise, Zenith was met with further pool advertisements threatening action against imported goods and further notifications, continuing past May 22, 1959, that its products were infringing pool patents and that no license was available **[585]** unless Zenith manufactured in Canada.

This evidence clearly warrants the inference **[****32]** that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally **[*119]** be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed.

LEdHN[12][] [12]We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. See, *e. g., Local 167 v. United States, 291 U.S. 293, 297-298* ***[***146]*** *(1934)*; **[****33]** *United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952)*. HRI frankly conceded the continuation of the pool before the District Court, [14] and it appears sufficiently clear that throughout this time Zenith was deprived of

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[13] HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for "leave to file" defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. The thrust of the former was primarily that the findings as to Canada had erroneously included damages resulting from conduct occurring prior to May 22, 1959. The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under *Fed. Rule Civ. Proc. 12 (h)*, as urged by Zenith in both the District Court and the Court of Appeals.

Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring "during the 4-year statutory damage period." *239 F.Supp., at 76*. The Court of Appeals, although not purporting to pass on the statute of limitations defense, referred to the "four year damage period" and identified it as "four years prior to the May 22, 1963, filing date of Zenith's counterclaim. *15 U. S. C. Sec. 15b*." *388 F.2d, at 35* and n. 4. The parties have not argued the matter here, and we make no further effort to penetrate the confusion surrounding this issue or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted.

[14] On April 1, 1965, during the further proceedings held by the District Court before judgment, counsel for HRI stated:

"Now, what [counsel for Zenith] is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents -- that characterized necessarily as he characterizes them, but that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

what had always been refused it -- a license on pool patents permitting it to sell American-made merchandise in Canada.

[**34]** On May 12, 1959, the pool manager conferred with Zenith's vice president, informing him that Zenith was infringing pool patents and would require a license, **[*120]** but that licenses were granted only for local manufacture. This was followed on June 5, 1959, by a letter stating without reservation that Zenith receivers were infringing, and enclosing the pool's standard license form. This was nothing more nor less than a demand during the damage period that Zenith either manufacture in Canada and take the standard package license or cease its **[**1575]** activities in that country. [15] There is no evidence that the pool ever retreated from that position during the next four years.

[**35]** Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business. We find singularly unpersuasive the argument that Zenith was as well off without a license as with one. This is little more than an assertion that pool licenses, from which CRPL and its participants enjoyed substantial income, were without value. Without the license, doing business in Canada obviously involved weighty risks for Zenith itself, besides requiring it to convince the trade that it could legally and effectively do business without clearance from CRPL. [16]

[586] **[****36]** **[*121]** Of **[***147]** course, Zenith determined to take these risks, serious as they were. Although HRI brought the instant litigation claiming infringement of an HRI domestic patent, the foreign counterpart of which had been made available to the Canadian pool by Hazeltine, Zenith persevered in its Canadian efforts. The claim is now pressed, and the Court of Appeals held, that the pool bothered neither Zenith nor its distributors after mid-1959 and that Zenith ran the gantlet so successfully that not having a license made no difference whatsoever.

It is true that the record discloses no specific instance of subsequent infringement suits or threats against Zenith's existing or potential distributors or dealers. But there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise. [17] **[****38]** More significant, the fair import of the testimony **[*122]** by

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HRI does contend, however, that the ties between the Canadian pool and the Hazeltine companies were broken in December 1965, when Hazeltine secured an early termination of its licensing agreement with CRPL. See n. 25, *infra*.

[15] That Zenith failed to make a formal request for a CRPL license during the damage period can properly be attributed to Zenith's recognition that such a request would have been futile. The pool had made its position entirely clear, and under these circumstances the absence of a formal request is not fatal to Zenith's case. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699-702 (1962)*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 487, n. 5 (1968)*.

[16] In 1960, the Report of the Royal Commission on Patents, Copyright and Industrial Designs was published. This Report described the magnitude of the risk taken by Zenith and its distributors in selling imported products in Canada:

"The portfolio in respect of which CRPL had the right to grant licences consisted of 5,000 patents, and in the absence of a licence from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.

"CRPL indicated that it does not grant a licence to any importer of radio or television receivers . . . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ."

[17] This letter, brought to Zenith's attention by an ex-Zenith dealer, warned the Motorola dealer that his importation of American-made television sets and FM radios probably infringed pool patents. The dealer not only was cautioned that CRPL remained willing to litigate infringements, describing two recent and successful suits, but also was reminded of CRPL's policy against licensing imports:

Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing **[**1576]** an effective distribution system throughout **[****37]** Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Canadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do, [18] **[***148]** but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge **[*123]** and failed to adhere to the teachings of *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)*, and other cases dealing with the standard of proof in treble-damage actions.

[**39]** ***LEdHN[13]***[] [13]***HN4***[] In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under *Rule 52 (a)* is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)*. See also *United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 495-496 (1950)*; *Commissioner v. Duberstein, 363 U.S. 278, 289-291 (1960)*.

[**40]** ***LEdHN[14]***[] [14] ***LEdHN[15]***[] [15]***HN5***[] Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are **[587]** rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that ***HN6***[] in the absence of more precise proof, the factfinder may "conclude **[**1577]** as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage **[*124]** to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra, at 264.* **[****41]** See also *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-379 (1927)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566 (1931)*.

In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theater granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This

"In closing, I wish to inform you that we would be most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents."

[18] HRI urges that the trial testimony as to Canada of each of two Zenith officers, Wright and Kaplan, was inconsistent with his own testimony on recall, inconsistent with the testimony of the other, and inconsistent with documentary evidence, and that we should therefore disregard their testimony. It is true that the trial judge's views as to credibility are not completely impervious, but *Rule 52 (a)* admonishes due regard for the trial court's opportunity to assess the credibility of witnesses. The Court of Appeals clearly took into account this evidence, and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence. See *United States v. United Shoe Machinery Co., 247 U.S. 32, 37-38 (1918)*; *Walling v. General Industries Co., 330 U.S. 545, 550 (1947)*; *Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 609-612 (1950)*; *United States v. Oregon State Medical Society, 343 U.S. 326, 332 (1952)*; *Orvis v. Higgins, 180 F.2d 537, 539-540 (C. A. 2d Cir.)*, cert. denied, ***340 U.S. 810 (1950)***; *Ruth v. Utah Construction & Mining Co., 344 F.2d 952 (C. A. 10th Cir. 1965)*. HRI relies heavily in this respect on Zenith's annual reports for the years 1957-1962, but aside from the fact that these reports, except for 1962, were never admitted into evidence, we find them quite insufficient to undermine the credibility of Wright and Kaplan.

Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages. *HN7*[] Although the factfinder is not entitled to base a judgment on speculation or guesswork,

"the jury may make a just and reasonable estimate **[***149]** of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co. v. Paterson Co., supra, 561-4*; *Eastman Kodak **[****42]** Co. v. Southern Photo Co., supra, 377-9*. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." *327 U.S., at 264-265*.

Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which **[*125]** it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer **[****43]** from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-701 (1962)*.

2. *The English Pool*.

LEdHN[16][] [16]Hazeltine patents were made available to the English pool in 1930. The pool issued only package licenses, restricted to local manufacture. Although pool radio patents had expired prior to the beginning of the damage period, the trial court found, and we assume, that the pool held television patents which would not be licensed for television sets made in the United States. [19] Zenith was interested **[**1578]** in the English market and made exclusive arrangements with one distributor desiring to handle its merchandise. At no time during or before the damage period, however, did Zenith make available or offer for sale a substantial number of television sets suitable for the English market or make any other serious efforts to **[*126]** enter that market. It attained no appreciable position in the English television market.

[**44]** Having initially found the patent pool responsible over the years for Zenith's failure to participate in the English market, the trial court, after further proceedings, held that a government embargo, not the patent pool, was the sole reason for Zenith's not entering the English market prior to the beginning of the damage period in 1959; until then, the **[***150]** District Court found, the pool "[was] not called upon to exercise the type of conduct that [it] exercised in Canada." It did not, however, retreat from its conclusion that restraints imposed by the pool had foreclosed Zenith **[588]** during the damage period. [20] In this respect we agree with the Court of Appeals that the trial court clearly erred. Based on our own examination of the record, we are convinced that even with the ending of the embargo in mid-1959, Zenith faced other obstacles which effectively discouraged its entry into the English market and for which the pool was not responsible.

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[19] Wright testified that in mid-1955 a representative of the English pool had confirmed his understanding that "the policy of the Pool . . . required that [radio and television] sets be made in England, and that nothing would be licensed if it was imported from abroad." Wright further testified that the pool representative "saw no possibility" that this restrictive policy would be changed in the future. Subsequently, during its dealings with its English radio distributor, Zenith was "given to understand that television was just out of the question."

[20] Because the embargo precluded any recovery by Zenith for the first year of the damage period, the trial court modified its initial measure of damages to reflect the time it would have taken Zenith, starting with the removal of the embargo, to build up its market share. See n. 1, *supra*.

[**45]** Positing that Zenith could not get a license from the English pool and that it did not enter the British market before or during the damage period, the issue is whether, once the embargo was lifted, Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its "business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other **[*127]** factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4. [21]

[**46]** Zenith was interested in the English market; this much is clear. But its standard domestic television set was manufactured to operate on 525- and 625-line-per-second scanning signals, whereas the 405-line signal was standard in England until after the damage period. Similarly, while FM transmission was utilized in the United States for the audio portion, AM signals were used in England. Zenith's regular product thus was not salable in the English market. To succeed at all, Zenith had either to produce a differently equipped set or to provide for the mass conversion of its standard receivers. Unquestionably, the company had the facilities and the ability to follow either course. But it is equally clear that it pursued neither. [22] A change in the standard **[***151]** British broadcast to include **[**1579]** a 625-line signal was under **[*128]** consideration, even imminent, during the damage period. Zenith's merchandise would in any event have sold at prices substantially higher than those prevailing in the English market; tariffs and freight costs tended to widen the differential. Producing a new set for the English market, or modifying existent models on a large-scale **[****47]** basis, would have involved substantial costs.

Based on the evidence before us, **[****48]** including the correspondence between Zenith and its British representative, we think the Court of Appeals correctly rejected the inference that "Zenith intended to and was prepared to enter the English television market during the damage period," and correctly concluded that Zenith was in fact "waiting for a change in English standards to a 625-line system." *388 F.2d, at 37*. It clearly emerges from the evidence that Zenith had every intention to promote the sale of its television sets if and when the signal change occurred. Given that event, neither the absence of a pool license nor pool threats against it or its customers would have deterred Zenith from a major effort to penetrate the British market. Why the existence of the pool, which as far as the record shows was quiescent during the damage period, should be credited with the power to discourage Zenith's entry before the signal change but not after is difficult to grasp. But the question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is **[589]** whether Zenith was in fact constrained by the pool to stay out of England during the **[****49]** damage period or whether Zenith's own business calculus led it to await more favorable conditions. As we have said, the latter is the only permissible inference from this record.

3. *The Australian Pool*.

LEdHN[17][] [17] ***LEdHN[18]***[] [18]The Australian patent pool, which had exclusive rights to license Hazeltine patents, also granted licenses only **[*129]** for local manufacture. Had HRI and Hazeltine's conspiracy with the Australian pool effectively kept Zenith from that market, a compensable violation of the antitrust laws unquestionably would have occurred. But the findings of the District Court are wholly silent as to how the Australian

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[21] See *American Banana Co. v. United Fruit Co. 166 F. 261, 264 (C. A. 2d Cir. 1908)*, affirmed without specific reference to this issue, *213 U.S. 347 (1909)*; *Stearns v. Tinker & Rasor, 252 F.2d 589, 606 (C. A. 9th Cir. 1958)*; *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395-396 (C. A. 6th Cir. 1962)*, cert. denied, ***372 U.S. 907 (1963)***. Cf. *Pennsylvania Sugar Rfg. Co. v. American Sugar Rfg. Co., 166 F. 254, 260 (C. A. 2d Cir. 1908)*.

[22] During trial, Wright and Kaplan testified that adjustments could be made by Zenith's English distributor in his shop to adapt Zenith television sets to the English transmission system. However, the fair import of their testimony, both during trial and in November 1965 on recall, was that conversion of Zenith sets to the English system, whether done before shipment to England or in the distributor's shop, had in fact been carried out only occasionally in the past and was of questionable utility on a commercial basis. Wright and Kaplan stated that Zenith could have manufactured a television set suitable for English use without appreciably more difficulty than Zenith faced in producing a new model for the American market, but the record does not indicate that Zenith took any steps in this direction before the end of the damage period, except in anticipation of the British changeover to the 625-line-per-second transmission system.

pool had any impact on Zenith's business. An officer of Zenith revealed that Zenith had exported no products to Australia since the 1920's or early 1930's. Zenith had not requested a pool license during the 20-year period preceding the trial. A government embargo was found by the District Court to have foreclosed Zenith's American-made merchandise until well into the damage period. High tariffs and shipping **[****50]** costs were additional barriers, as well as the prospect of vigorous competition. Nothing in the record before us would permit the inference that Zenith either intended or was prepared to enter the Australian market during the damage period. The Court of Appeals was correct in reversing the District Court's award of damages with respect to the Australian market.

[1580]** B. *The Injunction*.

In setting aside the District Court's grant of injunctive relief **[***152]** against continued participation by HRI and Hazeltine in any patent pool or similar association restricting Zenith's export trade, [23] the Court of Appeals stated, without more:

"It follows from our conclusion with respect to the foreign patent pools that injunctive relief against **[*130]** 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under *15 U. S. C. Sec. 26*. Paragraph C of the injunction granted must be stricken." *388 F.2d, at 39*.

[**51]** ***LEdHN[19]***[] [19]The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 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. [24] That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 54-55 (1927)*; 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. See *Swift & Co. v. United States, 196 U.S. 375, 396 (1905)*; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., supra, at 54*; *United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952)*; **[****52]** *United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)*.

LEdHN[20][] [20]Moreover, ***HN9***[] the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide **[*131]** **[****53]** private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States v. Borden Co., 347 U.S. 514, 518 (1954)*. 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." *Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)*. Its availability should be "conditioned by the necessities of the **[590]** public interest which Congress has sought to protect." *Id., at 330*.

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[23] Paragraph C of the District Court's injunction prohibits HRI from

"Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

[24] Section 16 provides:

HN8[] "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,* . . . 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 . . . ." (Emphasis added.) *15 U. S. C. § 26*.

[*153]** ***LEdHN[21A]***[] [21A] ***LEdHN[22A]***[] [22A]Judged by the proper standard, the record before us warranted the injunction with respect to Canada. The findings of the District Court were that HRI and CRPL were conspiring to exclude Zenith and others from the Canadian **[**1581]** market; there was nothing indicating that this clear violation of the antitrust laws **[****54]** had terminated or that the threat to Zenith inherent in the conduct would cease in the foreseeable future. Neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct would cease with the judgment negated the threat to Zenith's foreign trade. [25] **[*132]** That threat was too clear for argument, and injunctive relief against HRI with respect to the Canadian market was wholly proper.

LEdHN[21B][] [21B] ***LEdHN[22B]***[] [22B]

[**55]** ***LEdHN[23A]***[] [23A] ***LEdHN[24]***[] [24] ***LEdHN[25]***[] [25] ***LEdHN[26]***[] [26]We also reinstate the injunction entered by the District Court insofar as it more broadly barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign market. ***HN10***[] In exercising its equitable jurisdiction, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB v. Express Publishing Co., 312 U.S. 426, 435 (1941)*. See also *United States v. National Lead Co., 332 U.S. 319, 328-335 and n. 4 (1947)*. Given the findings that HRI was conspiring with the Canadian pool, its purpose **[****56]** to exclude Zenith from Canada and its violation of the Sherman Act were clearly established. Its propensity for arrangements of this sort was also indicated by the findings revealing its participation in similar pools operating in England and Australia. [26] Zenith, a company interested in expanding its foreign commerce and having suffered at the hands of HRI and its coconspirators in the Canadian market, was entitled to injunctive relief against like conduct by HRI in other **[*133]** world markets. **[***154]** We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the "salutary principle that ***HN11***[] when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *NLRB v. Express Publishing Co., supra, at 436*. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, **[**1582]** however unrelated to the violation found by the court, *e.* **[****57]** *g., New York, N. H. & H. R. Co. v. ICC, 200 U.S. 361, 401 (1906)*, "when the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States, 332 U.S. 392, 400 (1947)*. This is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Id., at 401*.

LEdHN[23B][] [23B]

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[25] HRI informs us that Hazeltine, having obtained an early termination of its licensing agreement with CRPL, is now prepared to license any one or more of its Canadian patents "with no restrictions on imports." Since Hazeltine's abandonment of its participation in the Canadian pool occurred only after -- and, apparently, in response to -- the District Court's judgment and decree, we cannot agree with the suggestion that injunctive relief as to Canada has been rendered unnecessary and inappropriate. See *United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952)*; *United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 202-203 (1968)*. Although HRI is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, see, *e. g., United States v. W. T. Grant Co., 345 U.S. 629, 633-636 (1953)*, we are not willing at this time to undertake a reappraisal of the injunction in light of post-trial developments.

[26] Having not disturbed the District Court's findings that HRI and Hazeltine were conspiring with English and Australian patent pools which refused to license imports, the Court of Appeals in any event should have sustained the injunction with respect to the English and Australian markets. These findings, together with Zenith's demonstrated intent to expand its export business, were sufficient foundation for the conclusion that continued participation by HRI and Hazeltine in the English and Australian pools posed a significant threat of loss or damage to Zenith's business.

[**58]** III. THE PATENT-MISUSE ISSUE.

Since the District Court's treble damage award for patent misuse was affirmed by the Court of Appeals, and HRI has not challenged that award in this Court, the only misuse issue we need consider at length is whether the Court of Appeals was correct in striking the last clause from Paragraph A of the injunction, [27] **[****59]** which enjoined HRI from

[591] "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any **[*134]** domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent*." (Emphasis added.)

This paragraph of the injunction was directed at HRI's policy of insisting upon acceptance of its standard five-year package license agreement, covering the 500-odd patents within its domestic licensing portfolio and reserving royalties on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured. [28]

LEdHN[27][] [27]In **[***155]** striking the last clause of Paragraph A the Court of Appeals, in effect, made two determinations. First, under its view of *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950)*, conditioning the grant of a patent license upon payment of royalties on unpatented products was not misuse of the patent. Second, since such conduct did not constitute **[*135]** patent misuse, neither could it be violative of the antitrust laws **[****60]** within the meaning of § 16 of the Clayton Act, under which Zenith had sought and the District Court had granted the injunction. With respect to the first determination, we reverse the Court of Appeals. We hold that conditioning the grant of a patent license upon **[**1583]** payment of royalties on products which do not use the teaching of the patent does amount to patent misuse.

The trial court's injunction does not purport to prevent the parties from serving their mutual convenience by basing royalties on the sale of all radios and television sets, irrespective of the use of HRI's inventions. The injunction reaches only situations where the patentee directly or indirectly "conditions" his license upon the payment of royalties on unpatented products -- that is, where the patentee refuses to license on any other basis and leaves the licensee with the choice between a license so providing and no license at all. Also, the injunction takes effect only if the license is conditioned upon the payment of royalties "on" merchandise not covered by the patent -- where the express provisions of the license or their necessary effect is to employ the patent monopoly to collect royalties, not **[****61]** for the use of the licensed invention, but for using, making, or selling an article not within the reach of the patent.

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[27] The District Court's injunction also included a paragraph barring HRI from continuing to coerce acceptance of its package license through the mechanism of offering a much lower royalty rate for those licensees who take a license on the entire package of patents rather than a license on merely a few of them. Paragraph B enjoined HRI from

"Conditioning directly or indirectly the grant of any license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the payment of the same or greater royalty rate than the rate at which licenses have been granted or offered to others under a group of domestic patents which includes said patent."

The Court of Appeals modified this paragraph in certain respects, *388 F.2d, at 39*, but we do not disturb these modifications.

[28] The District Court concluded:

"Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products." *239 F.Supp., at 77*.

LEdHN[28][] [28] *LEdHN[29]*[] [29]*HN12*[] A patentee has the exclusive right to manufacture, use, and sell his invention. See, *e. g., Bement v. National Harrow Co., 186 U.S. 70, 88-89 (1902)*. The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. See, *e. g., Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908)*; *Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U.S. 24 (1923)*. The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention. See, **[*136]** *e. g., Waterman v. Mackenzie, 138 U.S. 252, 255 (1891)*. But **[****62]** *HN13*[] there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. *E. g., Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 455-459 (1940)*; *International Salt Co. v. United States, 332 U.S. 392, 395-396 (1947)*. His right **[592]** to set the price for a license does not extend so far, whatever privilege he has "to exact royalties as high as he can negotiate." *Brulotte v. Thys Co., 379 U.S. 29, 33 (1964).* **[***156]** And just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to **[****63]** derive a benefit not attributable to use of the patent's teachings.

LEdHN[30][] [30]In *Brulotte v. Thys Co., supra*, the patentee licensed the use of a patented machine, the license providing for the payment of a royalty for using the invention after, as well as before, the expiration date of the patent. Recognizing that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that the payment of this royalty could be postponed beyond that time, we noted that the post-expiration royalties were not for prior use but for current use, and were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law. *Brulotte* thus articulated in a particularized context the principle that a patentee may **[*137]** not use the power of his patent to levy a charge for making, using, **[**1584]** or selling products not within the reach of the monopoly granted by the Government.

Automatic Radio is not to the contrary; it is not authority for the proposition that patentees have *carte blanche* authority **[****64]** to condition the grant of patent licenses upon the payment of royalties on unpatented articles. In that case, Automatic Radio acquired the privilege of using all present and future HRI patents by promising to pay a percentage royalty based on the selling price of its radio receivers, with a minimum royalty of $ 10,000 per year. HRI sued for the minimum royalty and other sums. Automatic Radio asserted patent misuse in that the agreement extracted royalties whether or not any of the patents were in any way used in Automatic Radio receivers. The District Court and the Court of Appeals approved the agreement as a convenient method designed by the parties to avoid determining whether each radio receiver embodied an HRI patent. The percentage royalty was deemed an acceptable alternative to a lump-sum payment for the privilege to use the patents. This Court affirmed.

Finding the tie-in cases such as *International Salt Co. v. United States, 332 U.S. 392 (1947)*, inapposite, and distinguishing *United States v. United States Gypsum Co., 333 U.S. 364 (1948)*, as involving a conspiracy between patentee and licensees to eliminate competition, the Court **[****65]** considered reasonable the "payment of royalties according to an agreed percentage of the licensee's sales," since "sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement." *339 U.S., at 834*. It found nothing "inherent" in such a royalty provision which would extend the patent monopoly. Finally, the holding by the Court was stated to be that in licensing the use **[*138]** of patents *HN14*[] "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." *Ibid*.

LEdHN[31][] [31]Nothing in the foregoing is inconsistent with the District **[***157]** Court's injunction against conditioning a license upon the payment of royalties on unpatented products or with the principle that patent leverage may not be employed to collect royalties for producing merchandise not employing the patented invention. The Court's opinion in *Automatic Radio* did not deal **[****66]** with the license negotiations which spawned the royalty formula at issue and did not indicate that HRI used its patent leverage to coerce a promise to pay royalties on radios not practicing the learning of the patent. No such inference follows from a mere license provision measuring royalties by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention. It could easily be, as the Court indicated in *Automatic Radio*, that the licensee as well as the patentee would find it more convenient and efficient from several standpoints to base royalties on total sales than to face the burden of figuring royalties based on actual use. [29] ***HN15***[] If convenience of the parties rather than patent power dictates the total-sales royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license.

[**67]** ***LEdHN[32]***[] [32]The Court also said in *Automatic Radio* that if the licensee bargains for the privilege of using the patent in all of **[593]** his products and agrees **[**1585]** to a lump sum or a percentage-of-total-sales royalty, he cannot escape payment **[*139]** on this basis by demonstrating that he is no longer using the invention disclosed by the patent. We neither disagree nor think such transactions are barred by the trial court's injunction. If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them," *339 U.S., at 834*, he cannot complain that he must pay royalties if he chooses to use none of them. He could not then charge that the patentee had refused to license except on the basis of a total-sales royalty.

LEdHN[33][] [33]But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent or that **[****68]** for some lines of his merchandise he has no need or desire to purchase the privileges of the patent. In such event, not only would royalties be collected on unpatented merchandise, but the obligation to pay for nonuse would clearly have its source in the leverage of the patent.

LEdHN[34][] [34]We also think ***HN16***[] patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others **[***158]** from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but also for producing products which do not employ his discoveries at all.

LEdHN[35][] [35] **[****69]** Of course, a licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's **[*140]** expenses in dealing with him. He cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent. If the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license -- enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all. But we discern no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

LEdHN[36][] [36] ***LEdHN[37]***[] [37]Although we have concluded that *Automatic Radio* does not foreclose the injunction entered by the District Court, it does not follow that the injunction was otherwise proper. **[****70]** Whether the trial court correctly determined that HRI was conditioning the grant of patent licenses upon the payment of royalties on unpatented products has not yet been determined by the Court of Appeals. And if there was such patent misuse, it does not necessarily follow that the misuse embodies the ingredients of a violation of either *§ 1* or *§ 2* of the Sherman Act, or that Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. See, *e. g., Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490 (1942)*; *Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 641 (1947)*; *Laitram Corp. v. King Crab, Inc., 245 F.Supp. 1019 (D. C. Alaska 1965)*. See also Report of the Attorney General's National Committee to Study

[29] The record and oral argument in *Automatic Radio* disclose no basis for the conclusion that Automatic Radio was forced into accepting the total-sales royalty rate by HRI's use of its patent leverage.

the Antitrust Laws 254 (1955); R. Nordhaus & E. Jurow, Patent-***Antitrust Law*** 122-123 (1961); Frost, Patent Misuse As A Per Se Antitrust Violation, in Conference on the Antitrust Laws and the **[**1586]** Attorney General's Committee Report 113-123 (J. Rahl & E. Zaidins ed., 1955). **[*141]** Cf. Staff of Antitrust Subcommittee of House Committee **[****71]** on the Judiciary, 84th Cong., 2d Sess., Antitrust Problems in the Exploitation of Patents 23 (Comm. Print. 1956); Schueller, The New Antitrust Illegality Per Se: Forestalling and Patent Misuse, 50 Col. L. Rev. 170, 184-200 (1950). Whether the findings and the evidence are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify the injunction issued by the District Court has not been considered by the Court of Appeals, and we leave the matter to be dealt with by that court in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Concur by: HARLAN (In Part)

Dissent by: HARLAN (In Part)

Dissent

[*159]** MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. However, I do not join Part III, in which the Court holds that a patent license provision which measures royalties by a percentage of the **[594]** licensee's total sales is lawful if included for the "convenience" of both parties but unlawful if "insisted upon" **[****72]** by the patentee.

My first difficulty with this part of the opinion is that its test for validity of such royalty provisions is likely to prove exceedingly difficult to apply and consequently is apt to engender uncertainty in this area of business dealing, where certainty in the law is particularly desirable. In practice, it often will be very hard to tell whether a license provision was included at the instance of both parties or only at the will of the licensor. District courts will have the unenviable task of deciding whether the course of negotiations establishes "insistence" upon the suspect provision. Because of the uncertainty inherent **[*142]** in such determinations, parties to existing and future licenses will have little assurance that their agreements will be enforced. And it may be predicted that after today's decision the licensor will be careful to embellish the negotiations with an alternative proposal, making the court's unravelling of the situation that much more difficult.

Such considerations lead me to the view that any rule which causes the validity of percentage-of-sales royalty provisions to depend upon subsequent judicial examination of the parties' **[****73]** negotiations will disserve rather than further the interests of all concerned. Hence, I think that the Court has fallen short in failing to address itself to the question whether employment of such royalty provisions should invariably amount to patent misuse. [1]

My second difficulty with this part of the Court's opinion is that in reality it overrules an aspect of a prior decision of this Court, *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950)*, without offering more than a shadow of a reason in law or economics for departing from that earlier ruling. Despite the Court's efforts to distinguish *Automatic Radio*, it cannot be denied that the Court there sustained a Hazeltine patent license of precisely the same tenor as the one involved here, on the ground that "this royalty provision does not create another monopoly; it **[****74]** creates no restraint of competition beyond the legitimate grant of the patent." *339 U.S., at 833*.

[1] I find it unnecessary to consider the further question whether inclusion of such a provision should be held to violate the antitrust laws.

In finding significance for present purposes in some of the qualifying language **[**1587]** in *Automatic Radio*, I believe that the Court today has misconstrued that opinion. A reading of the opinion as a whole satisfies me that the **[*143]** *Automatic Radio* Court did not consider it relevant whether Hazeltine Research had "insisted" upon inclusion of the disputed provision, and that in emphasizing that the royalty terms had no "inherent" tendency to extend the patent monopoly **[***160]** and were not a "*per se*" misuse of patents, the Court was simply endeavoring to distinguish prior decisions in which patent misuse was found when the patent monopoly had been employed to "create *another* monopoly or restraint of competition." *339 U.S., at 832*. [2] **[****75]** (Emphasis added.) Until now no subsequent decision has in any way impaired this aspect of *Automatic Radio*. [3]

Since the Court's decision finds little if any support in the prior case law, one would expect from the Court an exposition of economic reasons for doing away with the *Automatic Radio* doctrine. However, the nearest thing to an economic rationale is the Court's declaration that:

"just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Ante*, at 136.

The Court then finds in the patentee a heretofore nonexistent right to "insist upon paying only for use, and not on the basis **[****76]** of total sales . . . ." *Ante*, at 139.

[*144] What the Court does not undertake to explain is *how* insistence upon a percentage-of-sales royalty enables a patentee to obtain an economic "benefit not attributable to use of the patent's teachings," thereby involving himself in patent misuse. For it must be remembered that all the patentee has to license **[595]** is the right to use his patent. It is solely for that right that a percentage-of-sales royalty is paid, and it is not apparent from the Court's opinion why this method of determining the *amount* of the royalty should be any less permissible than the other alternatives, whether or not it is "insisted" upon by the patentee.

One possible explanation for the Court's result, which seems especially likely in view of the Court's exception for cases where the provision was included for the "convenience" of both parties, is a desire to protect licensees against overreaching. But the Court does not cite, and the parties have not presented, any evidence that licensees as a class need such protection. [4] Moreover, the Court does not explain why a royalty based simply upon use could not be equally overreaching.

[**77]** Another possible justification for the Court's result might be that a royalty based directly upon use of the patent will tend to spur the licensee to "invent around" the patent or otherwise acquire a substitute which costs less, while a percentage-of-sales royalty can have no **[***161]** such effect because of the licensee's knowledge that he must pay the royalty regardless of actual patent use. No hint of **[**1588]** such a rationale appears in the Court's opinion. Moreover, under this theory a percentage-of-sales royalty would be objectionable largely because of resulting damage to the rest of the economy, through less efficient allocation of resources, rather than because of possible harm to the licensee. Hence, the theory might not **[*145]** admit of the Court's exception for provisions included for the "convenience" of both parties.

Because of its failure to explain the reasons for the result reached in Part III, the Court's opinion is of little assistance in answering the question which I consider to be the crux of this part of the case: whether percentage-of-

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[2] The *Automatic Radio* Court explicitly distinguished a number of cases of that kind, including *United States v. United States Gypsum Co., 333 U.S. 364 (1948)*, and *Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944)*. See *339 U.S., at 832-833*.

[3] *Brulotte v. Thys Co., 379 U.S. 29 (1964)*, involved a different question: whether a royalty based solely upon use of the invention could be collected for use occurring after the patent's expiration.

[4] Cf. *American Photocopy Equip. Co. v. Rovico, 359 F.2d 745 (1966)*.

sales royalty provisions should be held without exception to constitute patent misuse. A recent economic analysis **[****78]** [5] argues that such provisions may have two undesirable consequences. First, as has already been noted, employment of such provisions may tend to reduce the licensee's incentive to substitute other, cheaper "inputs" for the patented item in producing an unpatented end-product. Failure of the licensee to substitute will, it is said, cause the price of the end-product to be higher and its output lower than would be the case if substitution had occurred. [6] Second, it is suggested that under certain conditions a percentage-of-sales royalty arrangement may enable the patentee to garner for himself elements of profit, above the norm for the industry or economy, which are properly attributable not to the licensee's use of the patent but to other factors which cause the licensee's situation to differ from one of "perfect competition," and that this cannot occur when royalties are based upon use. [7]

[**79]** If accepted, this economic analysis would indicate that percentage-of-sales royalties should be entirely outlawed. However, so far as I have been able to find, there has as yet been little discussion of these matters either by lawyers or by economists. And I find scant illumination on this score in the briefs and arguments of the parties in this case. The Court has pointed out both today and in **[*146]** *Automatic Radio* that percentage-of-sales royalties may be administratively advantageous for both patentee and licensee. In these circumstances, confronted, as I believe we are, with the choice of holding such royalty provisions either valid or invalid across the board, I would, as an individual member of the Court, adhere for the present to the rule of *Automatic Radio*.

References

Am Jur, Monopolies, Combinations, and Restraints of Trade (1st ed 102, 174, 181); Patents (1st ed 145, 149)

10 Am Jur Legal Forms, Patents, Forms 10:865, 10:867, 10:1054-10:1102

US L Ed Digest, Evidence 958; Judgment 208, 244; Patents 225, 232; Restraints of Trade and Monopolies 55, 58, 61, 67, 68, 77

ALR Digests, Patents 19; Restraints **[****80]** of Trade and Monopolies 15, 18

L Ed Index to Anno, Patents; Restraints of Trade and Monopolies

ALR Quick Index, Patents; Restraints of Trade and Monopolies

Annotation References:

Cross licensing or pooling of patents as violation of antitrust laws. *75 L Ed 926*.

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date. 3 ALR 3d 770.

Who may be regarded as injured in his business or property within provisions of antitrust acts as to person who may recover damages resulting from violation of the acts. 139 ALR 1017.

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[5] Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L. J. 267 (1966).

[6] See *id., at 299-301, 302-306*.

[7] See *id., at 300-301, 302-306, 331-332*.

Std. Pressed Steel Co. v. Astoria Plating Corp.

United States District Court for the Northern District of Ohio, Eastern Division

May 27, 1969

No. C 68-788

Reporter

1969 U.S. Dist. LEXIS 10541 *; 162 U.S.P.Q. (BNA) 441 **; 13 Fed. R. Serv. 2d (Callaghan) 844

STANDARD PRESSED STEEL CO. v. ASTORIA PLATING CORPORATION et al.

Core Terms

Interrogatory, patent, defendants', antitrust, discovery, objected, counterclaim, parties, severance, first trial, confidential, disclosure, infringement

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > Parties > Joinder of Parties > Misjoinder

Civil Procedure > Trials > Separate Trials

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Jurisdiction & Review > General Overview

HN1[] **Regulated Practices, Intellectual Property**

In cases where there is a patent claim and an antitrust defense, it is an acceptable procedure to sever the antitrust claims from the patent claims and to provide for separate trials of each. The practice of severing the trial of patent and antitrust issues is common because both issues require voluminous and complex proof, because this proof is non-duplicative, and because jury trials are often demanded on the antitrust issue.

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

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

HN2[] **Methods of Discovery, Interrogatories**

Interrogatories that seek opinions and legal conclusions are improper and the court will sustain an objection to them.

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

Patent Law > ... > Specifications > Enablement Requirement > General Overview

HN3[] **Methods of Discovery, Interrogatories**

Many cases considering discovery of the date that the plaintiff will rely upon to establish the priority of his patent require simultaneous disclosure both by the plaintiff and the defendants of this information.

Counsel: [*1] WILLIAM C. CONNER and CURTIS, MORRIS & SAFFORD, both of New York, N. Y., for plaintiff.

BRUCE B. KROST and WOODLING, KROST, GRANGER & RUST, both of Cleveland, Ohio, for defendants.

CURTIS F. PRANGLEY and PRANGLEY, CLAYTON, MULLIN & VOGEL, both of Chicago, Ill., for third party defendant.

Opinion by: LAMBROS

Opinion

[441]** LAMBROS, District Judge.

This is an action for patent infringement. Plaintiff is the owner of a patent issued to one Joseph P. Villo, U.S. Patent No. 3,093,177.

The defendants have denied infringement of the patent. They have also asserted that the patent is invalid on a number of grounds. One of these grounds is set forth in paragraph 12 of the defendants' amended answer. Paragraph 12 alleges that the plaintiff has misused its patent by using it as a basis for entering into contracts or conspiracies in restraint of trade, in violation of *15 U.S.C.A., § 1* of the Sherman ***Antitrust law***.

The amended answer also sets forth a counterclaim in two counts. The first count seeks a declaratory judgment that the patent at issue is invalid, and that the defendants have not infringed on said patent. Count two of the amended counterclaim seeks damages against the plaintiff **[*2]** and against an additional third-party defendant, Amerace Esna Corporation. The claim is based on an alleged conspiracy between Standard Pressed Steel Company and Amerace Esna Corporation to restrain trade and commerce in violation of the Sherman Act, allegedly by use of Standard Pressed Steel's patent at issue in the present case.

Standard Pressed Steel has moved the Court, pursuant to *Rule 42(b) of the Federal Rules of Civil Procedure*, for an order serving the issues in this case and providing for two separate trials. **[**442]** Plaintiff seeks a severance such that the first trial will relate only to the patent issues, i.e., patent ownership, patent validity, and patent infringement. The second trial would be directed to the issues of the alleged misuse of the patent in violation of the Antitrust laws. Amerace Esna, the third-party defendant, is agreeable to a severance of the issues and to separate trials as requested by the plaintiff. The defendants, Astoria and Astorlok, however, although they do not oppose severance per se, do oppose a cleavage of the issues along the lines suggested by the plaintiff. Astoria and Astorlok seek to include in the first trial (directed to the patent **[*3]** issues) their defense of misuse of the patent by violation of the antitrust laws.***HN1***[]

In cases such as the present one where there is a patent claim and an antitrust defense, it is an acceptable procedure to sever the antitrust claims from the patent claims and to provide for separate trials of each. *Container Co. v. Carpenter Container Corp., 10 F.R.D. 80, 90 USPQ 294 (D. Dela. 1949)*; *Fischer & Porter Co. v. Sheffield Corp., 31 F.R.D. 534, 135 USPQ 389 (D. Dela. 1962)*; *Transmirra Prods. Corp. v. Monsanto Chem. Co., 27 F.R.D. 482, 126 USPQ 239 (S.D. N.Y. 1961)*; *Henan Oil Tools, Inc. v. Engineering Enterprises, 262 F.Supp. 629, 151 USPQ 698 (S.D. Tex. 1966)*. The practice of severing the trial of patent and antitrust issues is common because both issues require voluminous and complex proof, because this proof is non-duplicative, and because jury trials are often demanded on the antitrust issue.

It appears that severance of the issues will be desirable in the instant case. It also appears that a cleavage of the issues along the lines suggested by the plaintiff would be non-prejudicial to the parties and would secure the most efficient use of judicial and jury time. Astoria and Astorlok **[*4]** have demanded a jury trial on the issues in count two of their counterclaim, which is the count relating to alleged Sherman Act violations. If the patent and antitrust issues are tried together, a jury would be required to hear all of the evidence relating to the validity of the patent under the patent laws, yet would be permitted to determine only the issues relating to the antitrust violations. In addition, Amerace Esna would be required to employ counsel to sit through a much longer trial, where the only claims against that party relate to the alleged antitrust violation. There seems little reason to have a jury occupied during the entire trial of all the issues, when the jury will only decide some of the issues.

If the defendants' defense to the patent action based onStandard Pressed Steel's alleged misuse of the patent were to be tried along with the other patent issues, rather than with the counterclaim for antitrust violations, a complete duplication of proof and trial time would be entailed.Amerace Esna would be required to employ counsel to sit through two successive trials on the identical issue. All parties would be required to present their cases on the alleged antitrust **[*5]** violations twice, first to a judge and then to a jury. This seems hardly justifiable, particularly since there can be no final judgment in this action until both trials have been concluded.

It is, therefore, ordered as follows. The plaintiff's-motion for severance of the issues in this action is granted in the following particulars. There shall be two separate trials of the issues presented in this action and counterclaim. The first trial will be directed to all issues relevant to the ownership, validity, and alleged infringement of the plaintiff's patent in suit save and excepting the issues raised in paragraph 12 of the defendants' answer. This first trial will relate to all issues raised by the complaint and the defendants' answer, save and excepting paragraph 12 of the answer as set forth above. This first trial will also include all issues raised in count one of the defendants' counterclaim.

A second trial shall be held thereafter, directed to the issues raised in count two of the defendants' amended counterclaim and in paragraph 12 of the defendants' answer.

The first trial, as outlined above, will be to the Court. The second trial will be to the Court on the **[*6]** issues raised in paragraph 12 of the defendants' answer and to a jury with respect to the issues in count two of the defendants' amended counterclaim.

It is further ordered that the discovery relating to both the first and the second trials shall go forth simultaneously.

There remain for the Court's consideration various objections by each of the parties to certain of the interrogatories directed at them by the other parties.

Astoria and Astorlok have objected to certain of the interrogatories directed to them by the plaintiff. They have first objected to Interrogatory 2(d). This seeks the identification of any drawings or specifications describing the fasteners made by the defendants of **[**443]** the type at issue here. The defendants have asserted that these are confidential and that they should not be disclosed. We need not pass on the question of the confidentiality of these drawings since the plaintiff has not demanded their production. Rather, the plaintiff has demanded only that they be identified. The Court can see no possible disclosure of confidential information resulting from the identification requested by the plaintiff. Therefore, the defendants' objections to Interrogatory **[*7]** 2(d) are overruled. For the same reasons, defendants' objections to Interrogatory 2(e) are overruled. It is ordered that Astoria and Astorlok answer these interrogatories on or before June 2, 1969.

Defendants have also objected to plaintiff's Interrogatories 2(f) and 2(g) on the ground that these seek the discovery of trade secrets belonging to the defendants. If is ordered, pursuant to Rule 30(b), that the defendants file answers to Interrogatories 2(f) and 2(g) with this Court on or before June 2, 1969.Said answers are to be enclosed in a sealed envelope and are to be opened only as directed by this Court. The Court will also entertain further briefs by the parties with respect to their position on the discovery of the information sought by Interrogatories 2(f) and 2(g). Any briefs directed toward this issue should also be filed with this Court by June 2, 1969.

The defendants have also objected to plaintiff's Interrogatories 6, 7, 8 and 9, each of which seeks the discovery of the basis of the defendants' antitrust claims against the plaintiff and Amerace Esna. The defendants' objections to these interrogatories are based upon their contention that the plaintiff should **[*8]** be required to make disclosure on these issues prior to the defendants' disclosure.

As the Court indicated at the hearing held on the various motions a few days ago, the Court will not establish any priorities for discovery. Rather, the Court will permit discovery to proceed by all parties on all issues simultaneously, insofar as that is practicable. The defendants now have the benefit of the plaintiff's answers to the defendants' interrogatories. It is, therefore, ordered that the defendants Astoria and Astorlok submit answers to plaintiff's Interrogatories 6, 7, 8 and 9 on or before twenty days from the date of this order.

Defendants have also objected to plaintiff's Interrogatory No. 10. The defendants have asserted that the information sought is of a confidential nature. It is, therefore, ordered pursuant to Rule 30(b) that the defendants Astoria and Astorlok file with this Court on or before June 2, 1969, their answers to Interrogatory No. 10 in a sealed envelope to be opened only at the direction of this Court.

The third-party defendant, Amerace Esna Corporation, has objected to certain interrogatories propounded by Astorlok. Amerace Esna has objected to Interrogatories **[*9]** 19 and 20 on the ground that they require the disclosure of confidential communications between attorney and client and the attorney's work product. These two interrogatories, however, do not seek disclosure of the substance of any confidential material. Rather, they are directed to the discovery of the fact of the communications. It is, therefore ordered that Amerace Esna's objections to Interrogatories 19 and 20 are overruled.

It appears that the parties are still discussing Amerace Esna's objection to Astorlok's Interrogatory 36(b). Rather than stay a ruling on Amerace Esna's objection of this interrogatory indefinitely, the Court will sustain the objection to Interrogatory No. 36(b) at this time without prejudice, however, to its being propounded again to Amerace Esna by Astorlok in the event no agreement on its can be reached.

Astorlok and Astoria have also propounded interrogatories to the plaintiff. The plaintiff has objected to certain of these interrogatories. Plaintiff objects to Interrogatories No. 25 and 28 on the ground that these seek opinions and legal conclusions of the plaintiff. The Court agrees with the plaintiff's position that these interrogatories **[*10]** seek discovery only of the plaintiff's position and opinions on various other items of evidence. ***HN2***[] Such interrogatories are improper and the Court will sustain the plaintiff's objections to these. Similarly, the Court sustains the plaintiff's objections to Interrogatories 31 and 32 since these cannot possibly lead to the discovery of admissible evidence. For the same reason, the Court sustains the plaintiff's objection to Interrogatory No. 42.

Plaintiff also objects to Interrogatory No. 27, which seeks discovery of the date which the plaintiff will rely upon to establish the priority of the plaintiff's patent. ***HN3***[] Many of the cases considering discovery of this information have required simultaneous disclosure boty by the plaintiff and the defendants of this information. 4 Moore's Fed. Pract., P33.27, fn. 32. With respect to Interrogatory No. 27 therefor, the Court will make the following order. The plaintiff's objection to Interrogatory No. 27 is sustained subject, however, to the defendants Astoria and **[**444]**

Astorlok filing with this Court in a sealed envelope the dates upon which they will rely for purposes of establishing priority, as against other patents and publications and prior **[*11]** knowledge, of the alleged invention of claims 1 and 2 of the Villo patent in suit. In the event this information is filed by the defendants, it is ordered that the plaintiff no later than ten days thereafter answer Interrogatory No. 27 and submit said answer to this Court in a sealed envelope at which time the answers of the parties to this interrogatory will be exchanged.

The defendants' motion to stay depositions filed in this Court on May 8, 1969, was previously granted until further order of this Court. It is now ordered that the stay on taking these depositions previously imposed by the Court is lifted, and depositions may now be noticed and taken in accordance with the usual procedures of Federal Rules of Civil Procedure.

Kolene Corp. v. Motor City Metal Treating, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

July 28, 1969

Civ. A. No. 25283

Reporter

307 F. Supp. 1251 *; 1969 U.S. Dist. LEXIS 13222 **; 163 U.S.P.Q. (BNA) 214 ***

KOLENE CORPORATION, and Deutsche Gold-Und-Silber-Scheideanstalt Vormals Roessler, Plaintiffs, v. MOTOR CITY METAL TREATING, INC., Defendant

Core Terms

patent, salts, cyanate, aeration, bath, nitriding, trademark, infringement, metal, shops, air, anti-trust, prior art, cyanide, patent-in-suit, processes, captive, heat, customers, misuse, soft, file wrapper, non-aerated, franchise, chemical, Steel, heat-treater, franchisees, words, process-in-suit

LexisNexis® Headnotes

Patent Law > ... > Utility Patents > Process Patents > General Overview

HN1[] **Utility Patents, Process Patents**

In process patents what the court is concerned with is a process invention. The specific details of the apparatus are of little or no significance or relevance. What the court is concerned with is a patent claim for a process as a whole.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN2[] **Bad Faith, Fraud & Nonuse, Fraud**

Where an applicant deliberately and intentionally, rather than unintentionally or mistakenly, suppresses material evidence or gives the Examiner false and misleading evidence, which betray him into granting a patent that he might not otherwise have granted, the patent is not only unenforceable, but the fraud so practiced might ground an antitrust claim, should the other elements of an anti-trust violation be proven.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN3[] **Bad Faith, Fraud & Nonuse, Fraud**

The burden of proof of fraud upon the Patent Office, whether relating to the defense of fraud or to the antitrust counterclaim based on fraud is upon the defendant.

Counsel: **[**1]** Daniel G. Cullen, and Bernard J. Cantor, of Cullen, Sloman & Cantor, Detroit, Michigan, for plaintiffs.

Martin J. Adelman, Birmingham, Michigan, and Joseph Levin, Detroit, Michigan, for defendant.

Judges: Talbot Smith, District Judge.

Opinion by: SMITH

Opinion

[*215]** **[*1252]** OPINION

TALBOT SMITH, District Judge.

This case involves a process patent. The use of the process on certain metals, particularly ferrous, results in a tough and wear resistant surface, with greatly increased fatigue strength. Thus "Helicopter rotor blade dampers have service tripled." [1] It has been described as a "new technology" and there is no doubt that the description is accurate. But this case has an unusual circumstance, new in our experience at least, of significance in some phases of the case. Although we have heard extensive oral testimony, have seen moving pictures, have examined many documents and depositions (the parties have prepared and tried the case with great care), have examined metallic pieces treated by the process, as well as much trade literature, we have yet to be told just how or why the process works as it does. The parties disagree and their experts disagree. We will examine **[**2]** this matter further in due course.

The parties before us are Plaintiff Kolene Corporation (hereafter Kolene), a Michigan corporation, doing business at 12890 Westwood Avenue, Detroit, Plaintiff Deutsche Gold-Und-Silber Scheideanstalt Vormals Roessler (hereafter referred to as Degussa, its trade **[*1253]** name), a corporation of the Federal Republic of Germany with offices in Frankfurt-am-Main, West Germany, both collectively referred to hereafter as the plaintiff, and Defendant Motor City Metal Treating, Inc. (hereafter Motor City), a Michigan corporation doing business at 3400 Dunn Road, Detroit.

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[1] Automotive Industries, May 14, 1962. Ex. 10.

Involved here is Claim 1 of U.S. Patent No. 3,022,204, issued February 20, 1962 on an application filed by Johannes Muller and Carl Albrecht. The patent is entitled "Process for Nitriding Metals". The plaintiffs claim that the defendant is guilty of infringement and seek an injunction and an accounting.

The defendant alleges that the patent-in-suit is invalid, due **[**3]** to obviousness, and moreover, that the patent is not infringed by the defendant's accused process. In addition, the defendant asserts that the patent is unenforceable and invalid because of alleged fraud on the Patent Office and misuse by the plaintiffs. Defendant also counter-claims for treble damages under the Federal Anti-Trust laws on the ground that the plaintiffs practiced a fraud on the Patent Office in securing the patent, **[***216]** such fraud arising from an alleged failure to advise the Patent Office of the best prior art and in making deliberate misrepresentations to the Patent Office. There is no issue as to jurisdiction of this Court, title to the patent-in-suit, or notice of infringement. There is no serious dispute that the defendant's principals and organizers had knowledge of the patent-in-suit when defendant was organized in October of 1963, when the defendant began its alleged infringing activities and, actually, at an even earlier date, that is, when they were associated with another company, Commercial Steel Treating, prior to mid-1963, and shortly after the issuance of the patent in February of 1962.

Prior to the issuance of the patent-in-suit there was extensive metal-treating **[**4]** history relating to what is called "nitriding". This term, broadly speaking, refers to the case-hardening of a piece of metal by the use of nitrogen. [2] The prior art background of the heat treating of metals begins with gas and liquid nitriding processes. [3] The use of these processes was unrestricted to certain of the ferrous alloys since they were not usable on all ferrous materials, such as cast iron. The gas and liquid processes were lengthy and expensive, the former (subjecting the piece to a high temperature nitrogen gas atmosphere) being used particularly for parts where high cost was not a factor, such as in selected governmental and aircraft operations. In the liquid nitriding processes (such as Chapmanizing, which involved heating in the range of 1550 to 1600 degrees F, Malcomizing, Kaliding, and others) the part was immersed in a high temperature molten cyanide bath for prolonged periods of time.

[5]** To those skilled in the art the term nitriding was synonymous with marked disadvantages. It did, it is true, result in a wear-resistant surface on some ferrous metals but at the cost of brittleness, lengthy treatment, and high costs. In addition, there was the problem of distortion in the processing. Mr. Michael Soviak, the Chief Metallurgist at Commercial Steel Heating Corporation, testified by deposition and referred in part to the difficulties involved due to the high temperatures used. "* * * We had a tremendous problem with this thing, using carbo-nitriding and cyanide treatments of all kinds where we had to heat to a high temperature and quench. * * *" **[*1254]** And at a later point, "One of the biggest headaches in our business in distortion. We carry a battery of straighteners that is expensive and their job is to straighten things that distort ". In addition, of course, the original dimensions of the piece had to take into account the machining and grinding required to correct the distortion resulting from the process. Under these circumstances there was a real need for a commercially feasible, non-distorting process that would impart to ferrous materials both **[**6]** wear resistance and fatigue resistance and at the same time maintain ductility, thus avoiding brittleness. It should, as well, be economically feasible.

In approximately 1954 Dr. Johannes Muller, a Chemist and Metallurgist who was employed by plaintiff Degussa, developed a "soft" nitriding process which anteceded the patented process we here consider. "Soft" nitriding [4] involved using a salt bath as the nitriding medium. The active ingredients were sodium cyanide or potassium cyanide or mixtures of both. Dr. Muller states (Ex. B) that the nitriding effect of sodium or potassium cyanide was

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[2] "* * * a process of case-hardening steel by impregnating with nitrogen * * *" Webster's Third New International Dictionary, 1961.

[3] Dr. Muller's article in Das Industrieblatt, Stuttgard, September, 1954, "Nitriding Steel in the Salt Bath" contains a descriptive comment, in referring to the use of ammonia as the nitriding agent, of the mechanism of the nitrogen penetration into steel. "The atomic nitrogen which is formed in this decomposition process is extremely reactive before it recombines to form a nitrogen molecule N (2), - it is able to penetrate the steel surface and to diffuse into the steel."

[4] The term arose, we are told, "because previous gas nitriding was brittle, and the opposite to brittleness was soft in the German language, I understand, so they called it 'soft nitriding'." It was a contradiction in terms in the metallurgical world since nitriding theretofore meant hardness and brittleness.

the result, for example, of the oxidation of sodium cyanide to sodium cyanate. In the decomposition of the latter, nitrogen appeared in the nascent state and could penetrate steel. There was thus obtained a thin, ductile, and tough "compound" layer formed of non-brittle, ductile iron-nitrides, beneath which layer a deeper nitrogen diffusion zone was found. The process was a relatively short one, requiring about 90 minutes, resulting in both increased wear and fatigue resistance, and without the sacrifice of ductility. Moreover, due to the operating temperature of approximately 1050 degrees **[**7]** F there was no significant distortion. These findings of Dr. Muller were reported in articles published in Germany, which articles form part of the prior art **[***217]** in this suit. We will refer to this process hereafter as the "non-aerated" process in order to distinguish it from the aerated process before us in the patent-in-suit.

Promising though it seemed in the laboratory, however, and in use on a small scale, it had one serious drawback. The results were not uniform. Commercially applied, the process was erratic to the degree that variations were not only found from batch to batch, but within parts in a single batch. Similar variations were found in both fatigue and wear resistance. Dr. Muller, himself, **[**8]** spoke of the experience of Volkswagen, "They found one day 50 per cent [reference is here made to per cent of improvement in the fatigue properties]; another 70 per cent; another 20. So that describes the situation." As a result "They decided to not continue the tests or to introduce a process into the production or to approve it for production." Daimler-Benz "stopped all the test work after a certain while, * * * because of not reproducible results." In fact, Dr. Muller himself when asked whether he or his company ever used a non-aerated cyanide-cyanate bath in commercial processing answered, "I would say not really", and went on to explain "because the results I got from this non-aerated bath were not consistent enough, so it was not possible to, let's say, enlarge the use in this field." When asked whether anyone used such a bath commercially in the commercial processing of workpieces, he replied that one company did (Braunschweig) but that "they threw it away after a certain while." This process, we find, was a commercial failure.

We now reach the gist of the patent. We have noted that the simple immersion of the metal in the chemicals, "soft" nitriding, although it resulted **[**9]** in the marked advantages described, was commercially unusable because of its fatal defects as to inconsistency and lack of uniformity. **[*1255]** This was particularly harmful to its employment in large volume production. In 1959 one Carl Albrecht, collaborating with Dr. Muller, decided to experiment with the theretofore relatively quiescent bath by adding another step, namely, that of air-bubbling. Sub-surface air was introduced into the vessel and allowed to bubble through the mixture. The results, for some reason, were not only uniformity, consistency, and large-volume reliability, but an increase in the favorable attributes (e.g. ductility) obtained from the commercially unsuccessful non-aerated salt bath. As we have noted heretofore, just why this is true no one seems to know. Counsel for both parties presented theories, as did various experts. Plaintiff's counsel thought that if aeration oxidizes cyanide (as usually contended) it does so by forming a nascent cyanate in situ. This, of course, would be in addition to the already present cyanate. Dr. Muller, the patentee, theorized that when aeration forms a nascent cyanate in situ, the bath in effect contains two forms **[**10]** of cyanate, a normal cyanate and an iso-cyanate. But Dr. Muller does not tell us why this reaction caused both qualitative improvement and uniformity of results. Expert witness Kates, the Director of Metallurgy for the Lindberg Steel Treating Company, admitted that "* * * I don't know the cause of the chemical thermodynamics involved but there is - the addition of air creates a catalytic effect to allow for the greater diffusion of the nitride that is formed." (Whenever an expert speaks of some sort of "catalytic" action it is merely another way of saying that an unknown factor is at work.) Expert witness Arne Mars, employed by Vickers, Inc., a division of Sperry-Rand, as Manager, Metallurgy Research and Development (this company, we note, not only has manufacturing plants within the United States but plants in Australia, Japan, Germany, England, and under construction in India and Brazil), in response to the question "Do you feel that the air oxidizes cyanide to cyanate?", "I don't know for sure exactly if it does do that in a replenishing type of reaction which you are talking about, but there are chemical reactions that are going on, and exactly what happens, I really don't know."

[11]** From the testimony presented in Court and a review of the depositions, articles, and exhibits, the Court is satisfied that although no one can tell us precisely in what manner aeration operates to produce consistent and uniform results, together with a substantial qualitative improvement, it does do so. It is clear that when the air supply is shut off, either by mishap or deliberately, the process no longer works in the sense that it no longer produces uniform, consistent, and acceptable results. Again referring to the testimony of Mr. Mars of Vickers:

"We've had some problems with no aeration. For instance, when our sparging ring [which introduces the air] would plug up or something and we had a lot of problems, parts were scrapped." He goes on "And without the air we just didn't get the compound layer on there." Referring to the effect of aeration, Mr. Mars referred to some tests that **[***218]** they had run: "This is something that we previously had done in our R and D type work, just to run a bath without air to see what happens, so when we run into a production problem we can recognize it". Question: "And you found then that without the air it did not work?" Answer: "That's right."

[12]** It is our judgment that aeration (meaning, in this context, sub-surface air introduction) is the gist of the invented process before us. It is well to stress at this point that the accused patent-in-suit, is a "Process for Nitriding Metals" and that what has been patented is a process or art. The important thing is a method of procedure, not the particular means by which the method is practiced, *Expanded Metal Co. v. Bradford, 214 U.S. 366, 29 S. Ct. 652, 53 L. Ed. 1034 (1909)* or the apparatus used in carrying it out.

So far we have emphasized the operations of Degussa and the work of the chemical experts. The way Kolene got **[*1256]** into this matter is this: Its business is the chemical process business. The company sells the equipment and salts used in various industrial molten salt bath processes. These include rescaling stainless steels, exotic metals and alloys, degraphatizing and desanding cast iron, and the stripping of paints and plastics from industrial components. It deals with nearly all of the major industrial plants in the United States as well as plants overseas.

In 1958 John H. Shoemaker, the President of Kolene, visited Degussa, which was one of its licensees **[**13]** in Frankfurt, Germany. At that time he was told of the then new (and later unsuccessful) "soft" nitriding process which had been developed at Degussa. The test specimens shown him were from the earlier "soft" nitriding process which did not involve the bubbling of air through the mixture. When Mr. Shoemaker returned to this country he endeavored to sell the process in the United States but was received with much skepticism and some ridicule because the term "soft" nitriding was contrary to the then accepted understanding of metallurgists that nitriding produced hardness, not softness. There was little interest shown in the process.

In the summer of 1959, however, Mr. Shoemaker returned to Germany with Mr. George Bidigare. Mr. Shoemaker, who was not himself a metallurgist, desired the advice and the evaluation of an expert in the field and hence made an arrangement with Mr. Miel, at that time the President of Commercial Steel Treating of Detroit, to take with him Mr. George Bidigare, who was a highly skilled, experienced metallurgist in Commercial's employ. After some reluctance, Degussa agreed to disclose its process to Mr. Bidigare upon Mr. Shoemaker's representations that **[**14]** he required Mr. Bidigare's technical advice, and the process was disclosed to both gentlemen in confidence. They spent some three weeks with Degussa receiving information and dictating detailed reports, for by this time Degussa had the aerated process, it having been conceived and introduced at Degussa in February of 1959. This was the first time Mr. Bidigare had ever seen or heard of such a process and it was his opinion that the process was new and different from anything he had known before. It was at this time, during the 1959 visit to Degussa, that Mr. Shoemaker coined the trade name "Tufftride". A new and more descriptive name was sought because of the resistance that metallurgists in the United States had exhibited to the term "soft" nitriding. The trade name refers only to aerated processes and has been used commercially by Kolene only to describe such process. The Court does not view the appearance of this word, from time to time in memoranda and files, and its use by translators in translating documents from German to English, to refer to the earlier non-aerated "soft" nitriding process as significant. We find that the trademark "Tufftride" was coined and formulated **[**15]** by Mr. Shoemaker, was intended to refer only to the aerated process (and not the earlier unsuccessful non-aerated process) and does commercially refer only to such aerated process which was introduced to the United States by Mr. Shoemaker. Incidentally, it is clear that the non-aerated process was never introduced into the United States. (Where the word "Tenifer" is found, it may be recognized as the trademark used in Germany by Degussa for the successful aerated high-cyanate process.)

The process-in-suit was introduced into the United States in 1959 and has been widely adopted and widely used. This, however, took considerable time and effort on the part of plaintiff Kolene and its various franchisees since as we have heretofore noted, the term "soft-nitriding" was contrary to the normal knowledge of the art and the understanding of experts in the field respecting the effect of nitriding on ferrous metals. The skepticism, however, and resistance, were overcome by the use of the process. International Harvester, for example, had been experiencing difficulty with its **[*1257]** crankshafts which were breaking after being used from 100 to 150 hours. They tried this technique **[**16]** as the last straw, and **[***219]** found that "After the Tufftriding process, we ran 5000 hours." The process has now been adopted by many major industries in the United States and in foreign countries. Trade publications speaking favorably of the process are numerous and will be found in Exhibit 10. Some quotations therefrom will be found in the footnotes. [5] The materials from the publications are so voluminous that we will simply say that the record is replete with instances where the lives of all types of industrial parts such as dies, intricate stampings, automotive and engine parts, gears, as well as other pieces, have been substantially increased, and substantially improved by treatment with the process-in-suit.

[17]** The invention disclosed in the patent-in-suit, in more detail, relates to the process of aerating a cyanide-cyanate salt bath for the treating of metal parts. The application was filed on March 20, 1961 [6] and patent issued in 1962. Messrs. Miel and Bidigare, both with defendant Motor City, thereupon sought the advice of counsel upon how best to avoid the patent. Their background and interest was this: Mr. Miel was President of Commercial Steel Treating Corporation until 1963 and thereafter became one of the organizers and the controlling stockholder of defendant Motor City. In 1959 Mr. Miel and Commercial had cooperated with Kolene in introducing the Tufftride process into the United States, afterwards splitting from Kolene. After 1963 (after Mr. Miel had left) Commercial became a franchisee. Mr. Bidigare, whom we have mentioned heretofore, also left Commercial in 1963 and was also one of the organizers of Motor City, serving as its President until 1964.

[18]** As we have noted, after learning of the process with Mr. Shoemaker, at the Degussa plant, Mr. Bidigare had set up and operated at Commercial a Tufftride installation. Afterwards, in 1960, the split between Commercial and Kolene took place. Miel and Commercial, however, continued to use the aerated process. They assert that they are using a different process, which brings us to the matter of infringement.

As to the desired avoidance of the patent-in-suit, Messrs. Miel and Bidigare made certain changes in the process and equipment used therewith. Since the patent claims specified that the process employed "between about 25 to 40% cyanate" they decided to use 50%. This introduced no functional change in the **[*1258]** process, but was described by Mr. Grafmiller, a graduate metallurgist, formerly with Commercial, later one of the organizers and President of Motor City, in these terms:

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[5] Ex. 10, Tab 7, Tool & Manufacturing Engineer, April, 1964:

"Many parts now made of more expensive alloy steel can be made of low carbon steel and then processed to achieve desired level of engineering properties."

(p. 3) "In addition, the use of the process occasionally offers the only acceptable engineering solution to a part's performance problem."

Ex. 10, Tab 9, Machinery, March, 1965: "An economical nitriding treatment eliminates spalling and decreases soldering of die casting dies."

"Greatly improved operation of die casting dies has been observed by nitriding them with a low temperature, short-cycle process called Tufftriding."

Ex. 10, Tab 10, Hot Rod, March, 1965: (p. 32) "The forged steel crank, having undergone the Tufftride process, is one of the Chevy bottom end highlights." (Referring to new Chevrolet engine).

Ex. 10, Tab 11, Iron Age, July 5, 1962: Describing an automated TUFFTRIDE system set up to treat crankshafts:

> "Why did they automate Tufftriding? An unusual crankshaft design was needed for the new Willys Motors heavy duty Toronado-OHC engine. Willys wanted a tough crankshaft with the right proportions and finish to assure good bearing life."
>
> "This made possible a lighter and simpler shaft. It also gave high mechanical efficiency to the heat treated parts."
>
> "Machined from SAE 1045 steel forgings, the crankshafts promise higher reliability at lower costs."

[6] This was based on earlier patent applications U.S. Serial No. 17,541 filed March 25, 1960 and U.S. Serial No. 40,555 filed July 5, 1960.

"Q: Do you know of any difference whatever in the functioning of a bath that has a cyanate content of 50 or more as contrasted with a bath which has a cyanate content of 25 to 40?

A: Again, I have not been in this long enough to say yes or no to that. But to my knowledge it doesn't **[**19]** make any difference.
Q: It is simply a question of avoiding the patent?
A: Right."

Mr. Miel was somewhat more guarded. Avoidance of the patent was only part of the reason for going to a 50% cyanate level. The only other changes made were equally non-functional, namely, the use of an L-shaped tube (instead of a ring) to introduce the air into the bath, and (about this same time) using a titanium liner for the bath. (Stainless steel has also been employed for liners.) But it is noteworthy that the process of aeration, **[***220]** which was the key distinguishing feature between the old commercially unsuccessful German process, and the present successful one under the Muller-Albrecht patent, was not disturbed.

The claims-in-suit for the process were in part,

"A process comprising immersing a metal workpiece in a molten alkali metal salt bath comprising between *about 25 to 40% cyanate*, at least about 40% cyanide * * *" Col. 8, lines 48-50, Patent-in-suit.

Our italicized words indicate the core of the controversy. The defendant claims that it uses between 48 to 50% cyanate and thus does not infringe. The first question that arises concerns the reasons for defendant's **[**20]** increase in cyanate. It sometimes happens in chemical processes that at a certain point in the reaction, a marked or significant change takes place. The reactions may stabilize on a certain plateau, that is, at a certain level. Or, having theretofore maintained a certain level, they may with changed conditions or concentrations, show a rise, or possibly a decrease, in intensity. Nothing of the sort occurs here. The "about 40%" is not critical from an operating point of view. Nothing happens at this point. It is clear from the testimony that this "about" 40% figure had its origin in the fact that the salts were eating up (reacting with) the then-available iron pots, producing a sludge. Its removal was difficult and laborious, since it was a shovel operation with highly poisonous chemicals, (the lethal effect of the cyanides is well known) heated up to over a thousand degrees Fahrenheit. The "about 40%" was not a critical limitation of the inventive concept. At about 40% the effects upon the pot were so marked as to be incompatible with an economical and efficient commercial operation. As a matter of law, the term "about" is a clear warning that exactitude is not claimed but **[**21]** rather a contemplated variation. Thus the words "between about 25 to 40%" of claim 1 described limits ranging from a chemically operative lower limit (the 25% figure, as shown from the charts and testimony, is approximately where the effects of the bath begin consistently to increase) to a commercially imposed (for economic reasons) upper limit. It was the then best known method for operating the process.

HN1[] While we are on this topic of operating the process, it would be well to keep in mind that what we are concerned with here is a process invention. It includes certain acts or steps in combination, simultaneously acting on the salt bath and the metal pieces therein, namely, immersing the workpiece in the described liquid solution, and next, aerating the whole mixture, workpieces and all, by bubbling air upwardly through the mixture from below. The specific details of the apparatus are of little or no significance or relevance. The pot is not the claim, but merely the vessel in which it all takes place. Nor is the pipe introducing the air the claim, whether a ring with holes **[*1259]** in it, or an L-shaped pipe or what not. What we are concerned with here is a patent claim **[**22]** for a process as a whole and so we consider it. See, *Minnesota Mining v. Kent Industries, 409 F.2d 99 (CA 6 1969)*.

Except for the asserted difference in the cyanate content to 48-50%, the process used by Motor City is substantially the same as that taught by Degussa to Mr. Bidigare. Both Mr. Bidigare and Mr. Grafmiller testified that (in comparing the process when operated at 40% cyanate with that employing 50% cyanate) the purpose of the process was the same, the operations were the same, the results the same, and, more revealingly, Motor City's customers were advised that the results of the Tufftride process and defendant's accused process were essentially the same. "Equivalent to or superior to" were Mr. Bidigare's words to Chevrolet and to the trade in general. In fact, orders from General Motors, Chevrolet Division, and from Firestone Steel, Division of Firestone Tire and Rubber, [7] to Motor City, specifying Tufftriding were received in evidence as bearing on the point that customers treated the accused process as the full equivalent of the Tufftride process and that Motor City was "riding along" (counsel's expression) on the trademark "Tufftride". So far as equivalence **[**23]** is concerned, the defendant is hardly in a position to deny it since it is clear that they have traded on the Tufftride name and reputation in soliciting business for its accused process.

The defendant's position respecting non-infringement rests upon the literal difference, if any, between the 48 to 50% cyanate allegedly used by the defendant and the words of the claims-in-suit "between about 25 to 40% cyanate". Shortly stated defendant says that a "between about 25 to 40%" cyanate **[***221]** does not " literally read" upon 40 to 50% cyanate and therefore there is no infringement. But the difference is colorable, merely. There is no substantial or material difference. There is in fact literal readability, if proper weight is given to the qualifying word "about". Moreover the accused process is the full equivalent of the process defined in Claim 1 under the doctrine **[**24]** of equivalents, *Graver Tank & Mfg. Co. v. Linde, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097 (1950)*.

But defendant asserts that plaintiffs are estopped by a so-called File Wrapper Estoppel from construing the words "between about 25 to 40%" cyanate to include defendant's 48 to 50% cyanate. We will consider the entire File Wrapper disclosures and reliances at this point as they bear upon the several aspects of the case.

The original claims 1 and 2 in Patent Application U.S. Serial No. 17,541, filed March 25, 1960, described only the concept of bubbling air through the mix, that is, aeration and nothing more. "According to the invention it was unexpectedly found that the nitriding action of such baths could be materially improved by passing finely divided air or other similar oxidizing gases therethrough * * *". [8]

These claims were rejected on the grounds (see pp. 18 and 19 of the bundle) that the specifications did not indicate how the formula for the amount of oxidizing gas **[**25]** was derived, and that nitriding by nitrogen was the equivalent of what applicant was accomplishing by oxidizing, and that a British patent showed the "bubbling of the nitrogen containing gas" into a salt bath for nitriding. But it is significant, at this point, to note that the Examiner did not reject on the basis that the prior art showed a process over which applicant distinguished solely on the matter of the maximum level of cyanate, which is the bone of contention at this point. Had he done so, a substantial question might arise, but such was not the case.

[*1260] The insertion of the phrase "between about 25% and 40%" which later came into the case was hence not dictated in attempting to distinguish over any earlier aerated cyanide-cyanate process but was inserted because substituted attorneys [9] felt that it was improper under United States patent practice not to clearly define an operative process, stating an operative range, rather than merely describing the naked concept of adding aeration to some (or any) cyanide-cyanate baths. As we have seen, there was an approximate lower limit, for chemical reasons, of 25% cyanate, and an approximate upper limit, for commercial **[**26]** reasons, of 40% cyanate. Thus, there was no giving up of any operative claim and the substitution therefor of another. No prior art required the cancellation of such claims, since no prior art cited by the Examiner (or, in fact, by the defendant here) included aeration in combination with cyanide and high cyanate. The Court, therefore, concludes and finds that the cancellation of the original, non-operative, no-range claims, when viewed in context, was not caused by a need to avoid any area of prior art which plaintiff here seeks to recapture, but rather was a surrender only of inoperative naked claims, monopolizing every level of cyanate content, from the excessively low to the excessively high. Plaintiff is not here asking the Court to add an unclaimed element, which was once claimed and then abandoned in

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[7] E.g., Purchase Order, 2-22-65, Firestone to Motor City Metal Treating Corporation, "Services to *Tufftride* Chevrolet Flexplate Part #RA 26821-2"

[8] Page 2, Application 17,541.

[9] There is some argument whether the original attorneys were German attorneys or American but we do not find it particularly helpful to resolve the issue.

order to save the claim from invalidity due to the prior art, [10] or to drop from the claim some limitation originally added to distinguish the claim from the prior art cited by the Patent Office. There is, we find, no surrender or estoppel barring plaintiff from asserting infringement against cyanate percentages over 40%. This "surrender" point is the first of defendant's **[**27]** two theories of file wrapper estoppel.

But defendant also argues that plaintiff's file wrapper statements, which allegedly argue that 25-40% is a critical level of the cyanate content of the process bar plaintiff from bringing infringement against the same process when operated over 40% cyanate. The defendant urges to us that while plaintiffs knew that the cyanate content was not critical to the operation of the process, they repeatedly took the position before the Examiner that the cyanate range was critical.

This is an area calling for the greatest care in the interpretation of single sentences isolated from not only what preceded and followed the text, but from the case as a whole. We have seen heretofore that approximate ranges of operation with cyanate were imposed by a) the **[**28]** chemistry of the process (this is at about 25% cyanate) and b) the commercialization of the process (this was about 40%, due to the then-existing sludge problem). To this **[***222]** extent there is a critical range, "between about 25-40%". But (and we are looking particularly at the higher level, because this is where defendant operates) there is nothing whatever in the file wrapper, or the evidence before us to support a conclusion that the upper limit was critical to one exact percentage. "About 40" was good enough. This reflected merely the then operating experience. Whether 48, where defendant allegedly operates (48-50), was equivalent to 40 is nowhere negated by the file wrapper. Actually, that question is determined by the functioning of the process with the available impedimenta. Speaking of functioning, it is significant that defendant has failed to show that the functioning of the process at 48 is any different from that at 40, and we have heretofore commented that no performance or reaction curve presented to us shows any significant break at 40. We will not prolong this opinion with excerpts **[*1261]** and testimonial references to the file wrapper [11] but we are satisfied **[**29]** that the plaintiff did not critically limit itself to a maximum of 40% during Patent Office proceedings.

It is our conclusion as to infringement that the accused process is identical in all material respects to the process defined in Claim 1, the slight increase in the cyanate employed by defendant being immaterial. The accused process performs an identical function, and is identical in purpose and operation. Its results, as well, are substantially identical. Moreover, so far as equivalence may be involved, we find specifically that the accused process is the full equivalent of the process defined in Claim 2 in all material respects, and is an infringement thereof.

We turn next to the defense of obviousness, novelty having been admitted. In this area our first inquiry must be as to the scope and content of the prior art. The best and most obvious prior art, of course, was the German nonaerated cyanide-high cyanate process we **[**30]** have heretofore discussed, along with the Volkswagen and other experience. Despite its initial high promise, it was unsuccessful. This earlier process was clearly presented to and considered by the Patent Office Examiner. Thus we find on the very first page of the patent application file wrapper that "The nitriding of steel workpieces by treatment in a fused salt bath containing alkali metal cyanide and alkali metal cyanate at temperatures between 500-600 degrees C already is well known." Other comparisons are found between the earlier nonaerated process and the aerated process-in-suit, with the result of the Examiner's finding that the aerated process was patentable. Other prior art (note the Webster Dictionary definition found in footnote 2 hereto) were the old gas and liquid nitriding processes. None employed the gist of this invention, aeration. They were usable on only certain types of ferrous materials, not all, they had pronounced disadvantages, and none provided a ductile (yet hard surfaced) workpiece. The process-in-suit was considered contrary to the established knowledge of those skilled in the art, as to purposes, functions, operations and results of the prior known **[**31]** nitriding processes. The essential difference was the addition of aeration. The results, at first received with skepticism, even by those skilled in the art, were as we have pointed out heretofore, subsequently

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[10] See, *Kaiser Co. v. McLouth Steel Corp., 400 F.2d 36 (CA 6 1968)*.

[11] This is Exhibit O. See, also, patent-in-suit, Ex. 1, col. 2, lines 39-40.

referred to as "unheard of in the metallurgical field", [12] and as "probably the biggest breakthrough in the heat treating field for several generations." [13]

Our ultimate question considering this phase of the case is whether the addition of aeration (which is the essential difference between the claimed process and the prior art) was obvious to those skilled in the art. Persuasive in this regard is the established fact that the experts differ on just what sub-surface aeration does and why. It just happens, that's all. No prior art suggested adding aeration for uniformity of results and qualitative improvement over the earlier non-aerated bath. Such an unexplainable **[**32]** happening can hardly be said to be obvious to anyone.

Defendant argues that the principal result of aeration is merely to add cyanate (by oxidizing cyanide), thus replenishing used cyanate. But there is no proof of this, and it is significant to us that defendant, while maintaining its high level of cyanate by adding bricks of pure cyanate, nevertheless continues to employ aeration. The reason is clear. It is because without aeration the process is commercially useless. We find, on the record before us, that aeration does more than merely to add cyanate, but just exactly what it does we have not been told **[*1262]** and cannot say. Our conclusion, based upon the criteria set forth in *Graham v. John-Deere, 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966)* is that the defendant has not maintained its burden of proof as to obviousness. The **[***223]** Court, rather, finds that the process defined by Claim 1 was not obvious to those skilled in the art at the time the invention was made.

Defendant also contends that a fraud was practiced on the Patent Office. Defendant offered no proofs on this serious charge save introducing the File Wrapper into evidence. In the *Pfizer* case, [14] **[**33]** upon which defendant heavily relies, the Patent Office Examiner was called and testified that he was in truth misled by the concealment of evidence which he had requested and which evidence was available and known to the patentee. Of course, this is not the only way, as defendant properly argues, of proving such fraud but in a case of this magnitude on an issue so important, involving, as it does, the penalties involved in anti-trust violations, we would desire something more decisive than the dry contents of the Wrapper. However, we will work with what we have.

Briefly, the patent application followed a not unusual path in the Patent Office. [15] There was an initial rejection of claims based upon a British patent [16] and an earlier Muller patent. [17] Applicant's responses contrasted the claimed process with both of these references. The material and significant ones of the rejected claims were replaced by Claim 12, renumbered as Claim **[**34]** 1-in-suit. Such claim was directed to a process employing (a) cyanide (b) high cyanate and (c) aeration, together with other specifications. This claim (with others) was ultimately accepted by the Patent Office and the patent-in-suit issued.

The gist of the fraud charge is the allegation, repeated with many variations, that the Examiner "did not have before him the best prior art, 'soft nitriding'." We find, on the contrary, and beyond reasonable contradiction, that the Examiner was fully informed thereof, that the applicants acknowledged the old unsuccessful German process as part of the prior art, but urged that its aeration in a cyanide-high cyanate bath was the distinctive and novel element of the process claimed. Thus on pages 1 and 2 of the Patent Application, No. 17,541, Ex. O, after referring to the older, well-known nitriding by treatment in a fused salt bath, it was stated that "It was **[**35]** found, however, that the nitriding action of such baths is not always uniform and that quite often defective results were obtained", and, continuing:

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[12] Metallurgist Soviak, Commercial Steel Treating Corporation. Tr. 626.

[13] Metallurgist Mars, Vickers Corporation. Tr. 645.

[14] ***Chas. Pfizer v. Federal Trade Commission, 401 F.2d 574*** (CA 6, 1968).

[15] See Ex. O. Patent Application.

[16] No. 591,793, August 28, 1947.

[17] No. 2,927,875, March 8, 1960.

> "According to the invention it was unexpectedly found that the *nitriding action of such* baths could be materially improved by *passing finely divided air* or other similar oxidizing gases therethrough and that when this measure is taken the nitriding action of the baths is no longer dependent upon the depth of the baths.
>
> "The beneficial effect achieved by introduction of finely divided air into the fused salt bath is, for example, exemplified in that a fused salt bath 60 cm in diameter * * *" [p. 2.]

Later (p. 80) it is also pointed out that

> "The *aeration of the fused salt bath* during the nitriding operation to a certain extend controls the nitriding action obtained. In general for reasons of economy the nitriding action is increased to its highest possible value." [p. 8.]
>
> * * *
>
> "The air or oxidizing gas is introduced into the bottom of the fused salt bath in such a way that it is finely distributed in the form of small bubbles which rise up through the molten bath." [p. 8]

[*1263] We note **[**36]** also (pp. 13-16, Application) that the process claims as filed specified aeration as an essential element.

The curves in the File Wrapper (p. 28) labelled as "unaerated" and "aerated", graphically demonstrate the differences between the old unsuccessful process and the new one. "The differences between treatments of the same metal under the same conditions and in the same bath is even more pronounced when the bath has been *aerated* during the treatment of the metal as compared to the *same bath in which no air was added*." (p. 27)

The record is replete with further instances of notifications, together with comparisons. We find that, starting with the first page of the application, and continuing throughout, there were ample references to alert the Examiner to the old process. The law in this area seems clear. ***HN2***[] Where an applicant deliberately and intentionally, rather than unintentionally or mistakenly, suppresses material evidence or gives the Examiner false and misleading evidence, which betray him into granting a patent that he might not otherwise have granted, the patent is not only unenforceable, but the fraud so practiced might ground an antitrust claim, should the **[**37]** other elements of an anti-trust violation be proven. *Walker **[***224]** Process Equipment Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*.

Further charges of fraud are levelled with respect to technical papers and brochures, test samples and test reports describing the results obtained by the use of the old German non-aerated process, and an affidavit by Mr. Shoemaker, President of Kolene, all of which are found in the file wrapper. It is said that these were fraudulent misrepresentations to the Patent Office since those representations involved in the charge related to the old German process. It is true that much of the soft nitriding data obtained from the older, one-step process was used but it was equally applicable to the new aerated process-in-claim. As we have pointed out heretofore, the old process did indeed have marked advantages, combined with its disastrous disadvantages, and it was the claim of the applicants that the new bubbling process largely eliminated the disadvantages. The use of the old process data was completely proper (indeed, we would say, essential) provided only, and here is when the charges of fraud collapse, provided **[**38]** the Examiner was informed of the relation of the old process to the new. This he was, as we have shown.

HN3[] The burden of proof of fraud upon the Patent Office, whether relating to the defense of fraud or to the antitrust counterclaim based on fraud is upon the defendant and it has not been sustained. There is no showing that any statements to the Examiner by applicants were materially untrue or misleading, or that any representations had a tendency to (or did, in fact) mislead the Examiner into granting a patent which he would otherwise not have granted. Moreover, and most importantly, there is no showing of an intent deliberately to mislead the Examiner or that he was in fact misled. We find that defendant has failed to maintain its burden of proof as to the fraud alleged to have been practiced upon the Patent Office, whether treated as a defense or as defendant's anti-trust counterclaim.

We come now to the matter of the alleged "misuse" of the patent. Defendant argues that should we decide as to infringement or other issues in plaintiff's favor, nevertheless plaintiff cannot maintain any enforcement action against defendant because plaintiff has "misused" the patent.

The argument **[**39]** by defendants that Kolene has misused the patent comes to us with very skimpy proofs. We know very little about Kolene's quantitative use of the patents in the industry, this arising from defendant's disclaimer of any anti-trust violation though it relies heavily upon anti-trust cases by way of analogy, should analogy there be. Much of defendant's "misuse" case rests **[*1264]** squarely upon argument and speculation. Very few hard facts are presented. Analogies from the anti-trust field, as we have noted, are heavily relied upon, but it must be kept in mind that this is not an anti-trust case. If it were, it would fail, even under the *per se* doctrine, for there is no showing that a "not insubstantial amount of commerce" is affected. *Northern Pac. R. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1957)*. As to analogies it is well also to keep in mind that we are cited to both patent and trademark cases, involving both the anti-trust laws and the *Morton Salt* doctrine of misuse. The permutations and combinations possible with two sets of rights involving two types of remedies, in various postures of association, without any discernible unifying thread **[**40]** of legal or economic principle, warns us to consider and to use the analogies with some caution. These observations are peculiarly relevant to the trademark (or patent) issue involving the franchised heat treaters, *infra*.

As will be later set forth in detail, Kolene does business with two types of shop, "captive" shops and heat-treater franchisees. With respect to each, defendant argues that there has been a "misuse" of the patent itself, relying, among other cases, on the *Morton Salt* [18] case. This case held that the holder of a patent on a salt depositing machine, who had licensed the patent for use only with salt purchased from him, could not maintain suit against the manufacturer of an infringing machine. "* * * [Courts], and especially courts of equity," it was held, "may appropriately withhold their aid where the [patentee] is using the right asserted contrary to the public interest". This proscription of denial of remedy is not, then, automatic. We are remitted to a consideration of "the public interest."

[41]** To view this matter in its proper setting upon the facts before us it is necessary to review in somewhat more detail not only the relationship between the parties, but Kolene's method of doing business in this respect.

As we have previously noted, in the summer of 1959, with the permission of Lucas Miel, then President of Commercial, Mr. Bidigare went to Germany with Mr. Shoemaker as a technical adviser, to learn the process-in-suit from Degussa. It was taught to them in confidence upon assurance that it would not be **[***225]** used as against Degussa. It is clear that Mr. Bidigare had never, prior to that time, heard of the process. Upon returning to this country Mr. Bidigare set up and operated a Tufftride installation at Commercial, in a joint venture with Kolene, in which, Kolene provided the salt free of charge to Commercial. During this period Mr. Bidigare and Mr. Shoemaker attempted to exploit the process and advertising literature was prepared. Thereafter, in 1960, Commercial and Kolene split up. The reason is not shown in the record. We gather that animosities existed between the parties.

Miel and Commercial, after the split up, continued to practice and promote the process **[**42]** but changed the trademark from "Tufftride" to "Nu-Nitride".

In 1962, when the patent-in-suit issued, Miel and Bidigare sought legal advice on how to avoid the patent, making, pursuant to such advice, what we have decided heretofore are slight changes in the salt concentrations and in the equipment. It is clear, however, that they did not give up aeration, which was the gist of the patent-in-suit.

Litigation between Commercial and Kolene regarding contractual agreements, breaches of confidence, patent infringement, and other issues thereafter took place, all of which issues were settled in 1963 after Miel, Bidigare and Grafmiller left Commercial. Thereafter, Commercial became a Tufftride franchisee. In the same year, 1963, Messrs. Miel, Bidigare, Grafmiller, and other **[*1265]** former Commercial employees formed the defendant, Motor City. At all times Motor City has operated the accused process, with the exception of equipment (pot or liner) changes, substantially as it had at Commercial but under the name "Cynatride". To complete the picture we will

[18] *Morton Salt v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363* as amended, ***315 U.S. 788 (1942)***.

merely note that there are certain off-shoots to the Commercial operation. Miel and Bidigare taught the process to Industrial **[**43]** Heat Treat of Charlotte, North Carolina, and licensed Industrial to practice the process under Commercial's trademark "Nu-Nitride". Industrial made duplicate copies of Kolene's advertising materials for Tufftride, changing only the word "Tufftride to "Nu-Nitride." All of this was done without Kolene's permission or license but with Commercial's active assistance. During this same period, the Nu-Nitride process was licensed to a Canadian company controlled by Miel, the Preston Heat Treat company, which shortened the trademark to "Nutride". It is noteworthy that Kolene has not sought injunctive or other relief against these processors so far as this record discloses.

We do not more fully explore the Commercial litigation since we were informed at the trial, by defendant's counsel, that such litigation he viewed as lacking relevance to the issues under litigation. [19]

[*226]** **[**44]** **[*1266]** In addition to the Commercial litigation during the time that Mr. Miel controlled Commercial, there was litigation between Kolene and Mr. John Sheppard, a retired metallurgist and chemicals

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[19] *Tr. pp. 180-183*: "MR. CULLEN: Excuse me. May I say something to the Court? The Court should understand, to keep this testimony in proper perspective, that at the beginning the Kolene people and Mr. Miel and Bidigare of Commercial Steel Treating were working together in a joint effort. Subsequently, there was a falling out between Mr. Shoemaker, on the one hand, representing Kolene, and Mr. Miel, on the other hand, representing Commercial.

"As a result of that falling out, and subsequent to that falling out, Commercial Steel Treating Company, which was then under the control of Mr. Miel, went its own way and practiced the process that they were practicing, and they now adopted the trademark 'Nu-nitride,' and they were continuing their operations without regard to any claim of right of Kolene.

"There was litigation between the Kolene people and between Commercial Steel Treating during the time that Mr. Miel controlled the operations of Commercial. Subsequently, the principal stockholders of Commercial Steel Treating Company had a falling out with Mr. Miel, and Mr. Miel left Commercial Steel Treating Company to form Motor City Company.

"Meanwhile, the stockholders of Commercial Steel Treating Company then returned back into operation with Kolene and became a licensee, and exclusive licensee for the Detroit area, except for Kolene's own operations under the Franchise system.

"Now, Mr. Miel and Bidigare, having left Commercial Steel Treating Company, formed Motor City Company, the present defendant, and continued in Motor City Company the same operations that they had previously performed in when they were in the employ of Commercial Steel Treating Company, and in the operations of Motor City Company, the same people, by the way, now call their process 'Cynatride.'

"This explains the peculiar thing, that Commercial Steel Treating Company was at one time controlled or operated by Mr. Miel and later was not, and also the peculiar fact that at one time Commercial Steel Treating Company was in a joint venture with Kolene and then later had a falling out with Kolene, and then still later returned to use the Kolene trademark and the Kolene services and literature and publicity and sales effort as a franchisee of Kolene.

"THE COURT: That is the corporation itself and not the individual?

"MR. CULLEN: That's right.

"THE COURT: All right.

"MR. CANTOR: Perhaps I might shorten the questioning of the witness, since this witness was obviously intimately acquainted with those facts.

"Q (By Mr. Cantor) Is Mr. Cullen's statement correct, Mr. Shoemaker?

"A Correct, yes.

"Q Would you be willing to adopt that as your testimony as an answer to a question?

"A Yes.

"MR. CANTOR: Is there any objection to that?

"MR. ADELMAN: No. I only want to say I was hoping we could avoid getting into the issues *of that prior litigation, which I view as having no bearing on this lawsuit whatsoever*."

salesman. Mr. Sheppard had furnished salts for the accused process to Commercial during the time it was operated by Mr. Miel, and thereafter furnished them to Motor City. Apparently as a part of the litigation with Commercial (prior to the departure in 1963 by Mr. Miel) or at about the same time, Kolene sued Sheppard for patent infringement, and later, convinced that he was not so infringing, dropped the suit. The defendant refers to Mr. Sheppard as a "manufacturer of salts". The description is hardly apt. Mr. Sheppard's activities with respect to the defendant's operation were described in some detail by Mr. Grafmiller, formerly of Commercial, later one of the organizers of defendant Motor City, its president, and general manager. He testified that the salts used by Motor City were "made there on our property," and that an employee of Motor City assisted Mr. Sheppard in his work, "after hours". Mr. Sheppard used Motor City's equipment and their space, on which he paid no rent. **[**45]** The record is utterly devoid of any testimony as to what would normally be called a bona fide manufacturer's plant operations, volume of business, equipment, number of employees, or otherwise. Actually, it would seem that what Mr. Sheppard did, first at the premises of Commercial and then Motor City, was to cast cyanate bricks for use in the process by Grafmiller. Mr. Sheppard's operations respecting the salts hardly rise to the dignity of being a "manufacturer thereof" as the term is normally used. We have gone into these suits in some detail, despite counsel's disclaimer, since they form the basis of the charge, essential to the application of the misuse doctrine to the captive shops, that Kolene was "vigorously enforcing" its patent.

The argument by defendant that Kolene has misused its patent on the process requires a considerably detailed exposition of Kolene's methods of doing business with respect to the process-in-suit. Its business is that of selling salts and equipment used in chemical processes. With respect to the process-in-suit, Kolene sells equipment and salt to two classes of customers: a) the so-called "captive" shops, accounting for about 98% of the market, **[**46]** which are merely the heat-treating departments of corporations which process their own industrial parts; b) the so-called "heat treaters", independent operators, accounting for about 2% of the market, operating under franchises. This is a service type of business. These heat treaters process parts sent to them for treatment by their various customers.

With respect to the captive shops and the heat treaters using the process-in-suit, there is a different sales policy as to each, arising out of the differences in their methods of operation. The captive shops do their own work in their own shops and the responsibility for improperly treated parts is solely their own. Kolene sells equipment and salts to them upon purchase order. With them it has no agreements, contracts, or licenses. They are free to make purchases of their materials and equipment wherever they see fit, although as a practical matter they buy their salts and most of their equipment for the process from Kolene. These captive shops are also brought and kept abreast of technical improvements in the art through Kolene's technical help of various kinds.

The situation with respect to the "heat-treater" franchisees is **[**47]** substantially different. There are eleven heat treater licensees located in various parts of the United States, one of them (Lindberg) having multi-plant operations in widely scattered places. Each of these franchisees is required to operate in accordance with Kolene's controls and procedures, and to buy all salts used in their "Tufftride" baths from Kolene. Each franchisee sells its Tufftride services under the trademark "Tufftride", relying (as do its customers) upon that trademark **[*1267]** and its good will and reputation to sell to its industrial customers.

With respect to these franchisees, an outside company sends its parts to a heat-treater to be "Tufftrided". Uniformity or consistency of treatment is an important factor. There may be substantial lapses of time between successive orders. There are widespread geographical separations between locations of either the same heat-treater, in its various branches, or between different **[***227]** heat-treaters. An example given the Court [20] was that of a customer who "has a plant in Peoria, * * * and a plant in York, Pennsylvania and a plant in San Dreando, California, and he desires Tufftriding work done, that he could send to a **[**48]** licensee in California or into Pennsylvania or in Illinois and secure the same quality, the same product, the same process as he would get from any of the other licensees." International Harvester, [21] for example, sends the same crankshafts both to Commercial in Detroit and Lindberg in Melrose Park, Illinois. Moreover, not only the heat-treaters but their

[20] Shoemaker, Tr. 316.

[21] Ex. 5. Hall dep., pp. 26-27.

customers turn to Kolene for aid in the solution of problems which have arisen in the heat-treater shops. In addition, such shops must conform to an expected standard of work, as contrasted with the captive shop which, for its own work, may set its own standards, accepting or rejecting as it wishes. The franchisees pay a royalty to Kolene based upon their Tufftride business volumes. In addition, they are required to buy salts used in the trademarked "Tufftride" process, but not their equipment, from Kolene. Kolene argues that the salts must be of the same proven formulation, quality, and purity, the salts forming a major integral part of the process. It is argued, as well, that merely setting specifications for salts obtainable from different sources will not achieve the coast-to-coast uniformity of treatment necessary for **[**49]** the product.

With respect to the captive shops, it is Kolene's position that their sales policy was to sell on the basis of being a good supplier, that it does not use patents as a sales weapon, that the business is the sale of salts and that it would not, nor has it ever, refused to sell salts to anyone. Defendant counters with the argument that the plaintiff has used its patent "to coerce captive shops to purchase unpatented salts from the plaintiffs", relying upon such cases as *Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 58 S. Ct. 288, 82 L. Ed. 371 (1938)*; *B.B. Chemical Co. v. Ellis, 314 U.S. 495, 62 S. Ct. 406, 86 L. Ed. 367 (1942)*; *Lincoln Electric Co. v. Linde Air Products Co., 171 F.2d 223* (CA 6, 1949) and, of course, *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363*, as amended *315 U.S. 788 (1942)*. These are but a few of a host of cases all involving the same principles, all of which are based expressly or **[**50]** impliedly upon the element of coercion. See, *Rocform Corp. v. Acitelli-Standard Concrete Wall, Inc., 367 F.2d 678* (CA 6, 1966). A fair summarization of these cases would seem to be that the courts require for application of the doctrine, a showing that while the patentee was permitting the use of the patent to his own customers, he was, as a practical and substantial concomitant, denying the use of it to others, by suit, threat, or otherwise. It is noted, for example, in our earlier Sixth Circuit case (*Lincoln Electric, supra*) that the patentee was vigorously enforcing its patent rights under the patent claims against sellers of the unpatented elements.

It is just at this point that defendant fails in his evidentiary showings. Although it asserts "vigorous enforcement" by Kolene, it turns out that the vigorous enforcement referred to are the old suits at the time of the breakup of Commercial and Kolene and nothing more, either against Nu-nitride, or other off-shoots of the Commercial operation. It urges vigorously that with respect to **[*1268]** the captive shops (which do not employ the trademark Tufftride), the practice of Kolene is to force the use of the salts by lawsuits. **[**51]** "You have to have it [an implied patent license] or you go out of business because they sue everybody." [22] What defendant is asserting here is actually coercion. It is reminiscent of the statement of the Court in *Switzer Brothers, Inc. v. Locklin, 297 F.2d 39* (CA 7, 1961) that the patentee had threatened "all non-licensed manufacturers and all users of non-licensed devices with patent infringement suits" and had commenced suits "in widely scattered parts of the United States against dealers, manufacturers, users, and customers", and the argument made in *Lincoln Electric, supra.* But defendant's argument in the case before us founders on the record. There are before us no such suits. There is no evidence of threats of infringement, and no evidence of any kind that the captive shops or any franchisee have been pressured in any way by the existence of the patent-in-suit or its employment. The same situation obtains with respect to the words "Patent Pending" appearing on some drums shipped into the United States by Degussa. Defendant argues that the purpose of such words "is unlawful coercion". Mr. Shoemaker testified that the appearance of such words was either an oversight **[**52]** or a mistake of fact by plaintiff relating to the pendency of relevant patent applications. At any rate no evidence was presented that anyone other than defendant's counsel was either aware of **[***228]** or interested in or disturbed by this language and we regard it as inconsequential.

In short, on this issue of coercion raised by the defendant, all that we have is counsel's charge and speculation, unsupported by evidentiary showings. Far more than this is required for the application of the *Morton Salt* doctrine, harsh as it is and involving forfeiture as it does, since its meaning is that a patentee cannot enforce his rights against deliberate infringement. No threats have been shown to us and no disgruntled user, or would-be user, has appeared before us. It is inconceivable to us that an entire industry could have been so intimidated. Upon the record we cannot find that the patent-in-issue has, in this suit, or any other, been held as a club over the salt users

[22] Tr. May 28, 1969, p. 16.

to bring them into **[**53]** line. It is our judgment, having heard and seen the witnesses presented, as well as other evidence, that the charge is without foundation.

The trademark tie-in, involving about 2% of the industry, remains for consideration. The objectives of trademark protection were summarized in a Senate Report [23] on the Lanham Act [24] as follows:

> a) "* * * [To] protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get.
>
> b) "* * * [Where] the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats." [Paragraphing used is the court's]

It must be recognized that we have two opposing considerations **[**54]** at this point, each of which has powerful support. On the one hand we have the anticompetitive effects inherent in any tying arrangement. On the other hand we have a trademark licensor's efforts to preserve the good name and integrity of his product. As Mr. Justice Holmes observed in *Bourjois & Co. v. Katzel, 260 U.S. 689, 692, 43 S. Ct. 244, 245, 67 L. Ed. 464 (1923)*, a trademark "deals with a delicate matter that may be of great value but that easily is destroyed, and **[*1269]** therefore should be protected with corresponding care," going on to say "[It] stakes the reputation of the plaintiff upon the character of the goods". There are few cases in the field, none on all fours, and the literature is sparse and inconclusive. [25]

The defendant relies heavily upon *Switzer Bros. v. Locklin, 297 F.2d 39* (CA 7, 1961). **[**55]** In this case the patentee sought the most extensive controls, since "The licenses required, as a condition for the grant thereof, that the licensee purchase all materials from Switzer, or sources approved in writing by it, *not only for production of the patented devices, but also for the production of all daylight fluorescent devices*." [26] There is no such parallel here. Moreover, the case involved both patent and trademark tie-ins, the Court concluding that the appellants had misused both the patents involved and the trademark "in restraint of trade in interstate commerce in violation of the antitrust laws". There is no claim of an anti-trust violation made in our case. The case of *Susser v. Carvel Corp., 332 F.2d 505* (CA 2, 1964) is more in point, although it also involved charges of violation of the anti-trust laws. There the Court divided, but both opinions held that a tying might be justified as necessary to protect a trademark. The majority held that a trademark tie-in, to be illegal, must meet the same tests applied in a patent tie-in situation, namely, both market dominance and the affecting of a substantial amount of commerce, the plaintiff failing there in establishing **[**56]** either element. The defendant here makes no effort at such a showing. Its argument is that the heat-treater franchises really involve a patent tie-in, not a trademark tie-in, and thus the franchises offend public policy, under the *Morton Salt* case, *supra*. Is the arrangement before us, then, a patent tie-in or is it a trademark tie-in? We pursue the same inquiry as did both the trial and appellate courts in *Susser v. Carvel Corp., supra*, in asking, What is the focus of the arrangement?

We turn to the franchise contracts themselves and examine that of the Getchell Steel Treating Company, Inc., a Minnesota corporation. The franchise, it states therein, concerns the "Tufftride" process. Granted are certain exclusive area rights, in which the licensee may "practice the Tufftride process and * * * use Tufftride apparatus **[***229]** and materials". Kolene agrees to furnish advertising materials, technical help and training, and to conduct inspections to assure "consistently high quality". **[**57]** The purpose of the latter provisions is to safeguard the quality on a nationwide basis for the benefit of customers relying on the Tufftride name, reputation, and trademark. The only reference to the patent (which had issued some three years previously) is in the first paragraph in which

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[23] S.Rep. No. 1333, 79th Cong., 2d Sess. 1, 3 (1946); U.S.Code Congressional Service, p. 1274.

[24] 60 Stat. 427 (1946), *15 U.S.C. §§ 1051-1127 (1958)*.

[25] See, Schniderman, Trade-Mark Licensing - A Saga of Fantasy and Fact, 14 Law and Contemp.Prob. 248, 259-268 (1949); Timberg, Trade-marks, Monopoly, and the Restraint of Competition, Id. 323.

[26] *297 F.2d 39, 44*.

the "Metal Treater" agrees to honor all of Kolene's and Degussa's rights, "including all patents, issued or to be issued in the future * * *".

Defendant does not demonstrate to us any focus on the patent itself by any direct evidence of record. Its argument rests on speculation and conjecture, as did its argument with respect to the "pressuring" of the captive shops, allegedly to force them either to buy Kolene salts or face suit "because they sue everybody". Defendant points to an amendment made in the licenses approximately a year after the patent grant, which amendment required the purchase of Kolene salts. As to this amendment, on the other hand, plaintiff submits exhibits (see Exs. W and Y) on the basis of which it argues that such requirement was imposed as a part of a review and recast of their method of doing business, including re-allocation of exclusive territorial rights (Ex. B to **[**58]** Ex. Y). Again, we are in the realm of speculation. **[*1270]** We cannot find the causal relation asserted by the defendant upon the evidence before us.

We construe this instrument not only within its four corners but with reference to the testimony of Mr. Shoemaker, who described in detail Kolene's method of doing business. The focus here clearly is the trademark "Tufftride", the term coined by Mr. Shoemaker himself in an effort to avoid the disparagements which had been cast upon the words "soft nitriding", which had been employed at an early stage in the art. The trademark or service mark [27] Tufftride has become known on a nationwide basis and it is to the protection of such mark that the franchise agreement is principally devoted.

With respect to the widespread use of the trademark Tufftride and reliance thereon we have previously noted that the defendant itself receives (and processes) orders from Firestone and the Chevrolet Division **[**59]** of General Motors calling for the "Tufftride" process. Defendant informs its customers, we are told, that its process is not Tufftride but Cynatride "and its equivalent". Counsel continues "I admit that we're riding on the good will of the process insofar as it has good will, and we're entitled to do that in a competitive economy, absent a valid patent. That's what we're talking about here, is that patent valid?"

Moreover, it is significant to us, among other factors, that in the captive shops, which use the process-in-suit and comprise 98% of the market, but which is a non-trademark situation, there is no requirement that these large shops purchase their salts from Kolene. It is only with respect to the 2% remainder, scattered all over the country, operating under the Tufftride trademark, a process requiring uniformity for industrial use, that the purchase of salt requirement is made. Since both segments of the market are using the patented process it is the more difficult to say that the control is based upon the patent rather than the trademark.

We find the focus of the franchises, then, to be upon the trademark Tufftride and, considering the need for nationwide dependability, **[**60]** reliability and uniformity of quality and purity of the salts used by those using the Tufftride trademark, the difficulties of supervision of operation nationwide as to salts from different sources, even though conforming to specifications and within commercial limits of purity, (available commercial grade cyanides have 2-4% unknown impurities) considering as well the lethal nature of these salts (i.e., cyanide) and the difficulties encountered in the efforts of Mr. Shoemaker to mix them, as well as the fact that this is a relatively new process, it is our judgment that under the unique circumstances of this case the salt purchase requirement by the heat-treater shops is not unreasonable.

The finding thus made is determinative of the case under defendant's theory. It concedes (Defendant's Supp. Brief, p. 2, submitted following oral argument on this phase of the case) that "if the focus of the franchise agreements were, in fact, the Tufftride mark, rather than the patent-in-suit, then defendant's charge of misuse would fail".

We will add that even without the concession, *Morton Salt* itself makes it clear that the doctrine there enunciated is not to be taken as dogmatic and its **[**61]** application automatic. Denial of remedy against an infringer is a harsh remedy, a species of forfeiture. And just as there is now found, in amelioration of the adamant application the per **[***230]** se rule [28] **[**63]** to tying contracts in anti-trust law, the doctrine of business justification, [29] **[*1271]** so it

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[27] For the purposes of this case a distinction is unnecessary.

would seem that the *Morton Salt* doctrine should admit of similar amelioration, even if this were indeed found to be a patent tie-in, in the light of *Morton's* requirement that the plaintiff must be using the right asserted "contrary to the public interest." In all of the welter of words and literally volumes of learned discussions in the area of anti-trust, per se violation, business justifications, and all the rest, we are impressed by the down-to-earth observations of the Fifth Circuit in the case of *Denison Mattress Factory v. Spring Air Company, 308 F.2d 403, 408*, in upholding a trademark agreement against assault under the anti-trust laws that

> "* * * the cases do point out that courts are prone to look at the primary purpose of a contract to determine its validity. If the primary purpose, however disguised, is to stifle competitors and create a monopoly, then the agreement **[**62]** or contract is struck down. However, the cases seem to follow the principle that if the primary purpose of the contract is lawful, e.g., to protect one in the fruits of his labor, and if the arrangement was actuated by or could be explained on the basis of legitimate business justification as opposed to the desire to increase market control through economic leverage, then the court will generally hold any incidental restraint of trade, not harmful to competition of the public to be lawful. *Dehydrating Process Co. v. Smith (CA 1, Cir. 1961) 292 F.2d 653*. Therefore, it is our duty to determine whether the general primary purpose of the contract under consideration was to protect Spring-Air in its product, and then determine more specifically whether the provisions of the contract complained of here violate any ***antitrust law***."

Under the facts as we have found them and the law applicable thereto we need not consider plaintiff's offer to defendant, made in 1968 after suit was instituted, of a license giving defendant full freedom to practice the process without either controls or the salt-purchase requirement, conditioned, however, along with other requirements, that defendant take care to remove any belief or impression in the trade that it was a franchised Tufftride heat treater. Defendant urges this as an implied admission of guilt. Plaintiff points to it as evidence of complete good faith. If we were compelled to make a choice **[**64]** we would, after seeing and hearing the witnesses, accept the good faith explanation. We find no misuse of the patent, either as to the captive or the franchised shops and we so hold.

It is our conclusion that Claim 1 of the patent-in-suit is valid and has been and is infringed by defendant and that plaintiffs are entitled to a judgment granting an injunction against further infringement and an accounting awarding damages as sought by the Complaint. A suitable order may be presented.

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[28] This term involves both a semantic and a procedural wilderness. Compare (as to " market dominance" alone) *Northern Pac.Ry. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* with *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; compare also *United States v. Loew's, Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962)* with *White Motor Co. v. United States, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*.

[29] See, Comment, 62 Mich.L.R. 1413, Tying Arrangements under the Anti-Trust Laws: The "Integrity of the Product" Defense; Note, 72 Yale L.J. 1171 (1963). See, also, *Baker v. Simmons Co., 307 F.2d 458* (CA 1, 1962); *Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653* (CA 1), cert. den. ***368 U.S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 194 (1961)***; *United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D.Pa.1960)*, aff'd per curiam ***365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961)***.

LexisNexis

Cosentino v. Carver-Greenfield Corp.

United States District Court for the District of Nebraska.

August 6, 1969.

Civil 03278.

Reporter
1969 U.S. Dist. LEXIS 13134 *; 1970 Trade Cas. (CCH) P73,390

Dominic Cosentino and Richard Brown v. Carver-Greenfield Corp., carver-Greenfield Omaha, Inc., First Mid-America, Inc., Eastman Dillon-Union Securities & Co., City of Omaha, and Omaha Pollution Control Corp.

Core Terms

taxpayer, stockholder, damages, plant, municipality

Opinion by: [*1] ROBINSON

Opinion

Memorandum and Order

ROBINSON, Chief Judge: This matter comes before the Court upon motions of all of the defendants for dismissal. [Filings #6, 8, 10.] The action is one arising out of a series of agreements between the City of Omaha [City], the Omaha Pollution Control Corporation [OPCC], organized by the City, Carver-Greenfield Corporation [Carver] and its subsidiary Carver-Greenfield Omaha, Inc. The series of agreements basically provide for the building of a plant and its necessary adjuncts to process waste from packing houses located in the City of Omaha. Also joined as defendants are First Mid-America Inc. and Eastman Dillon-Union Securities & Co. who allegedly secured the right to purchase and resell bonds to be issued to finance the project. The waste utilization process employs a series of patents which protect either the method or technique of the process or the plant design. Copies of these agreements have been attached to the complaint and are incorporated by reference. Oral arguments have been received and briefs submitted on behalf of all of the parties.

Plaintiffs allege jurisdiction under *Sections 15* and *22 of Title 15, U.S.C.* and **[*2]** *Section 1337 of Title 28, U.S.C.* Substantively they allege antitrust violations by conspiring to monopolize the waste process in violation of the Sherman Act. They specifically allege conspiracy among all of the above-mentioned defendants to misuse patent rights granted to Carver.

The plaintiffs in this action are residents and taxpayers of the City of Omaha. They have alleged that the action is brought in a representative capacity. Damages is the only relief requested. Reduced to the basics, as plaintiffs' complaint now stands, it is a taxpayers' class suit at best alternatively alleging harm to the taxpayers individually, each member of the class being so injured or alleging harm to the City for whom they are bringing the action. It is essentially then either a class action or a derivative action similar to that brought by a stockholder in which the benefits of such an action accrue to and for the benefit of the corporation directly and only indirectly benefit the stockholders.

The taxpayers as a class may only be injured personally in their "business or property", as required by *15 USCA § 15*, should the agreements mentioned above somehow affect the amount of their tax **[*3]** burden. This Court has determined that in accordance with the requirements of *§ 15* this injury, if there be any, is too remote and therefore in this capacity plaintiffs have no standing to sue.

Plaintiffs other alternative of a derivative action has no basis of which this Court is aware. A taxpayer is not a shareholder entitled to bring an action in lieu of the municipality or one of its municipal corporation within the meaning of the term as this Court understands it and therefore rules that the motions of dismissal should be sustained.

The real distinction between the direct action and the derivative action, regardless of whether the action is on behalf of a class, in the normal stockholder situation is that the individual shareholder has a personal or individual right of action against third persons which results from the impairment of the value of his or, in the case of the class, their stock. *Roseland v. Phister , 125 F.2d 417*; *Loeb v. Eastman , 183 F. 704* [3rd Cir. 1910]; *D'Ippolito v. Cities Serv. Co. , 374 F.2d 643* [2d Cir. 1967]; See also *Bookhout v. Schine Chain Theatres , 253 F.2d 292* [2d Cir. 1958]; *Gerli v. Silk Ass'n of America , 36 F.2d 959* [S.D.N.Y. **[*4]** 1929].When his action is derivative the result is different. The derivative action is not a personal right of recovery but rather representative of and for the benefit of the corporation. The stockholder sues in the right of the corporation. *Ramsburg v. American Investment Co. , 231 F.2d 333* [7th Cir. 1956]; *Fanchon v. Paramount Pictures, Inc. , 202 F.2d 731* [2d Cir. 1953].

In order to have standing to bring an action under *15 U.S.C. § 15* there must not only be public injury but there must also be private damage to the party or parties bringing the action. While the fact of damage has been stated somewhat differently by different courts the rule is basically that a plaintiff must be directly injured or defendants have directed their wrongdoing at him; plaintiff would thus be considered in the "target area". Such damage cannot be indirect, remote or inconsequential. See Supplement to Report of the Attorney General's National Committee to Study ***Antitrust Law***, Antitrust Developments 1955-1968, p. 279 [Published by A.B.A. 1968]. If the Courts have refused the stockholder individually [1] or a representative of consumers [2] of a product to bring an anti-trust suit because **[*5]** of the remoteness from injury and the target area, then the taxpayer is in no better position. In fact he is probably further remote because the violation is but only one factor among many that may affect the amount of a tax.

It should be noted that the type of damage allegation to which the Court has reference when speaking of the consumer, stockholder or taxpayer is where the plaintiff is one step removed from the target area. These plaintiffs' corporation, municipality, or retailer from whom they buy the product are the entities directly injured. Plaintiffs' damage is only derivative from the loss which has occurred to another more closely concerned with the actual wrongdoer. This Court thus holds that resident taxpayers individually or as a class have no personal standing to bring suit upon the violations of the Sherman Act here alleged.

The matter of the plaintiffs as a class or individually bringing this action as representatives of and for the benefit of the City or as they allge the City's **[*6]** alter ego OPCC is also subject to dismissal for lack of standing. Plaintiffs state in their brief that, at least in Nebraska, taxpayers have uniformly been entitled to bring an action on behalf of the governmental agency concerned. While it is true that the taxpayer may contest the action of the governmental agency, that action is in the nature of a restraint directly upon the agency. Here the action is again one step further removed. The taxpayer steps into the municipalities' shoes and then sues a third party for damages. The writer has not been cited to any authority nor has independent research revealed any basis for such a representative suit in Nebraska nor in the federal system which governs standing in this action. Those authorities which plaintiffs to cite relate to situations where the state or its attorney general because of their public office or duty to its residents and agencies have been vested with authority to represent individuals or certain entities. See *Commonwealth Edison Co. v. Allis Chalmers , 315 F.2d 564* [7th Cir. 1963]; *State of Illinois v. Brunswick Corp. , 32 F.R.D. 453*.

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[1] *Roseland v. Phister, supra*; *Loeb v. Eastman, supra*; *Gerli v. Silk Ass'n of America, supra* .

[2] *Commonwealth Edison Co. v. Allis Chalmers , 315 F.2d 564* [7th Cir. 1963].

Those situations are far removed from the taxpayers acting for the benefit **[*7]** of a state or municipality. Any analogy to stockholder suits is also without merit. A taxpayer is not a stockholder allowed to invoke the equitable remedy of a stockholder, as defined in precedent establishing that right. See *Hawkes v. Oakland , 104 U.S. 450* [1881]; Dodge v. Woolsey , 18 How. [U.S.] 331 [1855].

There is also an additional ground present for sustaining defendants' motions. Plaintiffs' complaint claims damages in the amount of the total obligation which the City has undertaken. This includes the total amount of the bonds issued, a fixed rate expense for operation payable to the subsidiary-operator if sufficient revenues from the operation of the plant are not obtained and the cost of the City's agreement to build certain connecting sewers. Plaintiffs then proceed to allege that the reason for these damages is "operating deficits to arise from said plant because of the actual removal of packers from Omaha." The removal of the packinghouses from Omaha is further alleged to have occurred not because of the patent misuse but because "the meat packers, in order to stay competitive, would have to move out of their plants in Omaha to modern plants in smaller **[*8]** communities." As defendants' briefs have pointed out, the damage that has occurred must have some causal connection with the injury alleged. *Continental Ore Co. v. Union Carbide and Carbon Corp. , 370 U.S. 690, 697* [1962]; *Flintkote v. Lysfjord , 246 F.2d 368*. See also Supplement to the Attorney General's Report, supra at p. 282. There is no mention of excessive or illegal royalties which could have some causal connection. The damages as alleged are rather, as one of the defendants has stated, the result of an improvident contract and not the result of patent misuse. The plaintiff will not fold because of the trust violation if one exists but because the packinghouse industry has sought more appropriate locations. Therefore, assuming for the moment that the plaintiffs have standing, their complaint fails to state a cause of action for the reason that the damages as alleged have no causal connection to the antitrust violations alleged. Accordingly,

For either of the above reasons It Is Ordered that the motions of all of the defendants for dismissal should be and are hereby sustained.

Gottesman v. General Motors Corp.

United States Court of Appeals for the Second Circuit

August 13, 1969, Decided

Nos. 32412, 32413, 32414

Reporter

414 F.2d 956 *; 1969 U.S. App. LEXIS 11109 **; 1969 Trade Cas. (CCH) P72,888

Callman Gottesman, Maria Mattiello, and Paul J. Peyser, Plaintiffs v. General Motors Corp. and E.I. Du Pont De Nemours & Co., Defendants

Core Terms

Clayton Act, acquisition, stock, automotive, damages, fabrics, finishes, percent, district court, anti trust law, antitrust, decree, violation of section, cause of action, Sherman Act, supplier, cases, prima facie evidence, private action, evidentiary, pre-trial, monopoly, government's case, stock interest, treble damages, money damages, ultimate fact, treble-damage, plaintiffs', ownership

LexisNexis® Headnotes

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

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] Private Actions, Remedies

See 15 U.S.C.S. § 15.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Monetary Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN2[] Remedies, Damages

A violation of the Clayton Act § 7, 15 U.S.C.S. § 18, furnishes a basis for a claim for money damages under the broad language of the Clayton Act § 4, 15 U.S.C.S. § 15.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] Antitrust & Trade Law, Clayton Act

The Clayton Act *§ 1*, *15 U.S.C.S. § 12*, defines "antitrust laws" as including "this Act," and it seems clear that the Clayton Act § 7, *15 U.S.C.S. § 18*, is an ***antitrust law*** within the meaning of the Clayton Act § 4, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

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 > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN4[] Remedies, Damages

Damages have been allowed to private litigants under the Clayton Act *§§ 2* and *3*, *15 U.S.C.S. §§ 13* and *14*, which are also aimed at anticipated injury and proscribe certain activities when the effect may be to lessen competition or tend to create a monopoly.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN5[] Clayton Act, Claims

Plaintiffs alleging violation of the Clayton Act § 7, *15 U.S.C.S. § 18*, cannot rest on a showing of such a violation; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

See *15 U.S.C.S. § 16(a)*.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] Private Actions, Remedies

While a judgment of violation of the Clayton Act § 7, 15 U.S.C.S. § 18, in a government suit covering a given period is insufficient to establish a violation at a later date, that judgment may be of evidentiary weight in a subsequent private action if it encompasses findings sufficiently related to the issues of the private action and if sufficient additional evidence is adduced to show that the illegal activities condemned in the government decree carried over into the period in issue.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Private Actions, Remedies

If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the government, the private plaintiff can treat the outcome of the government's case as prima facie evidence on that issue. It would be proper in determining the effect of the judgment in a government case to look to earlier opinions both with respect to violation and with respect to remedy.

Judges: [1]** Waterman, Smith and Feinberg, Circuit Judges.

Opinion by: FEINBERG

Opinion

[*957] FEINBERG, Circuit Judge:

I. *Background.*

Plaintiffs, minority stockholders of General Motors Corporation, appeal from a judgment for defendants General Motors and E.I. du Pont de Nemours & Company entered in the United States District Court for the Southern District of New York after a trial without a jury before *Charles M. Metzner, J., 279 F. Supp. 361 (1967)*. Plaintiffs brought this derivative antitrust action in June 1957, [1] immediately after the Supreme Court's opinion in *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957)*. That decision reversed a district court dismissal of an antitrust action brought against du Pont and General Motors, among others. The Court held that du Pont's commanding position as a supplier of automotive finishes and fabrics to General Motors, obtained at least in part by its ownership of a 23 per cent stock interest in General Motors, violated section 7 of the Clayton Act, *15 U.S.C. § 18*, since acquisition of the stock raised a reasonable probability of the creation **[**2]** of a monopoly in that line of commerce. While the Government had also alleged violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, the Court did not decide the appeal from the district court's dismissal of those charges. *353 U.S. at 588 n. 5*. In a later decision, the Court held that the proper remedy for the

[1] An amended consolidated complaint was filed in November 1959.

Clayton Act violation was complete divestiture by du Pont of its General Motors stock. *United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)*.

The present civil action for treble damages was brought pursuant to section 4 of the Clayton Act, *15 U.S.C. § 15*, alleging that du Pont had violated section 7 of the Clayton Act and *sections 1* and *2* of the Sherman Act, and had breached its common law fiduciary duty. Specifically, plaintiffs claimed that subsequent to May 4, 1950, [2] du Pont utilized its stock control **[**3]** to insure its position as primary supplier to General Motors of a variety of products, thereby preventing actual and potential competition from other suppliers and enabling du Pont to **[*958]** sell General Motors its products at excessive prices. In September 1963, Judge Metzner issued an opinion dealing with the effect to be given to the Supreme Court judgment in the first *du Pont* case, explaining that a decision on that issue in advance of trial was necessary in order to define the scope of deposition-discovery procedures. *221 F. Supp. 488*. The judge held that a violation of section 7 of the Clayton Act did not constitute a cause of action for money damages. Moreover, since the Supreme Court judgment dealt only with the situation of the two corporations as of June 1949, the judgment was not available to the plaintiffs, who were suing for acts committed after May 4, 1950, on their other claims, except "for historical purposes and background material." The judge disagreed with plaintiffs' contention that the Supreme Court had found an actual restraint of trade by du Pont, stating that the Court had found only a "reasonable probability of the creation of a monopoly. **[**4]** " In a subsequent Pretrial Order dated November 12, 1963, Judge Metzner held that the only "ultimate facts" determined by the *du Pont* decision which might be prima facie evidence in the case at bar were:

(a) that du Pont acquired 23% of the stock of General Motors;

(b) that automotive finishes and fabrics constitute a substantial "relevant market" within the meaning of the Clayton Act;

(c) that said acquisition of stock by du Pont was not solely for investment;

(d) that General Motors' share of the "relevant market" for automotive finishes and fabrics was substantial;

(e) that du Pont supplied a substantial share of that market;

(f) that du Pont used its stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive finishes and fabrics and that du Pont controlled General Motors to that extent.

The judge dismissed plaintiffs' claim for money damages under section 7 of the Clayton Act as a matter of law, but certified the order for immediate appeal. This court denied leave to appeal from that order on January 31, 1964, and the Supreme Court denied certiorari, *379 U.S. 882, 85 S. Ct. 144, 13 L. Ed. 2d 88 (1964)*. **[**5]**

After extensive pre-trial and discovery proceedings, the claims relating to du Pont's sales of automotive fabrics and finishes for passenger cars manufactured by General Motors came to trial in November 1966 solely on the questions of liability of du Pont and injury to General Motors as distinguished from the quantum of damages. The trial continued until late January 1967; thereafter Judge Metzner filed his opinion, dismissing these causes of action. He found that du Pont had not used its stock ownership to control General Motors' purchases of automotive finishes or fabrics or to insulate General Motors from competition in either line of commerce in violation of *section 1* or *2* of the Sherman Act and that du Pont had not abused any fiduciary duty to General Motors. On March 29, 1968, final judgment was entered after a finding pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure* that more than one claim for **[**6]** relief had been presented and that there was no just reason for delay. This finding was upheld by this court in denying defendants' motion to dismiss plaintiffs' appeal in July 1968. *401 F.2d 510*.

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[2] This was apparently the earliest date at which any plaintiff owned General Motors stock.

On this appeal plaintiffs argue that numerous issues of law and fact were incorrectly decided by the court below. We do not have to reach most of these claims, however, for we find that the rulings in Judge Metzner's Pretrial Opinion of September 18, 1963, and their application to the case at trial, were sufficiently erroneous to require remanding the action for further consideration. In particular, we hold that Judge Metzner erred in deciding that a violation of section **[*959]** 7 of the Clayton Act cannot support a private cause of action for money damages, and that he improperly restricted the scope and weight of the government judgment in the first *du Pont* case as applied to the case at bar. Because of this disposition of the case, we need summarize only briefly the relevant facts set out at length in the *du Pont* opinion and in the opinion of the district court.

During the second decade of the century, du Pont acquired a number of manufacturing operations **[**7]** in automotive fabrics and paints. Considering other areas of further expansion, the corporation became interested in purchasing General Motors stock, both as a profitable investment and because General Motors constituted a large potential market for du Pont products. In 1917, du Pont decided to acquire $25,000,000 worth, or 23 per cent, of the outstanding common stock of General Motors. While the precise percentage of ownership varied for a number of years, it remained at 23 per cent from 1939 on. At least in the first few years after du Pont's stock acquisition, the company made substantial and successful efforts to insure that the maximum share of General Motors' purchases of automotive fabrics and finishes were from du Pont. As the Supreme Court found in the first *du Pont* case, these purchases constituted a substantial part of the total market. Thus, in 1946 and 1947, when General Motors purchased approximately one half of all such products, du Pont supplied 67 and 68 per cent, respectively, of General Motors' requirements for finishes and 52.3 and 38.5 per cent of its fabric requirements. *353 U.S. at 596*. During the years covered by the case at bar, the **[**8]** district court found that General Motors' share of the automobile market varied 41 per cent and 52.7 per cent and that du Pont's share of General Motors' purchases averaged at 21 per cent for automotive fabrics and 74 per cent for automotive finishes. *279 F. Supp. at 369*. From 1951 to 1959, du Pont sold from 89.2 per cent to 96.2 per cent of its total production of automotive finishes to General Motors and during 1955 to 1959 du Pont's sales of automotive fabrics to General Motors averaged 86 per cent of du Pont's production. *Id. at 380-81*.

In holding that du Pont's stock purchase resulted in a violation of section 7 of the Clayton Act, the Supreme Court found that "immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes," *353 U.S. at 602*, and that "the inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." *Id. at 605*. The Court referred to "the fact, plainly revealed by the record, **[**9]** that du Pont purposely employed its stock to pry open the General Motors' market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." *Id. at 606*. This answered the question, posed by the Court at the outset of its opinion, "whether du Pont's commanding position . . . was achieved . . . because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." *Id. at 588-89*. The Court did not determine whether there was an actual restraint of competition at the time, but noted:

> The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to du Pont, and if it has quieted down, it remains hot, and, from **[*960]** past performance, is likely at any time to blaze and make the fusion complete.

[10]** *Id. at 607*.

II. *Treble damages under section 7 of the Clayton Act*.

HN1[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, states:

> 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 three-fold the damages by him sustained . . . .

The Supreme Court's first *du Pont* decision established that du Pont's acquisition of General Motors' stock was a type forbidden under section 7. In his 1963 pre-trial opinion, however, *221 F. Supp. at 493*, Judge Metzner noted that:

> No case has been found discussing the question whether damages can be recovered for a violation of section 7 of the Clayton Act, and no case has been found where damages have been awarded for such a violation.

After distinguishing two cases he concluded:

> The test of a section 7 violation is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." *United States v. E. I. du Pont de Nemours & Co., supra, 353 U.S. at 607*. **[**11]** Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.

Other district courts have subsequently reached the same conclusion, see, e. g., *Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510 (E.D. Mo. 1965)*; *Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 716-17 (D. Hawaii 1964)*, and one circuit court has approved it in dictum, see *Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 728 n. 3 (8th Cir. 1964)*. However, other courts have disagreed. Both the Fifth Circuit, see *Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5th Cir. 1967)*, and Judge McLean in the Southern District of New York, see *Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 523-26 (S.D.N.Y. 1965)*, have held that there can be a claim for money damages for a violation of section 7, though the latter case contains some qualifying language. Moreover, a number of other cases have impliedly sanctioned such a cause of action, dismissing or affirming the dismissal of section 7 money damage claims **[**12]** only for the lack of a sufficient showing of specific, proximate injury. See, e. g., *Blaski v. Inland Steel Co., 271 F.2d 853 (7th Cir. 1959)*; *Bender v. Hearst Corp., 263 F.2d 360, 370 (2d Cir. 1959)*; *Rayco Manufacturing Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill. 1964)*. In *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*, the Supreme Court itself held that the statute of limitations did not bar a private, treble-damage action based on alleged violations of both section 7 of the Clayton Act and *sections 1* and *2* of the Sherman Act; although the issue was not discussed, the Court evinced no qualms about dealing with a section 7 money damage claim. Finally, commentators have overwhelmingly supported the conclusion that section 7 does give rise to a treble-damage action. See, e. g., J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 340-42 (1967); Stein, Section 7 of the Clayton Act as a Basis for the Treble-Damage Action: When May the Private Litigant Bring His Suit?, 56 Calif. L. Rev. 968, 971-80 (1968); Note, Private **[**13]** Actions Under Sections 4 and 7 of the Clayton Act: A Fresh Look at an Old Problem, 29 Ohio St. L. J. 756 (1968); 64 Colum. L. Rev. 597 (1964); 79 Harv. L. Rev. 445 (1965).

HN2[] We agree with those authorities cited above that indicate that a violation of section 7 of the Clayton Act does furnish a basis for a claim for money damages **[*961]** under the broad language of section 4 of the Act. ***HN3***[] To begin with, *section 1* of the Act, *15 U.S.C. § 12*, defines "antitrust laws" as including "this Act," and it seems clear to us that section 7 of the Clayton Act is an ***antitrust law*** within the meaning of section 4 of the same Act. This proposition is not the truly disputed one in the above-cited cases or even in this one. The trial judge did not hold that section 7 is not an ***antitrust law***, nor do defendants so contend. The basis of the pre-trial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, **[**14]** not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that "may" or "tend to" cause specified harm, such an acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury "by reason of" the violation are persuasive propositions. The Supreme Court seems to have recognized as much in the first *du Pont* decision, *353 U.S. at 597*, when it rejected the argument that section 7 is applicable only to acquisition of stock and not to the holding or subsequent use of it:

> Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

HN4[]

Damages have been allowed to private **[**15]** litigants under *sections 2* and *3* of the Clayton Act, *15 U.S.C. §§ 13*, *14*, which are also aimed at anticipated injury and proscribe certain activities when "the effect . . . may be . . . to lessen competition or tend to create a monopoly." See Stein, *supra*, 56 Calif. L. Rev. at 979 & nn. 47-50. Finally, if we had any real doubts on this issue, we would resolve them in favor of a broad, rather than a narrow, construction of section 4, because "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*.

HN5[] Of course, plaintiffs cannot rest on a showing of a violation of section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation. However, the Supreme Court's finding that du Pont's stock ownership in General Motors constituted a "potential" restraint **[**16]** of trade or monopolization hardly precludes a showing that a given part was in fact injured by the prohibited acquisition, or that the section 7 violation proximately caused damage which might not in itself constitute a cause of action under the Sherman Act. *Cf.* the examples given in J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 342 (1967). Appellees argue that even assuming that a cause of action for damages lies under section 7, appellant suffered no prejudice from the district court's ruling as they specifically failed to prove any injury at trial. However, in view of the fundamental nature of the error here, we think that the district court should be given the opportunity to reconsider the evidence before it in the light of our holding that injury from a section 7 violation, as distinct from the alleged Sherman Act claims, is ground for treble damages. The advisability of such a re-examination is further supported by the evidentiary effect which the Supreme Court's finding of a section 7 violation may have on the plaintiffs' claims, a subject discussed below.

III. *Effect of the first du Pont judgment*.

In his September 18, 1963 opinion, **[**17]** Judge Metzner ruled that since the judgment **[*962]** in the first Supreme Court *du Pont* case covered a different time period than the case at bar, the "ultimate facts" determined in that judgment could not be used against the defendants under ***HN6***[] section 5(a) of the Clayton Act, *15 U.S.C. § 16(a)*:

> A final judgment or decree . . . hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

He concluded that "plaintiffs may introduce in evidence the decree in the government suit, for historical purposes and background material . . . Plaintiffs, however, will have to submit other proof of the existence of the facts on which they base their claims." *221 F. Supp. 488, 494*. **[**18]** In his pre-trial order of November 12, 1963, the judge listed the "ultimate facts" inherent in the Supreme Court decision, see page 958 *supra*, which were "prima facie evidence of ultimate facts in this suit," but again limited their availability to plaintiffs:

> The final judgment entered March 1, 1962 in said Government suit may be introduced in evidence on the trial of this action for historical purposes and as background material. The judgment in the said Government suit speaks as of June 30, 1949. The present plaintiffs may only recover damages for acts occurring after May 4, 1950.

In his final opinion in *December 1967, 279 F. Supp. 361, 364*, the judge noted that a violation of section 7 of the Clayton Act requires no showing "that restraint or monopoly was intended, nor that actual anticompetitive effects flowed from the acquisition." Since "there was no finding of private injury either to the competitors of du Pont or to General Motors itself" in the *du Pont* decision, the judge came to the "conclusion that the Court's language about entrenchment is not entitled to great weight as prima facie evidence in this case." Again the court noted: **[**19]** "The time period encompassed in the Government suit has been deemed relevant in this trial, however, to place the facts in dispute here in historical perspective."

Although Judge Metzner seemed to imply that "the Court's language about entrenchment" was entitled to *some* evidentiary weight, and one of the "ultimate facts" found in its November 1963 order was that "du Pont used its stock interest in General Motors to entrench itself as the primary supplier to General Motors," we interpret the net effect of the above comments to be that the judgment in the government case was given little or no substantive legal effect on the issues at trial. Since we think that that judgment was entitled to substantially greater impact than a limited use as "historical perspective" or "background material," we find it necessary to remand the case for Judge Metzner's further consideration in light of the principles we will set forth hereinafter.

Considerable controversy has arisen under section 5(a) of the Clayton Act over the proper evidentiary use to be made of government antitrust judgments covering violations prior in time to those alleged as a basis for damages in a subsequent treble-damage **[**20]** action. See generally Shores, Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act, 54 Iowa L. Rev. 434, 446-49 (1968); Timberlake, The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws, 36 N.Y.U.L. Rev. 991, 998-1002 (1961). Thus, some decisions have taken the strict view that a government judgment may not be introduced as evidence at all unless it covers the same, or part of the same, period as that in question in the private action. See *International Shoe Machine Corp. v. United **[*963]** Shoe Machinery Corp., 315 F.2d 449* (1st Cir.), cert. denied, *375 U.S. 820, 11 L. Ed. 2d 54, 84 S. Ct. 56 (1963)*; *Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 777 (D.D.C. 1957)*, aff'd per curiam, *104 U.S. App. D.C. 262, 261 F.2d 380 (D.C. Cir. 1958)*, cert. denied, *359 U.S. 943, 79 S. Ct. 725, 3 L. Ed. 2d 677 (1959)*; cf. *Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F.2d 533* (2d Cir.), cert. denied, *360 U.S. 912, 3 L. Ed. 2d 1261, 79 S. Ct. 1296 (1959)*. **[**21]** Other cases, however, appear to embody a more flexible approach to the question, evaluating the actual relevancy or materiality of the government judgment to the facts and issues in the private suit, even though the period covered by each may differ. See, e. g., *Park Neponset Corp. v. Smith, 258 F.2d 452 (1st Cir. 1958)*; *Eagle Lion Studios, Inc. v. Loew's, Inc., 248 F.2d 438, 442-45 (2d Cir. 1957)*, aff'd by an equally divided *Court, 358 U.S. 100, 79 S. Ct. 218, 3 L. Ed. 2d 147 (1958)*; *Alamo Theatre Co. v. Loew's, Inc., 143 F. Supp. 419 (N.D. Ill. 1956)*; *Buckhead Theatre Co. v. Atlanta Enterprises, Inc., 327 F.2d 365* (5th Cir.), cert. denied, *379 U.S. 888, 13 L. Ed. 2d 92, 85 S. Ct. 158 (1964)*. While it is true that in none of these latter cases was the earlier government judgment allowed into evidence, [3] it is equally true that no flat, inflexible rule of exclusion was applied. ***HN7***[] The rationale which emerges from them is that while a judgment of violation in a government suit covering a given period is insufficient **[**22]** to establish a violation at a later date, that judgment may be of evidentiary weight in the private action if it encompasses findings sufficiently related to the issues of the private action and if sufficient additional evidence is adduced to show that the illegal activities condemned in the government decree carried over into the period in issue. This approach, which negates an "all or nothing" position, see *Buckhead Theatre Co. v. Atlanta Enterprises, Inc., supra, 327 F.2d at 370* (concurring opinion), perhaps finds some support in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*. In that case, the

[3] In the *Alamo Theatre* case, the court deferred determination of the question of admissibility until trial, noting that the "mere fact of plaintiff's entry into the motion picture field subsequent to a conspiracy found to exist in 1945 is not alone sufficient for the court to rule as a matter of law that the Paramount decree has no relevance to the instant suit." *143 F. Supp. at 420-21*.

Supreme Court affirmed a jury verdict for defendants in a treble-damage action under the Sherman Act. The trial judge had allowed the introduction of the decrees in a prior government suit against the defendants, although that judgment was an injunction in 1948, at the latest, of a conspiracy found to exist in 1945, and the private plaintiff claimed damages from a conspiracy in 1949 and 1950. The jury was instructed that these decrees were not sufficient to support recovery in themselves and **[**23]** that the plaintiff had to produce additional evidence relating that conspiracy to the period and location of the alleged conspiracy in issue. Appellant contended that greater weight should have been given to the government judgment; appellees argued that it should have been given no weight at all. The Court rejected appellant's argument, noting that "the relevancy of [the government suit] to the instant case is slight." *346 U.S. at 544*. It declined to pass on appellees' contention. While *Theatre Enterprises* circumvented the question here in issue, the Court's reference to the "relevancy" of the government judgment to the private action suggests that it may have been "deliberately avoiding an inflexible rule." Shores, *supra*, 54 Iowa L. Rev. at 447.

[24]** Certainly there are circumstances here suggesting that it is both appropriate and desirable to give substantial evidentiary weight to the judgment entered in *du Pont I*. The case is being tried to a judge rather than to a jury, thus minimizing the nagging problem of undue prejudice referred to in many of **[*964]** the cases. See, e.g., *Buckhead Theatre Co. v. Atlanta Enterprises, Inc., 327 F.2d 365, 368* (5th Cir.), cert. denied, *379 U.S. 888, 13 L. Ed. 2d 92, 85 S. Ct. 158 (1964)*; *International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F.2d 449, 459* (1st Cir.), cert. denied, *375 U.S. 820, 84 S. Ct. 56, 11 L. Ed. 2d 54 (1963)*. The defendants in the two actions are identical and the same product lines and geographical market are involved. Very similar issues of fact and law are raised in the two cases; important substantive elements of plaintiffs' cause of action under section 7 of the Clayton Act are precisely the same as those determined against defendants by the government *du Pont* judgment. Moreover, while it is true that the complaint which led to the first *du Pont* decision was filed in the district **[**25]** court in June 1949, it would be formalistic in the extreme to ignore the fact that the position of stock ownership which was the crux of the violation existed on June 3, 1957, when the Court in *du Pont I* reversed the district court and ordered it to grant "appropriate" equitable relief and continued to exist until after the Court decreed complete divestiture by du Pont in 1961. Nor does it seem improper to give realistic recognition to the Court's language in both *du Pont* decisions for an understanding of what the government case actually decided. Thus, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 485, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, the Court made clear that:

> We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. ***HN8***[] If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie **[**26]** evidence on that issue.

Moreover, the Court specifically noted that it would be proper in determining the effect of the judgment in a government case to look to earlier opinions both "with respect to violation and . . . with respect to remedy." *Id.* It is significant, therefore, that in its second *du Pont* decision, *366 U.S. 316, 318-19, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)*, the Court apparently regarded its 1957 holding as encompassing not only an antitrust violation but also injury, summarizing its prior decision:

> We held that du Pont's acquisition of the 23 percent of General Motors stock *had led to the insulation from free competition* of most of the General Motors market in automobile finishes and fabrics . . . .

We do not agree entirely with the lower court's statement that "the thrust of the [first *du Pont*] opinion was directed to show the probability of public injury based on events quite far removed from the time period with which we are concerned herein." *279 F. Supp. at 364*. The Court in that decision did not focus exclusively on evidence relating to the early years of the du Pont stock acquisition **[**27]** but relied as well on such recent factors as the growing substantiality of the relevant market up to 1955, *353 U.S. at 595 n. 16*, and on the fact that Fisher Body, a division of General Motors which had long stubbornly resisted du Pont sales pressure, only gave in at last to that pressure in 1947 and 1948. *Id. at 604-05*. The Court also noted that "the potency of the influence of du Pont's 23% stock interest is greater *today," id. at 607 n. 36*, because of the diffusion among a larger number of stockholders of the non-du Pont owned shares. In short, the language of the Court is directed to a real present danger of impairment of competition. In its 1961 decision, the Court clearly indicated that this danger continued to be present, holding that even the partial divestiture plan proposed by the district court would not insure the elimination of "the tendency towards monopoly of the acquisition **[*965]** condemned by § 7." *366 U.S. at 331-32*.

It is important to distinguish this case from the more usual situation in which plaintiffs seek to apply to a subsequent period a government judgment condemning activities prohibited **[**28]** under the antitrust laws, where it is not unreasonable to assume that defendants ceased those activities after the prohibition. Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct," *221 F. Supp. 488, 493 (1963)*. Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture.

Accordingly, while we make no attempt to formulate a general rule on the effect to be given to government judgments relating to earlier time periods, we hold that under the circumstances of this particular litigation, the judgment in the Government's suit was entitled to greater evidentiary weight than was accorded it by the court below. We are aware that the judgment is only prima facie evidence at best and that plaintiffs have the burden of showing not only ***antitrust law*** violation but injury as well. However, it must be remembered that if the latter fact is established to the satisfaction **[**29]** of the trier, "the standard of proof as to the quantum of damages is less severe," as appellee du Pont concedes. [4] See, e.g., *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-66, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*; *Flintkote Co. v. Lysfjord, 246 F.2d 368, 392* (9th Cir.), cert. denied, *355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957)*. In any event, as to all the issues, the trier of fact must make the determination, giving proper weight to the earlier judgment, and the district court may allow further evidence, although it is not required to. While we do not know whether it will reach the same conclusions as before on the record before it, plaintiffs are entitled to a determination which gives greater consideration to the earlier rulings of the Supreme Court.

Accordingly, we remand for further proceedings **[**30]** consistent with this opinion. In view of this disposition of the appeal, we find it unnecessary to rule or express any views on appellants' additional arguments that the trial judge erroneously held that du Pont had not violated the Sherman Act [5] or breached any fiduciary duty to General Motors.

End of Document

[4] Brief for Appellee du Pont at 37 n. 36.

[5] Appellants do not press on appeal the lower court's finding as to *§ 1* of the Sherman Act but have relied primarily on an alleged violation of *§ 2*.